Contents

Introduction 1
Theme A: The limits of "tolerance" 3
Theme B: "Sharīʿa" as "Rule of Law" 7
Theme C: Rule of Law, history, and the enterprise of governance 17
Theme D: Minorities and the hegemony of law 23
An overview 24

PART I: AFTER TOLERANCE: THE *DHIMMĪ* RULES AND THE RULE OF LAW 31

1. *Dhimmīs*, Sharīʿa, and Empire 33
1.1 After "tolerance" in *dhimmī* studies: From myth to Rule of Law 34
1.2 In the beginning . . . 46
1.3 Islamic universalism, empire, and governance 60
1.4 Empire, universalism, and Sharīʿa as Rule of Law 66
1.5 The contract of protection: A legal instrument of political inclusion and marginalization 69
1.6 A genealogy of the *dhimmī* rules: *Dhimmīs* in the Qur'ān and Sunna 72
1.7 Conclusion 76

2. Reason, Contract, and the Obligation to Obey: The *Dhimmī* as Legal Subject 77
2.1 Reason and the obligation to obey 79
2.2 Contract in the law and politics of pluralism 87
2.3 Conclusion 91

3. Pluralism, *Dhimmī* Rules, and the Regulation of Difference 95
3.1 Contract and poll-tax *(jizya)*: Imagining the pluralist polity 97
3.2 Inclusion and its limits: Contract theory and liability for theft 106
3.3 Accommodation and its limits: Contraband or consumer goods? 108
3.4 Property, piety, and securing the polity: The case of *dhimmīs* and charitable endowments 113
3.5 The sites and sounds of the religious Other: *Dhimmīs*' religion in the public sphere 119
3.6 From principle of superiority to home construction regulation 126
3.7 *Dhimmīs* in public: On attire and transport 131
3.8 Construing the character of justice: Witnessing in the courtroom 136
3.9 Conclusion 141

4. The Rationale of Empire and the Hegemony of Law 145
4.1 Sex, shame, and the dignity (*iḥṣān*) of the Other 146
4.2 Sexual slander and the *dhimmī*: Recognition and redress 152
4.3 Traditions and their context: Ibn ʿUmar and ʿAbd Allāh b. Salām 155
4.4 Conclusion 162

PART II: PLURALISM, RULE OF LAW, AND THE MODERN STATE 165

5. Sharīʿa as Rule of Law 167
5.1 Reason, authority, and Sharīʿa as Rule of Law 174
5.2 Sharīʿa as Rule of Law: Legitimating and enabling the enterprise of governance (A) 177
5.3 Sharīʿa as Rule of Law: Legitimating and enabling the enterprise of governance (B) 183
5.4 *Madrasas* and curriculum: Institutional site and pedagogic discipline 189
5.5 *Ijtihād* and epistemic authority: Staying within the bounds 195
5.6 The modern state and the disruptions of history on the claim space of Sharīʿa 206
5.7 Conclusion 219

6. The *Dhimmī* Rules in the Post-Colonial Muslim State 223
6.1 From empire to state: Rule of Law, Saudi Arabia, and wrongful death damages 232
6.2 The post-colonial Muslim state and the hegemony of law: Sharīʿa and the *Lina Joy* case 245
6.3 Conclusion: The hegemony of Rule of Law 257

7. Religious Minorities and the Empire of Law 260
7.1 Rule of Law and the empire of the public good 260
7.2 Regulating the covered Muslim woman 269
7.3 Conclusion: Is there an escape from hegemony? 309

Conclusion 314

Bibliography 327
Arabic Sources 327
English Sources 331
Cases, Statutes, Treaties, and Government Documents 351

Index 355

Introduction

Well before the onset of the twenty-first century, academic and popular debates have either implicitly or explicitly positioned Muslims, Islam, and Islamic law as the paradigmatic "Other" to be managed and regulated through policies of multiculturalism and human rights.[1] This is especially the case in societies identified by such labels as *western*, *liberal*, *democratic*, or some combination thereof. That paradigm is mirrored in Muslim majority countries that both acknowledge an Islamic contribution to their core values, and participate in a global network in which that Islamic content is at times suspiciously viewed from the perspective of liberal democratic approaches to good governance and individual autonomy, which have become standard benchmarks of governance, or at least are perceived to be so.[2] The suspicions about Islam and Muslims tend to beg one important question that animates considerable debate in popular venues and the public sphere, i.e., whether or not Muslims, in light of their faith commitments, can live in peace and harmony with others, and treat all people, regardless of their faith traditions, with equal dignity and respect.[3] To use the more common terms of reference,

[1] See, for example, Natasha Bakht, "Family Arbitration Using Sharīʿa Law: Examining Ontario's Arbitration Act and Its Impact on Women," *Muslim World Journal of Human Rights* 1, no. 1 (2004): Article 7. On religion in liberal constitutional legal systems more generally, see Caryn Litt Wolfe, "Faith-Based Arbitration: Friend or Foe? An Evaluation of Religious Arbitration Systems and Their Interaction with Secular Courts," *Fordham Law Review* 75 (2006): 427–69. For research centers and academic initiatives devoted to the study of religion in the public sphere, see the University of Toronto's "Religion in the Public Sphere Initiative"; Columbia University's "Institute for Religion, Culture and Public Life." For a center devoted to the study of Islam and Muslims in particular, see the University of Exeter's "European Muslim Research Centre."

[2] For policy-oriented studies that negotiate the tensions this dynamic creates, see United States Agency for International Development (USAID), *Afghanistan Rule of Law Project: Field Study of Informal and Customary Justice in Afghanistan* (Washington D.C.: USAID, 2005); Noah Feldman, *What We Owe Iraq: War and the Ethics of Nation Building* (Princeton: Princeton University Press, 2006). For an analysis of how a Muslim majority country (i.e., Egypt) negotiates its commitments to its Islamic values alongside its commitments to constitutional commitments to citizenship and equality for both its Muslim majority and non-Muslim minority (i.e., Coptic Christians), see Rachel M. Scott, *The Challenge of Political Islam: Non-Muslims and the Egyptian State* (Palo Alto: Stanford University Press, 2010).

[3] Such debates occur in both scholarly and public arenas. One highly public endeavor has been the work of those behind the letter "A Common Word Between Us and You," which consists of a letter from Muslim clerics to Christians about their shared values. See

the question can be restated as follows: "Do Muslims and their religious tradition (in particular Islamic law) have the capacity to *tolerate* those who hold different views, such as religious minorities?"

The question about tolerance and Islam is not a new one. Polemicists are certain that Islam is not a tolerant religion.[4] As evidence they point to the rules governing the treatment of non-Muslim permanent residents in Muslim lands, namely the *dhimmī* rules that are at the center of this study. These rules, when read in isolation, are certainly discriminatory in nature. They legitimate discriminatory treatment on grounds of what us moderns would call religious faith and religious difference.[5] The *dhimmī* rules are invoked as proof-positive of the inherent intolerance of the Islamic faith (and thereby of any believing Muslim) toward the non-Muslim. Some Muslims and others, on the other hand, seek to portray Islam as a welcoming and respectful tradition.[6] They do not give much weight to the *dhimmī* rules as indicative of an Islamic ethos regarding the non-Muslim living in Muslim lands. Further, historians of Islam have shown that its historical and legal traditions contain examples that vindicate both perspectives of tolerance and intolerance toward the non-Muslim, thereby suggesting that the question about whether Islam is tolerant or not is one that cannot be answered definitively one way or another.[7]

This study problematizes *tolerance* as a conceptually helpful or coherent concept for understanding the significance of the *dhimmī* rules that governed and regulated non-Muslim permanent residents in

<http://www.acommonword.com/> (accessed July 14, 2010). For scholarly approaches to this debate, see Andrew March, *Islam and Liberal Citizenship: The Search for an Overlapping Consensus* (Oxford: Oxford University Press, 2009); Mohammad Fadel, "The True, the Good, and the Reasonable: The Theological and Ethical Roots of Public Reason in Islamic Law," *Canadian Journal of Law and Jurisprudence* 21, no. 1 (2008): 5–69. Louise Marlow addresses the tensions between egalitarianism and social differentiation in early Islamic thought, though does not address the *dhimmī* in any great detail. Consequently, while that study offers an important set of insights into philosophies of political community, identity and difference, the difference posed by the *dhimmī* raises a host of questions not addressed in Marlow's study: Louise Marlow, *Hierarchy and Egalitarianism in Islamic Thought* (Cambridge: Cambridge University Press, 1997).

[4] Indeed, this view is foregrounded in the titles of certain books. See, for example, Robert Spencer, *The Truth About Muhammad: Founder of the World's Most Intolerant Religion* (Washington D.C.: Regnery Publishing, 2006); idem, *Religion of Peace? Why Christianity Is and Islam Isn't* (Washington D.C.: Regnery Press, 2007).

[5] For an important study on the concept of "religion" and its role in demarcating the non-secular, see Talal Asad, *Formations of the Secular: Christianity, Islam, Modernity* (Palo Alto: Stanford University Press, 2003).

[6] This was one of the main topics of the letter "A Common Word," which opined on Islamic teachings of love of God and one's neighbor as principles that are shared by both Muslims and Christians. For the text of the letter and supporting documents, visit The Official Website of *A Common Word*: <http://www.acommonword.com/> (accessed July 14, 2010).

[7] For more on these distinct approaches, see Chapter 1.

Islamic lands. In doing so, it suggests that the Islamic legal treatment of non-Muslims is symptomatic of the more general challenge of governing a diverse polity. Far from being constitutive of an Islamic ethos, the *dhimmī* rules are symptomatic of the messy business of ordering and regulating a diverse society. This understanding of the *dhimmī* rules allows us to view the *dhimmī* rules in the larger context of law and pluralism. Further, it makes possible new perspectives from which to analyze Sharīʿa as one among many legal systems; and that far from being unique, it suffers similar challenges as other legal systems that also contend with the difficulty of governing amidst diversity. A comparison to recent cases from the United States, United Kingdom, France and the European Court of Human Rights shows that however different and distant premodern Islamic and modern democratic societies may be in terms of time, space, and tradition, legal systems face similar challenges when governing a populace that holds diverse views on a wide range of values.

This study is organized around four major themes, all of which are interrelated. One might even find the work fugal, in the sense that the basic focus on the *dhimmī* rules makes possible these thematic departures, all of which are distinct and can stand alone from each other, and yet together reverberate with a harmony that offers something richer and more robust. The *dhimmī* rules raise important thematic questions about tolerance; rule of law and governance; and the way in which the aspiration for pluralism through the institutions of law and and governance is a messy business. A bottom line in the pursuit of pluralism is that it can result in impositions and limitations on freedoms that we might otherwise consider fundamental to an individual's well-being, but which must be limited for some people in some circumstances for reasons extending well beyond the claims of a given individual. This introduction will outline the four basic themes that animate this study, showcasing their distinct contributions to the study of the *dhimmī* rules, and illuminating how, in the aggregate, they raise important questions about the scope of freedom possible through the law in a context of diversity and difference.

THEME A: THE LIMITS OF "TOLERANCE"

The first theme focuses on the premodern Sharīʿa-based rules governing non-Muslim permanent residents in Islamic lands. The technical term of art for this group is *dhimmīs*, and the rules governing them are thereby called the *dhimmī* rules. According to Islamic legal doctrines, the *dhimmīs* would enter the *ʿaqd al-dhimma,* or contract of protection (whether express or implied) with the ruling Muslim authorities. That contract permitted them

to maintain their distinct faith traditions and to live in peace under Muslim rule. Under the terms of this contract, *dhimmīs* agreed to live by certain conditions in return for peaceful residence in Muslim lands. The *dhimmī* rules were those conditions. Hence, the *dhimmī* rules cannot be viewed today in isolation as mere legal artifacts. They were part of the political compromise made between the ruling authorities and the minority groups that became subjected to the Muslim sovereign. The *dhimmī* rules, in other words, were a legal expression of the way in which the Muslim polity contended with the fact of diversity and governed pluralistically.

As previously indicated, the *dhimmī* rules often lie at the centre of contemporary debates about whether the Islamic faith is tolerant or intolerant of non-Muslims.[8] Some suggest that these rules had, at one time, only limited real-world application and thereby are not significant for appreciating the tolerant nature of the Islamic tradition and history today. Others suggest that these rules were possible because of the inherent intolerance of the Islamic tradition of other faith traditions.[9] Both arguments are not without their justifications. The former view finds support in historical records that illustrate the important role non-Muslims played in Muslim-ruled lands, whether economically, politically, or otherwise. The second view is bolstered by historical incidents of persecution, premodern rules that discriminated on religious grounds, and reports of human rights watch groups that detail incidents of persecution (both official and unofficial) against non-Muslim citizens of Muslim states today. These two perspectives are pitted against one another in both the scholarly and popular arenas of debate and dialogue. Furthermore, a mere cursory review of popular books written on the subject reveals how "tolerance" provides the analytic frame for the debate. For those inclined to the view of Islam as tolerant and peace-loving, the following are noteworthy:

- Khaled Abou El Fadl, *The Place of Tolerance in Islam* (Beacon Press, 2002).
- M. Fethullah Gülen, *Toward a Global Civilization of Love and Tolerance* (The Light, Inc., 2004).

[8] For a discussion of the historiography on the *dhimmī* rules, see Chapter 1.

[9] Mark R. Cohen writes about these two positions as they pertain to the history of Jews living in premodern Christian and Arab/Islamic milieus. His labels for these positions are "the myth of an interfaith utopia" and the counter-myth of the "neo-lachrymose conception of Jewish-Arab History," Mark R. Cohen, *Under Crescent & Cross: The Jews in the Middle Ages* (1995; reissue, Princeton: Princeton University Press, 2008), 6–9. Cohen's use of "myth" to describe these two positions informs the historiographic approach of this study, though his particular labels are not utilized herein.

For those who consider Islam an intolerant faith, Robert Spencer has two contributions of special note:

- *Religion of Peace? Why Christianity Is and Islam Isn't* (Regnery Press, 2007).
- *The Truth about Muhammad: Founder of the World's Most Intolerant Religion* (Regnery Press, 2006).

This study suggests that the frame of "tolerance" does little to explain the intelligibility of the *dhimmī* rules. The weakness of the "tolerance" frame is revealed once we consider how "tolerance" often hides the underlying regulatory features of governance that spark the need to discuss tolerance in the first place.

Definitions of tolerance vary, and this is not the place for a sustained analysis of the vast literature on the issue. However, Leslie Green's account offers us a useful starting point for our analysis: "As a distinctive moral and political ideal, tolerance has a particular structure: it involves the notion that an activity is wrong or to be disapproved, together with the idea that one has moral reasons for not acting on that disapproval in certain ways."[10] Tolerance is neither acceptance nor merely indifference. It implies not simply allowing people to live peacefully with their differences, but instead a disapproval by some of the differences of others.

Importantly, tolerance is meaningful in a context of power relations, such that being tolerant is at once to be disdainful of difference while also having the power and authority to grant the freedom to others to be different. Bernard Williams, for instance, remarks that we may "think of toleration as an attitude that a more powerful group, or a majority, may have (or may fail to have) toward a less powerful group or a minority."[11] Likewise D. Raphael states: "Toleration is the practice of deliberately allowing or permitting a thing of which one disapproves. One can intelligibly speak of tolerating, i.e., of allowing or permitting only if one is in a position to disallow. You must have the power to forbid or prevent, if you are to be in a position to permit."[12]

Tolerance is employed at levels formal and informal, private and public. On the small, private scale, tolerance may be witnessed in the context of a

[10] Leslie Green, "Pluralism, Social Conflict, and Tolerance," in *Pluralism and Law*, ed. A. Soetman (The Hague: Kluwer Academic Publishers, 2001), 85–105, 99.

[11] Bernard Williams, "Tolerating the Intolerable," in *The Politics of Toleration: Tolerance and Intolerance in Modern Life*, ed. Susan Mendus (Edinburgh: Edinburgh University Press, 1999), 65–76, 65–6.

[12] D.D. Raphael, "The intolerable," in *Justifying Toleration: Conceptual and Historical Perspectives* (Cambridge: Cambridge University Press, 1988), 137–54, 139.

religious family contending with the wayward son who has left the family's faith tradition yet nonetheless welcoming him to family gatherings.[13] On a large, public scale (which is the main focus of this study), tolerance is evident in the way public authorities use their legally proscribed powers to contend with the extent and scope to which minority cultural and religious practices can be accommodated.[14] The law is not the only way in which public authorities manifest tolerance, but it is a common one, as suggested by various studies on tolerance that are concerned with what sorts of laws should or should not exist to regulate difference in society. As Williams remarks, "discussions of tolerance have often been discussions of what laws should exist—in particular, laws permitting or forbidding various kinds of religious practice—and the laws have been determined by the attitudes of the more powerful group."[15] When tolerance is understood as a mask for governing diverse societies, we find that minority perspectives are not necessarily condemned, banned, or otherwise excluded. Room may be made for minority group members to act in accordance with their traditions. The scope of that room, however, will be defined (and restricted) in terms of the law in accordance with majoritarian attitudes about the public sphere, the public good, and the polity as a whole.

When the law is viewed in this fashion—as an instrument that can be deployed by some over and against others—we cannot fail to recognize that the language of "tolerance," when used concomitantly with legal doctrines associated with governance and regulation, operates as a cover that hides the operation of power on the bodies of minorities. For Wendy Brown, who critiques tolerance discourses in the liberal state, the language of tolerance "masks the role of the state in reproducing the dominance of certain groups and norms."[16] This is not to deny that tolerance is an important value; it certainly has a place in contemporary political discourse.[17] But that should not allow us to forgo critiquing the assumptions that underlie how polities draw the line between the tolerable and the intolerable. Rainer Forst perspicaciously points out that "we must be suspicious of the way the limits of toleration have been and are drawn between the tolerant and the intolerant/intolerable. One

[13] Wendy Brown, *Regulating Aversion: Tolerance in the Age of Identity and Empire* (Princeton: Princeton University Press, 2008), 4.

[14] See Chapter 7 for recent examples of court decisions, legislation, and constitutional enactments.

[15] Williams, "Tolerating the Intolerable," 66.

[16] Brown, *Regulating Aversion*, 84.

[17] For both a critique of liberal individualist conceptions of tolerance, and a persuasive argument for a group-based approach to tolerance, see Adam B. Seligman, "Tolerance, Tradition, and Modernity," *Cardozo Law Review* 24, no. 4 (2003): 1645–56.

always needs to ask who draws those limits, against whom, on the basis of what reasons, and what motives are in play."[18] To dress the *dhimmī* rules with the vocabulary of tolerance or intolerance masks their contribution to a discourse of Sharīʿa as a mode of regulating a polity. Consequently, this study draws upon the critiques of tolerance to offer an initial point of departure in the study of the *dhimmī* rules, namely to show how and why the *dhimmī* rules are best understood as symptomatic of the challenge that arises when governing diverse societies.

THEME B: "SHARĪʿA" AS "RULE OF LAW"

To describe Sharīʿa as a mode of regulating a polity is to imagine a legal culture in which the law and the institutions of governance are distinguishable and yet aligned in an ongoing enterprise of regulation and management. Sharīʿa is more than legal doctrines (*fiqh*) or interpretive activity (*ijtihād*), for instance; it is more than the work of jurists operating outside the realm of governance and politics. Rather, as posited herein, Sharīʿa offers a discursive site about the requirements of justice as understood by premodern jurists within a legal, historical, and political context, whether real or imagined. To capture this relationship between law and governance, this study proposes that Sharīʿa is better appreciated if understood as Rule of Law. To advance the view of Sharīʿa as Rule of Law requires building upon and, to some extent, departing from other approaches to the characterization of Sharīʿa. It also requires explaining how "Rule of Law" is being used in this study and why it offers an important contribution to the study of Sharīʿa generally, and to an understanding of the *dhimmī* rules in particular. This section will introduce how Sharīʿa as Rule of Law offers an important vantage point for conceptual and theoretical inquiries into Sharīʿa, and will address how and why Rule of Law is being used in this study to characterize Sharīʿa. A more developed and extensive analysis of these two issues is provided in Chapter 5.

Sharīʿa as Rule of Law

When describing Sharīʿa, some choose to start with a literal definition of the term, which refers to a place from which to drink and draw water, or a path toward water. From that literal definition, though, the word is quickly infused with legal import, bearing the meaning "[t]he religious

[18] Rainer Forst, "The Limits of Toleration," *Constellations* 11, no. 3 (2004): 312–25, 314.

law of God."[19] Beyond these initial starting points, debate arises over how to give further specification to the term. To introduce Sharīʿa as Rule of Law, an analysis of two distinct but related approaches to Sharīʿa will suffice. The first approach focuses on the distinction between Sharīʿa and *fiqh,* and the second approach focuses on the juristic class (as opposed to the ruling regime) and their legal literature as the primary, if not sole, source of material concerning and defining the Sharīʿa.

The first approach is reflected in the work of contemporary scholars of Islamic law who define Sharīʿa in part by distinguishing it from *fiqh,* which are the doctrinal traditions developed by jurists over centuries. They hold that

> God's law as an abstraction is called the *Sharīʿah* (literally, the way), while the concrete understanding and implementation of this Will is called *fiqh* (literally, the understanding) ... The conceptual distinction between *Sharīʿah* and *fiqh* was the product of a recognition of the inevitable failures of human efforts at understanding the purposes or intentions of God. Human beings, the jurists insisted, simply do not possess the ability to encompass the wisdom of God. Consequently, every understanding or implementation of God's Will is necessarily imperfect because ... perfection belongs only to God.[20]

This approach, definition-by-distinction, is a significant development in the field of Islamic legal studies and offers a first and important starting point to explain the conceptual purchase of defining Sharīʿa as Rule of Law.

Those seeking to distinguish Sharīʿa from *fiqh* often do so with a particular purpose, namely to make space for new interpretations of Islamic law (i.e., for new *ijtihād*).[21] Whatever might be the animating purpose, the distinction they make draws upon premodern Islamic legal theories of authority and legitimacy, and in doing so, begs an important set of legal philosophical questions about the implication of that distinction on the meaning of Sharīʿa itself as a term of art. As I have written elsewhere, the distinction between *fiqh* and Sharīʿa draws

[19] E.W. Lane, *Arabic–English Lexicon* (1863; reprint, Cambridge: Islamic Texts Society, 1984), 2: 1535. To appreciate the ongoing salience of definitional debates about the term, see Edward Omar Moad, "A Path to the Oasis: *Sharīʿah* and reason in Islamic moral epistemology," *International Journal for Philosophy and Religion* 62, no. 3 (2007): 135–48.

[20] Khaled Abou El Fadl, *Speaking in God's Name: Islamic Law, Authority, and Women* (Oxford; Oneworld Publications, 2001), 32. See also, Ziba Mir-Hosseini, "The Construction of Gender in Islamic Legal Thought and Strategies for Reform," *Hawwa* 1, no. 1 (2003): 1–28. For another approach to qualify the authority of *fiqh*, see Michael Mumisa, *Islamic Law: Theory & Interpretation* (Beltsville, Maryland: Amana Publications, 2002).

[21] See, for example, Mir-Hosseini, "Construction of Gender."

upon a philosophical debate about epistemology and authority.[22] That distinction found expression in premodern legal theory treatises (*uṣūl al-fiqh*) in the difference between what jurists called the *uṣūl* and the *furūʿ*. For Muslim jurists, the *uṣūl* are core values that are unchanging, and not subject to interpretation (i.e., *ijtihād*). The *furūʿ*, on the other hand, are all other claims of value, which may change and are subject to interpretation. These latter claims of value have only limited authority, where such limitation is a function of the epistemic limits of the jurist who interprets limited legal sources to arrive at a claim of value. The *furūʿ*, in other words, represent legal claims of value that are both authoritative pronouncements of the law, but also epistemically vulnerable to reinterpretation and change. Importantly, the premodern debate on *uṣūl* and *furūʿ* contributes either directly or indirectly to the contemporary argument of those who distinguish between Sharīʿa and *fiqh*. To claim that Sharīʿa and *fiqh* are different and distinct is in large part to emphasize the limited authority of the *fiqh* based on human epistemic limitations, and thereby create space for others to contribute legitimately to the ongoing development of *fiqh* norms in a changing world.

The distinction between Sharīʿa and *fiqh*, justified and supported by reference to the premodern debates on *uṣūl* and *furūʿ*, is meant to undercut the scope of authority that can be claimed for a particular doctrine of *fiqh*. It does not, however, offer any conceptually thick definition of Sharīʿa, except in negative terms: Sharīʿa is not *fiqh*. But this begs the question, "What is Sharīʿa?" To say it is the law in the "mind of God" may speak to the pious humility of the juristic interpreter who claims only a limited authority for his or her pronouncement of a *fiqh* norm. But that avoids the definitional issue entirely. This turn to the epistemic limitations on *fiqh* does little to help us understand what Sharīʿa is or can mean. Rather, it leaves Sharīʿa in a veritable conceptual "no-man's land" since it is beyond the reach of human epistemic capacities, at least in any deterministic fashion.

The second, though related, approach to the study of Sharīʿa focuses less on how to define Sharīʿa in legally philosophical terms, and more on the study of the sources that are understood to constitute the corpus of Sharīʿa. For instance, much scholarship on Sharīʿa tends to focus on the work of premodern jurists and the literature that they produced. Indeed, the work of premodern jurists has become so central to the modern study of Islamic law that the twentieth-century scholar of Islamic law, Joseph Schacht, famously wrote that Islamic law is an "extreme case of

[22] Anver M. Emon, "To Most Likely Know the Law: Objectivity, Authority, and Interpretation in Islamic Law," *Hebraic Political Studies* 4, no. 4 (2009): 415–40.

jurists' law."[23] Likewise, although Khaled Abou El Fadl recognizes that in Islamic history there were many voices of authority and legitimacy,[24] he nevertheless holds that Muslim jurists "had become the repositories of a literary, text-based legitimacy. Their legitimacy based itself on the ability to read, understand, and interpret the Divine Will as expressed in texts that purported to embody the Divine Will."[25] So while the Muslim jurist (and, by extension, his written legacy) embodied only one type of authority in Islamic history, that particular form of authority carried considerable weight for those keen to understand what God wants or demands of them.

The focus on premodern jurists and their writings is not entirely surprising, given the availability of extant sources of Islamic law, which more often than not are the sources written by jurists (e.g., *fiqh, uṣūl al-fiqh*). Sources of Islamic law as administered in courts or other tribunals did not often survive given the limits of preservation and record keeping, as well as the function such documents served, namely to account for dispute resolution rather than doctrinal development and justification. In instances where they have survived, they are often piecemeal or in a clerical shorthand that requires considerable historical circumspection to decipher and appreciate.[26]

One analytic consequence of viewing Sharīʿa through the eyes of premodern jurists is that it dangerously elides the jurist's authority with the sum total of what Sharīʿa has to offer. This danger is evident in a discussion Abou El Fadl has about a hypothetical posed by the premodern Shāfiʿī jurist Abū al-Maʿālā al-Juwaynī (d. 1098). Al-Juwaynī posited a Ḥanafī husband and a Shāfiʿī wife, both of whom are *mujtahids,* or, in other words, jurists who are equally capable of arriving at authoritative legal conclusions. Suppose the husband declares to his wife in a fit of anger that he divorces her. According to al-Juwaynī, the Ḥanafīs held that such a pronouncement is invalid and ineffective, whereas the Shāfiʿīs considered it to be valid. Are the husband and wife still married? To put it differently, and perhaps more cheekily, where should they sleep at night? According to the Ḥanafī husband they are married, but according to the Shāfiʿī wife they are divorced. Which view should prevail? Certainly the two parties can

[23] Joseph Schacht, *An Introduction to Islamic Law* (1964 reprint, Oxford: Oxford University Press, 1993), 5.

[24] Abou El Fadl, *Speaking in God's Name*, 12.

[25] Abou El Fadl, *Speaking in God's Name*, 12.

[26] Ghislaine Lydon, *On Trans-Saharan Trails: Islamic Law, Trade Networks, and Cross-Cultural Exchange in Nineteenth-Century Western Africa* (Cambridge: Cambridge University Press, 2009); Leslie Peirce, *Morality Tales: Law and Gender in the Ottoman Court of Aintab* (Berkeley: University of California Press, 2003).

insist on their respective views and claim to be justified in doing so; but to resolve the dispute, the parties must resort to a legal process, namely adjudication. According to al-Juwaynī, if they submit their case to a judge or *qāḍī,* the judge's decision, based on his own analysis, is binding on both parties. The *qāḍī*'s decision is authoritative not because it accords with one specific legal rule or another; rather, it is authoritative because of the imperium tied to his institutional position.[27] Abou El Fadl, however, disagrees with al-Juwaynī and suggests that in the hypothetical above, if the judge decides in favor of the husband, the wife can and should resist as a form of conscientious objection and thereby enjoy the protections afforded to her by the law of rebellion in Islam (*aḥkām al-bughāt*).[28]

Where he writes about this hypothetical, Abou El Fadl is principally interested in distinguishing the law of God from human determinations of that law, and thereby preserving the moral standing of the individual to assert his or her convictions before God without the imposition of external agents. However, his argument about rebellion betrays a tendency to view Islamic law as a jurist's law that speaks to the authority of the individual against all others.[29] A Rule of Law perspective on Abou El Fadl's criticism of al-Juwaynī and support for the wife as conscientious objector might raise the following observations and questions.

- For instance, the fact that the husband and wife would go to a court at all presumes that the parties live in an organized society where the court holds some degree of jurisdiction and dominion and is answerable to the governing authorities under which it operates. By submitting their case to the judge, do the parties expressly or impliedly consent to the court's jurisdiction?
- By agreeing to be members of a political society governed by the Sharīʿa, do the husband and wife enter into a social contract with each other (and

[27] Abū al-Maʿālā al-Juwaynī, *Kitāb al-Ijtihād min Kitāb al-Talkhīṣ* (Damascus: Dār al-Qalam, 1987), 36–8.

[28] Khaled Abou El Fadl, *The Authoritative and Authoritarian in Islamic Discourses: A Contemporary Case Study*, 3rd ed. (Alexandria, Virginia: al-Saadawi Publications, 2002), 60 n. 11. He holds a similar position concerning a second hypothetical al-Juwaynī posed. See Abou El Fadl, *Speaking in God's Name*, 161–2.

[29] The force of Abou El Fadl's argument is severely undercut if one considers a slight variation on the same hypothetical. Suppose the judge decided in favor of the wife. Abou El Fadl's logic would suggest that the husband could also ignore the judicial outcome and claim the protections of the law as a conscientious objector. Abou El Fadl's logic would effectively give some, though perhaps not full, legal protection to the husband if subsequently charged with rape. The odiousness of this particular outcome, which in fairness Abou El Fadl does not address, offers an important incentive to explore why the Rule of Law perspective offers an important lens through which to view doctrinal treatises such as the one by al-Juwaynī.

others in the polity) to forgo certain freedoms (like rebellion in the event of an unfavorable court decision) so that they may maximize their enjoyment of other freedoms?
- If the husband and wife undertake certain obligations and responsibilities to participate in organized political society, does it make sense to suggest (without further consideration) that the wife in the above hypothetical can and should rebel?

Sharīʿa as Rule of Law suggests that to allow the wife to rebel in this case implicates more than just simply whether the wife-jurist holds that a divorce pronounced in anger is valid or not. The substantive doctrine is certainly part of the calculus, but so too are the role and authority of institutions and the political commitments individuals make (or are presumed to make) to live in society organized pursuant to a law that is enforced by officials holding certain offices. Sharīʿa as Rule of Law reminds us that substantive doctrine is only one part of the calculus, and perhaps not always the most important part. Furthermore and perhaps most importantly, Sharīʿa as Rule of Law asks us to consider the possibility that, when offering this hypothetical, al-Juwaynī resolved the conflict in light of the above considerations.

These questions and considerations illustrate that behind the articulation of a legal doctrine lies a host of background assumptions that link the Sharīʿa's doctrines to the institutional and political framework within which those rules were intelligible. To view Sharīʿa as Rule of Law forces a reconsideration of the near-monopoly of authority granted to premodern jurists and their literary corpus in defining the content and intelligibility of Sharīʿa. Sharīʿa as Rule of Law is a reminder to remain ever cognizant of the absences in the evidentiary record, and the implication those absences may have on our ability to reflect and represent Sharīʿa in a robust fashion. In particular, Sharīʿa as Rule of Law requires that we acknowledge the multiple sites of authority that animated and influenced juristic writings about Islamic legal doctrines, and which thereby constituted Sharīʿa as a whole, such as the governing and institutional setting that animated the jurists' legal culture (whether real or imagined). Together, these constitutive features contributed to the conceptual heft of Sharīʿa as a discursive site for contestations about justice, amid competing authorities, not all of which would necessarily lead to the same result. Sharīʿa as Rule of Law is offered herein as a technical term of art that captures the complex ways that law, society, and politics may have interacted to discipline the way Muslim jurists interpreted and espoused the law in light of a more general purpose of organizing life under an Islamic system of governance.

The rhetoric of Rule of Law: Sharīʿa as a claim space

If Sharīʿa as Rule of Law offers a framework that gives heft to Sharīʿa as a conceptual term, a two-fold question remains to be addressed: "What is meant by Rule of Law and in what more specific analytic sense does viewing Sharīʿa as Rule of Law offer new and greater theoretical purchase on Sharīʿa discourses of both the past and the present?"

Definitions of Rule of Law abound.[30] Among more general definitions, Thomas Carothers offers a typical example. He states that to have Rule of Law is to have

> a system in which the laws are public knowledge, are clear in meaning, and apply equally to everyone. They enshrine and uphold the political and civil liberties that have gained status as universal human rights over the last half-century . . . The central institutions of the legal system, including courts, prosecutors, and police, are reasonably fair, competent and efficient. Judges are impartial and independent, not subject to political influence or manipulation. Perhaps most important, the government is embedded in a comprehensive legal framework, its officials accept that the law will be applied to their own conduct, and the government seeks to be law-abiding.[31]

Among political and legal philosophers, any definition of Rule of Law will often differ depending on the scholar and his or her particular approach to law. For instance, legal philosopher Joseph Raz, reflecting on its broadest meaning, writes that Rule of Law "means that people should obey the law and be ruled by it."[32] Yet from the perspective of political and legal theory, Raz reads Rule of Law in a narrower sense, "that the government shall be ruled by the law and subjected to it. The idea of the [R]ule of [L]aw in this sense is often expressed by the phrase 'government by law and not by men.'"[33] Focusing on the systemic features of law and governing in accordance with it, Lon Fuller suggests that the Rule of Law is the "enterprise of subjecting human conduct to

[30] Brian Z. Tamanaha, *On the Rule of Law: History, Politics, Theory* (Cambridge: Cambridge University Press, 2004), 3 (quoting International Commission of Jurists, *The Rule of Law in a Free Society* (Geneva, 1959), p. VII).

[31] Thomas Carothers, "The Rule of Law Revival," *Foreign Affairs* 77, no. 2 (Mar–Apr. 1998): 95–106, 96.

[32] Joseph Raz, "The Rule of Law and Its Virtues," *The Law Quarterly Review* 93 (1977): 195–211, 196.

[33] Raz, "The Rule of Law," 196. See also, James Tully, *Public Philosophy in a New Key*, 2 vols (Cambridge: Cambridge University Press, 2008), 2: 92. While Tully approaches Rule of Law in relation to his more particular interest in constitutional democracy, he shares with Raz a similar understanding of Rule of Law and its role in defining the scope and limits of government power and authority.

the governance of rules."[34] This enterprise of law, he writes, requires the law to be developed, promulgated, and enforced in a fashion that upholds a commitment to the "inner morality of the law." In this context, inner morality demands the fulfillment of various principles of legality, violation of which, Fuller argues, "does not simply result in a bad system of law; it results in something that is not properly called a legal system at all. . . ."[35] James Tully approaches Rule of Law from the perspective of democratic legitimacy, and argues that "the exercise of political power in the whole and in every part of any *constitutionally* legitimate system of political, social and economic cooperation should be exercised in accordance with and through a general system of principles, rules and procedures, including procedures for amending any principle, rule or procedure."[36] He continues by requiring that those "who constitute the political association . . . or their entrusted representatives, must also impose the general system on themselves in order to be sovereign and free, and thus for the association to be *democratically* legitimate."[37]

The above authors offer broad definitions of Rule of Law, focusing on different aspects that are important for this study. Raz emphasizes the role Rule of Law plays in limiting government. Fuller links Rule of Law to governance by reminding us that government is not simply an object to be understood, but rather reflects a process of ruling in ever-changing contexts. Tully refers to Rule of Law to emphasize the importance of the law conferring legitimacy on political action by reference to general principles and processes that transcend the specifics of a given context or situation.

The varying definitions of Rule of Law offered above reflect both core ideas that animate discussions of Rule of Law, and the difficulty in offering a cohesive and determinate definition of the phrase. Indeed, there is increasing research to show that the phrase defies any systemic definition.[38] Furthermore, Rule of Law has assumed a panacea-like (if not trendy) quality in recent decades, being offered as the principal solution to the development of effective, efficient, and just government

[34] Lon Fuller, *The Morality of Law*, rev. ed. (New Haven: Yale University Press, 1969), 106.

[35] Fuller, *Morality of Law*, 39–81. Fuller lists eight principles that define the enterprise of law: (1) generality of the rules; (2) promulgation of the rules; (3) general nonretroactivity of the law; (4) clarity of the rules; (5) noncontradiction of rules; (6) rules must not require the impossible; (7) constancy of the law through time; and (8) congruence between official action and declared rule.

[36] Tully, *Public Philosophy*, 2:93 (emphasis in original).

[37] Tully, *Public Philosophy*, 2:93 (emphasis in original).

[38] Jørgen Møller and Svend-Erik Skaaning, "On the Limited Interchangeability of Rule of Law Measures," *European Political Science Review* 3, no. 3 (2011): 371–94.

in transitional states.[39] The trendiness of the phrase, coupled with the absence of an agreed upon definition, are certainly reasons enough to be skeptical of its usage, whether in this study or elsewhere.

Far from trying to define Rule of Law, or from using it in any prescriptive sense, though, this study recognizes that a significant characteristic of Rule of Law is its *rhetorical* power at the site of contestations about justice. Writing about the rhetorical feature of Rule of Law, John Ohnesorge states: "Rule of Law rhetoric is more typically invoked when a commentator wishes to criticize a particular legal rule or judicial decision."[40] The indeterminacy about the definition of Rule of Law makes possible a view of it as a conceptual site in which contestations between competing and compelling interests are resolved using a disciplined mode of inquiry that is nonetheless framed by and embedded within the given political context in which individuals, officials, and institutions of government make demands on each other. Ironically, therefore, the ambiguity of the phrase "Rule of Law" and the political purposes for which it is deployed, gives credence to the thesis that Rule of Law creates what this study calls a *claim space* within which arguments about the demands and requirements of justice are made.

Throughout this study, "Rule of Law" refers to the "claim space" for legitimate legal argument and, by implication, raises important questions about the constitutive features that define and delimit that space. In other words, to view Rule of Law as a claim space immediately begs a question about the borders and boundaries that give shape to that space. Appreciating the shape of that space is important because of its implications on what counts as a legal argument, as opposed to some other sort of argument or claim (e.g., historical, philosophical, anthropological, poetic, etc.). Indeed, the border to the claim space is what renders arguments made within that space *intelligible* as a species of legitimate legal argument. The border can be constituted by a pre-commitment to the kinds of arguments, sources, and institutions that are authoritative and those that are not. It may also be constituted by the legal education that is deemed a prerequisite to participating in the claim space within which legal arguments are made. The border of that claim space will also, as argued throughout this book, take into account the species of political

[39] See, for example, Fareed Zakaria, "The Rise of Illiberal Democracy," *Foreign Affairs* 76 (1997): 22–43; Charles E. Tucker, Jr, "Cabbages and Kings: Bridging the Gap for More Effective Capacity-Building," *University of Pennsylvania Journal of International Law* 32 (2011): 101–25.

[40] John K.M. Ohnesorge, "The Rule of Law," *Annual Review of Law and Social Science* 3 (2007): 99–114, 102.

organization within which a legal system operates.[41] In short, the claim space is defined and bordered by reference to doctrinal, institutional, and systemic features of a given polity.

To approach Rule of Law in this rhetorical fashion is meant to draw attention to the conditions that legitimate and render intelligible particular claims made in the pursuit of justice. By denoting a "claim space," Sharīʿa as Rule of Law implicitly recognizes the rhetorical power by which claims of justice are proffered and espoused. That power can draw upon a vast repository of concepts and ideas, none of which uniquely or singularly defines what Sharīʿa is, but all of which contribute to what it can and does signify about what counts as law, justice, and legitimacy. To describe Sharīʿa as Rule of Law, therefore, is to appreciate Sharīʿa discourses as emanating from within a claim space, and thereby to prompt important questions about the constitutive features that both delimit that space and contribute to the intelligibility of claims of justice made therein.

As a term of art that focuses on how claims of justice are justified and legitimized, Sharīʿa as Rule of Law offers a conceptual framework for analyzing the operation and imposition of the force of law. This is not to say that Sharīʿa as Rule of Law merely appreciates the law as being principally an exertion of power. The fact that the law exerts power (whether persuasively, institutionally, or otherwise) is hardly novel or interesting. Certainly this study will address the hegemonic character of the law, and in particular, the ways in which it operates upon the bodies of minority members within a polity. More importantly though, by analyzing the *dhimmī* rules from the perspective of Sharīʿa as Rule of Law, this study reflects upon the conditions that gave *intelligibility,* purpose, and legitimacy to the *dhimmī* rules and the extent to which those conditions reflected presumptions of a complex legal and political context. Intelligibility is not simply about desconstructing the *dhimmī* rules to reveal the power dynamic underlying them, though that is an important part of the analytic process. Intelligibility reflects the deliberately affirmative, constructive agenda of the law that Sharīʿa as Rule of Law seeks to reveal.[42] Consequently, while this study aims to disrupt and destabilize inherited presumptions about Islamic law in

[41] On the place of institutions within the framework of legal interpretation, see Cass R. Sunstein and Adrian Vermeule, "Interpretation and Institutions," *Michigan Law Review* 101, no. 4 (2003): 885–951.

[42] The emphasis on intelligibility takes inspiration from the work of Boaventura De Sousa Santos, who advocates a type of legal scholarship that moves beyond postmodern modes of analysis that adopt deconstruction as an end in itself. Boaventura De Sousa Santos, *Toward a New Legal Common Sense: Law, Globalization, and Emancipation*, 2nd ed. (London: Butterworths, 2002). For an illuminating review and critique of De Sousa

general and the *dhimmī* rules in particular, it does so fully cognizant of the fact that legal systems, whether Sharīʿa or otherwise, by their nature play a constitutive, affirmative, prescriptive role in the development and design of a just society.

THEME C: RULE OF LAW, HISTORY, AND THE ENTERPRISE OF GOVERNANCE

The analytic heft of Sharīʿa as Rule of Law also lies in the historical lens it trains on the conditions of intelligibility and their constitutive contribution to the claim space of Sharīʿa. Specifically, by analyzing and tracking the *dhimmī* rules across time and across legal systems, this study explores and identifies the degree to which the intelligibility of the premodern *dhimmī* rules shifts as the prevailing conditions and presumptions that give shape to a claim space also shift. In doing so, it vests in Sharīʿa as Rule of Law a historical perspective on the study of Sharīʿa as a legal tradition of both historical import and contemporary relevance.

For premodern Muslim jurists, the conditions that bounded the claim space of Sharīʿa may have included competing epistemic techniques of legal interpretation, theological first principles, or inherited frameworks of governance inherited from the near or distant past. For the modern Muslim jurist, those conditions have changed as political communities have shifted from imperial models to state-based ones, and to complex modes of domestic and international regulation. Without adopting a historical perspective on the constitutive features of a Rule of Law claim space, such features may remain so implicit in the minds of jurists of a particular legal tradition as to be nearly hidden from critical analysis (whether their own or others'). Particularly troubling, though, is that the more hidden they are, the more they may persist in informing later legal arguments, even when other countervailing conditions arise over time and across space. To identify and name what may be so unarticulated as to be hidden from view—but which nonetheless conditions how and why the law regulates those subjected to the law—both disturbs and disrupts by no longer taking it for granted. Once disturbed and disrupted—once identified and named—a particular vision of the good life or the public good, for instance, can be scrutinized and its contribution to the law managed and regulated, especially in those cases where the particular

Santos' study, see Heidi Libesman, "Between Modernity and Postmodernity," *Yale Journal of Law and the Humanities* 16 (2004): 413–23.

vision (and the rules it informs) loses its intelligibility as shifts across time challenge earlier presumptions of what once constituted the good life or the best means to achieve it.

One presumption or condition underlying the premodern *dhimmī* rules that will be identified, named, and foregrounded is the relationship between legal doctrine and argument on the one hand, and the underlying governing enterprise that set a political backdrop to the premodern juristic imagination on the other hand. Disrupting this presumption is the key task of the third theme concerning the *dhimmī* rules. The shape and form that the claim space of Sharīʿa can take is in part determined by the political and institutional order of which it is a part. In fact, in some cases, the intelligibility of a particular legal doctrine may be deeply dependent upon the assumed institutional and political environment in which that rule was or will be applied or otherwise made manifest. Drawing upon what some have called the "institutional turn" in legal philosophy,[43] this study will show that the intelligibility of legal doctrines such as the *dhimmī* rules is intimately linked to the enterprise of governance in a mutually supportive and constitutive fashion.

That the conceptual contribution of Rule of Law generally, and Sharīʿa as Rule of Law specifically, should suggest a substantive, mutually constitutive relationship between law and governance should not be surprising. For instance, in his report to the Security Council, then-UN Secretary-General, Kofi Annan, stated that Rule of Law:

> refers to a *principle of governance* in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers,

[43] See, for instance, Sunstein and Vermeule, "Interpretation and Institutions," 885–951. See also Scott Shapiro, *Legality* (Cambridge: Belknap Press, 2011), 6, who proffers an "organizational turn" in legal philosophy. In the field of international law, Jacob Katz Cogan writes about the "regulatory turn," which includes "both doctrinal and structural elements, instituting duties and establishing enforcement mechanisms" between states and international organizations. Jacob Katz Cogan, "The Regulatory Turn in International Law," *Harvard International Law Journal* 52 (2011): 322–72, 325. In the field of Islamic legal studies, various scholars have already begun this important work. See David S. Powers, *Law, Society and Culture in the Maghreb, 1300–1500* (Cambridge: Cambridge University Press, 2002); Kristen Stilt, *Islamic Law in Action: Authority, Discretion and Everyday Experiences in Mamluk Egypt* (Oxford: Oxford University Press, 2012); Muhammad Khalid Masud, Brinkley Messick and David S. Powers, *Islamic Legal Interpretation: Muftis and their Fatwas* (Cambridge: Harvard University Press, 1996).

> participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.[44]

Drawing upon the Secretary-General's language, the United States Agency for International Development (USAID) links Rule of Law to the implementation of democracy as a particular political model of organization and governance: "[T]he term [Rule of Law] usually refers to a state in which citizens, corporations, and the state itself obey the law, and the laws are derived from a *democratic consensus*."[45] In the move from one document to another are two important factors. First, Rule of Law is very much connected to the mechanisms of governance, ordering and regulation of a society, or to what will be called herein the "enterprise of governance"—an enterprise that consists of the various rules, institutions, and protections that contribute to the well-being of a polity, both at the individual and collective levels. Second, the enterprise of governance is very much a juridified object in which the law plays a pivotal role in giving shape and aim to the enterprise; conversely, the prevailing conditions of the enterprise delimit the scope and extent of the law. Drawing upon the work of James Tully, "enterprise of governance" captures the official institutional features of legitimate governance and those who legitimately exert the authority to govern in the name of the polity. Given this study's focus on law and the exercise of government authority, the "enterprise of governance" is narrower than Tully's "relationship of governance," which applies broadly to "any relationship of knowledge, power and subjection that governs the conduct of those subject to it, from the local to the global."[46]

To further illustrate how Rule of Law illuminates the mutually constitutive relationship between law and the enterprise of governance, a brief example from US constitutional jurisprudence will suffice. When the US Supreme Court decided *Brown v Board of Education* in 1954 and thereby reversed the prevailing doctrine of separate-but-equal enshrined by the 1896 *Plessy v Ferguson* decision, the Court instigated an important jurisprudential debate about the authority and legitimacy of

[44] United Nations Security Council, *The Rule of Law and Transitional Justice in Conflict and Post-conflict Societies: Report of the Secretary-General*, S/2004/616 (New York: August 23, 2004), para. 6 (emphasis added).

[45] US Agency for International Development (USAID), *Guide to Rule of Law Analysis: The Rule of Law Strategic Framework; A Guide for USAID Democracy and Governance Officers* (Washington D.C.: USAID, 2010), 6 (emphasis added). The report can be accessed at: <http://www.usaid.gov/our_work/democracy_and_governance/publications/pdfs/ROL_Strategic_Framework_Jan-2010_FINAL.pdf> (accessed May 25, 2010).

[46] Tully, *Public Philosophy*, 1:3.

judicial review.[47] Judicial review, it has been argued, poses an important challenge to the democratic principles of the country. To what extent can and should unelected, appointed judicial officers effect legal outcomes that impact society at large, or—in more provocative terms—legislate from the bench? This question about the authority and legitimacy of judicial review is often captured by the phrase "the counter-majoritarian difficulty,"

John Hart Ely, in his justification of judicial review, reveals that the difficulty of "counter-majoritarianism" in judicial review is intelligible because of an assumed political commitment to democratic governance. Writing about American legal and political culture, he remarks that "[w]e have as a society from the beginning, and now almost instinctively, accepted the notion that a representative democracy must be our form of government."[48] In other words, democratic political commitments underlie the American polity's conception of governance and its laws. In light of this political presumption and commitment, the counter-majoritarian difficulty of judicial review becomes an *intelligible* problem:

> When a court invalidates an act of the political branches on constitutional grounds . . . it is overruling their judgment, and normally doing so in a way that is not subject to "correction" by the ordinary lawmaking process. Thus the central function, and it is at the same time the central problem of judicial review: a body that is not elected or otherwise politically responsible in any significant way is telling the people's elected representatives that they cannot govern as they'd like.[49]

The intelligibility of the problem of judicial review depends in part on a presumption that democracy is a constitutive feature of political organization and governance. Without that democratic pre-commitment, judicial review arguably does not pose the same problem. If the pre-commitment were to a different political form, such as a dictatorship, it is unlikely that the counter-majoritarian authority of the judiciary would lead to concerns about majoritarian representation.

Attentiveness to the mutually constitutive relationship between law and the enterprise of governance is significant for a consideration of the *dhimmī* rules. Without an appropriate understanding of the political assumptions or pre-commitments premodern jurists made when construing the *dhimmī* rules, the intelligibility of the *dhimmī* rules is

[47] Philip Bobbitt, *Constitutional Fate: Theory of the Constitution* (New York: Oxford University Press, 1982), 3.
[48] John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Cambridge: Harvard University Press, 1980), 5.
[49] Ely, *Democracy and Distrust*, 4–5.

vulnerable to anachronistic assessments. In fact, as Chapter 1 illustrates, the *dhimmī* rules have been subjected to anachronistic assessments in large part because of insufficient attention to the political order that jurists imagined when arguing for and justifying the *dhimmī* rules, and conversely the contribution of the *dhimmī* rules to the fulfillment and perfection of that presumed political order.

The reference to the jurists imagination of an enterprise being constitutive of Sharīʿa discourses draws upon Benedict Anderson's study of the nation and of nationalism as invoking an imagined community. For Anderson, a nation is "*imagined* because the members of even the smallest nation will never know most of their fellow-members, meet them, or even hear of them, yet in the minds of each lives the image of their communion."[50] Premodern jurists may not have known or fully experienced life in an imperial enterprise of governance, nonetheless their development of legal doctrines such as the *dhimmī* rules was premised in part upon their recognition that within a Muslim empire, different people can and will belong differently. That Islamic legal doctrines had the effect of defining and delineating community is not limited to legal debates on the *dhimmī.* David Friedenreich also draws on Benedict Anderson in his study of food regulations in Christianity, Judaism, and Islam. He shows that because "foreign food regulations express particular systems of classifying insiders and outsiders, they reveal the ways in which their participants imagine their own communities, other religious communities in their midst, and *the broader social order in which these communities are embedded*."[51]

By framing Sharīʿa as Rule of Law to reveal the mutually constitutive influence of law and the enterprise of governance, this study suggests that the intelligibility of the *dhimmī* rules is premised on the premodern jurists' pre-commitment to an imperial mode of governance, whether real or imagined. In her important study on the Ottoman Empire, Karen Barkey provides a useful characterization of Empire that offers a baseline reference for what premodern Muslim jurists may have imagined the enterprise of governance to be. She writes:

> An empire is a large composite and differentiated polity linked to a central power by a variety of direct and indirect relations, where the center exercises political control through hierarchical and quasi-monopolistic relations over groups ethnically different from itself. These relations are,

[50] Benedict Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism*, rev. ed. (London: Verso, 1991), 6.

[51] David M. Freidenreich, *Foreigners and Their Food: Constructing Otherness in Jewish, Christian, and Islamic Law* (Berkeley: University of California Press, 2011), 8 (emphasis added).

> however, regularly subject to negotiations over the degree of autonomy of intermediaries in return for military and fiscal compliance.[52]

Notably, Barkey's definition above specifies ethnic difference, though that need not be the only form of difference. As this study suggests, for Muslim jurists developing the *dhimmī* rules with an imperial backdrop in mind, the relevant difference was principally religious identity.

Paying attention to the boundaries that define and delimit the claim space of Sharīʿa, the Rule of Law analytic frame reveals how with the demise of that imagined imperial mode, the intelligibility of the *dhimmī* rules suffers considerable dissonance when invoked in contemporary contexts where the boundaries of contemporary Rule of Law claim spaces are considerably different than what premodern jurists may have imagined. This does not mean that the *dhimmī* rules cannot assume a *new* intelligibility. Any new intelligibility, however, must itself be analyzed in terms of the modern claim space within which today's Muslim jurists or government officers invoke the *dhimmī* rules.

For instance, as Muslim states have embarked on Islamization policies, they have come under scrutiny concerning their treatment of religious minorities.[53] The fact that such states persecute religious minorities in the name of, and by reference to, Islamic legal rules concerning the *dhimmī* is in part the impetus for the vast literature on the *dhimmī*, including this study. By invoking Sharīʿa broadly, these regimes often seek to legimate their sovereign authority. But when they invoke the *dhimmī* rules in public discourse, they often pay little attention to the historical and legal contexts in which those rules arose, and which once gave the rules intelligibility. Nor do they account for how the contemporary conditions of the enterprise of governance beg important questions about the ongoing authority, legitimacy, and relevance of the *dhimmī* rules. The Rule of Law frame discloses that while the *dhimmī* rules that are invoked are the premodern ones, what they *signify* depends on how they are utilized within the prevailing enterprise of governance. Resort to the premodern rules in a modern political context forces us to consider whether, how, and to what end *premodern answers* are offered in response to *modern questions* of governance. Indeed, the more interesting question, arguably, is what the modern questions are, and whether, to what extent, and under what conditions of intelligibility the premodern answers still have something to say.

[52] Karen Barkey, *Empire of Difference: The Ottomans in Comparative Perspective* (Cambridge: Cambridge University Press, 2008), 9.

[53] See, for example, Human Rights Watch, *World Report: 2009* (New York: Human Rights Watch, 2009).

THEME D: MINORITIES AND THE HEGEMONY OF LAW

One important question of governance—one that arguably transcends the premodern and modern periods—concerns the fact that where diversity exists, governing enterprises will often attempt some form of regulation and accommodation of minorities. This question does not concern *whether* a state will accommodate, but rather *how* it will do so and in light of what circumstances. The *how* of such regulation is often achieved by use of legal rules that manage the scope and extent to which a minority claimant's particularity will be given room for expression in a polity. The use of law to regulate this scope of activity immediately begs questions about the mutually constitutive relationship between law and the enterprise of governance, thereby invoking Rule of Law as an organizing conceptual framework of analysis. The *how* of regulation and accommodation thereby offers a significant site for examining and naming the underlying values that legitimate any particular ruling regime.

Importantly, a critical thrust of this study is to illuminate how Rule of Law not only reveals the mutually constitutive relationship between law and the enterprise of governance, but also, and most poignantly, the hegemonic potential of that relationship in a context of diversity where minority groups make claims upon the ruling regime. Whether the focus is on Islamic law or modern nation-states contending with constitutional claims of religious freedom, the fact of diversity creates the conditions for the hegemony of the enterprise governance through the law, regardless of region, time period, and legal system. In particular, as this study suggests, the hegemony that a Rule of Law analysis discloses is most evident when minority groups present a challenge to the extent and scope of the ruling regime authority. In contests involving minority claimants, the mutually constitutive relationship between law and the ruling regime has the potential of supporting, enhancing, and legitimating majoritarian interests,[54] often by limiting the burden on the governing enterprise to justify its denial of recognition or accommodation of minority interests. This is certainly the case with the *dhimmī* rules, but is not unique to Islamic law. Chapter 7 will illustrate this shared quality by examining how courts in liberal democratic societies such as in Western

[54] To uphold social, often majoritarian, interests, by itself, is not the problem. Legal scholars have shown that legal rules in developing areas of law often have socio-cultural foundations. See, for example, Robert Post, "The Social Foundations of Privacy: Community and Self in the Common Law Tort," *California Law Review* 77, no. 5 (1989): 957–1010. The problem identified here, though, is when upholding majoritarian interests comes at the cost of minority claimants, whose claims might be viewed as challenges or threats to the common good, social well-being, and so on.

Europe and the United States justify limits on when, where, and how the covered Muslim woman can cover or veil. Certainly the political systems assumed by and underlying Sharīʿa as Rule of Law and contemporary liberal constitutional states are vastly different. Ironically, though, despite the difference between their specific doctrines, legal systems, and governing enterprises, the dynamics of governing amidst diversity unite both systems in their respective hegemonic potential.

AN OVERVIEW

The *dhimmī* rules provide the vehicle for both exploring the analytic purchase of considering Sharīʿa as Rule of Law, and uncovering the hegemonic potential that lies at the intersection of the law and the enterprise of governance when minorities make claims for accommodation and inclusion. Rule of Law is offered as an alternative to the all-too-common reliance on "tolerance" to study and characterize the *dhimmī* rules. As will be shown in Part I of this study, the *dhimmī* rules represent a premodern juristic vision of an imperial Islamic polity in which governance through conquest and empire necessarily implied the existence of non-Muslims who came under Muslim rule. Whether or not jurists operated outside of and separate from the realm of government, they nonetheless imagined and developed a jurisprudence that was itself influenced and informed by the demands of an enterprise of governance that faced the challenge of governing amidst diversity.

Furthermore, the *dhimmī* rules offer a departure point for appreciating the historical dimension to the intelligibility of norms arising from within a Rule of Law claim space. As the backdrop of governance has changed—shifting from an imperial model to a modern state model—the intelligibility of the *dhimmī* rules has shifted as well. With the shifts in underlying modes of governance, the *dhimmī* rules no longer bear the same intelligibility they once had. Although they often remain today part of an informal discourse about identity, and in very limited cases, part of formal legal regimes, the *dhimmī* rules have since lost their original intelligibility. The challenge today is to understand the implications on the intelligibility of the *dhimmī* rules when the imperial assumptions underlying them give way to the realities of contemporary modes of governance.

Perhaps one of the more provocative theses of this study is that the *dhimmī* rules are hardly unique in the hegemonic dynamic that they reveal about the law, especially in cases where minorities make claims upon and against the enterprise of governance. As will be explored

in Part II of this study, and in particular in Chapter 7, the hegemonic potential of the law is endemic to the very endeavor of governing amidst diversity. Consequently, whether the legal system under consideration is religious or secular, premodern or modern, this study argues that minorities present a poignant discursive site that reveals the hegemonic tendencies of the mutually constitutive relationship between the law and the enterprise of governance.

This book proceeds in seven chapters organized in two parts. Part I focuses entirely on the history, doctrines, and legal reasoning of the *dhimmī* rules. Chapter 1 provides an historical context to the source texts and historical narratives that informed jurists as they debated and developed the *dhimmī* doctrines. As suggested, jurists seemed to hold various political assumptions that thereby contributed to their understanding of the law and its content. In fact, the original intelligibility of the *dhimmī* rules depended upon a pre-commitment to a polity that was defined in imperial, expansionist terms and deemed legitimate because of its commitment to the spread of the universal message of Islam.

Additionally, Chapter 1 positions this study in light of the existing historiographic literature on the *dhimmī*. That historiography reveals two dominant myths that underlie earlier studies of the field, namely the myths of persecution and harmony. These myths adopt the view either that Islam persecutes non-Muslims or that Islam is a faith that is open and warm to non-Muslims. A third innovative development in historical scholarship problematizes these myths by examining cases and periods in which non-Muslims were treated fairly, despite being subjected to doctrinal rules that operated against them because of their religious commitments. This historical scholarship is an important contribution to the field that takes us considerably farther than the writings associated with both myths. However, while this scholarship finds comfort in the inconsistency between practice and doctrine, it nonetheless takes for granted the inevitability of the discriminatory doctrinal rules. This study builds upon the existing historical scholarship; but rather than taking the doctrinal rules for granted, it traces their development and the grounds (both legal and extra-legal) for their legitimacy.

Chapters 2, 3, and 4 address the *dhimmī* rules themselves and the Rule of Law dynamics they reveal. The three chapters show, in the aggregate, how the *dhimmī* rules were developed in relation to an Islamic universalist ethos made manifest in the world by the aspiration for imperial conquest in which the non-Muslim was permitted to retain his faith while living in the Muslim polity. The ethics of univeralism, imperialism, and accommodation conflicted at times, thus rendering the *dhimmī*

rules an important site to examine how jurists developed legal doctrines in light of ethical values that were not always easily reconcilable. Chapter 2 reviews the ways in which Muslim jurists reconciled the *dhimmī*'s exceptionalism with an Islamic universalist ethos through different and competing theories of contract and obligation. Chapters 3 and 4 analyze the *dhimmī* rules as sites of contestation between competing imperatives, namely of the *dhimmī*'s private interest and an often vague reference to the broader public good. These two chapters offer different analytic perspectives on how jurists drew upon and reconciled a range of ethical arguments such as Islamic universalism, its corollary of subordination, and an accommodative spirit represented by the theme of contract.

For instance, as discussed later in this study, jurists debated why *dhimmīs* had to pay a poll tax (*jizya*). Some held that they paid it to manifest their commitment to a social contract they made with the Muslim polity, whereby they were to abide by Muslim rule in return for security and religious freedom.[55] Others argued that the *jizya* was part of a larger program of domination and humiliation exerted upon *dhimmīs* to turn them away from their faith and toward the Islamic message. These alternatives were the endpoints of a spectrum of norms within which different rules of law were possible.

The fact that some options became doctrinal and others did not is not taken for granted in this study. Certainly, jurists used the theme of Islamic universalism, and its corollary of subordination, to limit the scope of legal possibilities in order to ensure the dominance and superiority of Islam and Muslims over the non-Muslim. However, the jurisprudence of contract offered Muslim jurists a mode of legal argument designed to respect and protect *dhimmī* interests as participants in the Muslim polity. Using these themes and legal arguments, Muslim jurists generated rules that permitted some degree of accommodation and ensured the continuity of an Islamic imperial enterprise of governance that could not escape the fact of demographic diversity.

How they decided on a particular doctrine from a range of possibilities depended in part upon how jurists addressed a host of questions about the implication of diversity on the enterprise of governance and its ethics of empire and Islamic universalism, such as:

[55] Mahmoud Ayoub, "Dhimmah in Qur'ān and Hadīth," *Arab Studies Quarterly* 5, no. 2 (1983): 172–82; idem, "The Islamic Context of Muslim–Christian Relations," in *Conversion and Continuity: Indigenous Christian Communities in Islamic Lands, Eighth to Eighteenth Centuries*, eds Michael Gervers and Ramzi Jibran Bikhazi (Toronto: Pontifical Institute of Mediaeval Studies, 1990), 461–77, 470.

How could Islam claim to be a universal faith for all of humanity if, under the Sharīʿa, non-Muslims were permitted to practice their own faith traditions?

Were non-Muslims given a grant of autonomy that put them outside the Islamic framework, despite living under Muslim sovereign rule?

If so, how much autonomy should be granted to them before the sovereign authority of the ruling regime would be threatened?

If non-Muslims could have their own laws applied to them, would those laws be applied through the general courts that applied Sharīʿa-based norms?

If so, did that mean other religious traditions were equally as authoritative as Sharīʿa-based norms?

If so, how could that be reconciled with an underlying universalist Islamic ethos that framed and otherwise legitimated various modes of government action by reference to the application of Sharīʿa?

These are just some of the questions that animated premodern Muslim jurists and which this study tracks for the purpose of illuminating the conditions that made such questions intelligible in the first place.

Part II transitions from the premodern period to the modern one by addressing whether and to what extent the minority claimant in both Muslim-majority states and liberal democratic ones eerily and ironically suffers the hegemony of the law for reasons that echo the rationale of the *dhimmī* rules of the premodern era. To facilitate the transition, Chapter 5 offers an extended inquiry into the conditions of intelligibility of the premodern claim space of Sharīʿa, and examines the implication of changes in those conditions on the ongoing intelligibility of premodern Sharīʿa-based norms in the Rule of Law claim space of modern states.[56] By inductively drawing upon key doctrinal, education, and institutional features of premodern Islamic legal history, Chapter 5 gives content to the idea of Sharīʿa as Rule of Law and thereby outlines its analytic purchase when used to frame the *dhimmī* rule in the premodern and modern periods. Specifically, Chapter 5 explores premodern notions of authority, epistemology, and institutional design to give content to a concept of

[56] Chapter 5 proceeds with the caveat that what we mean by Rule of Law, what Sharīʿa as Rule of Law signifies, and what premodern Muslim jurists had in mind when developing legal doctrines are distinct but related questions. For a recent contribution to the ongoing debates about the ambiguity of "Rule of Law" as a phrase and field of inquiry, as well as the need to think about "Rule of Law" in comparative perspective (with special reference to the Islamic legal perspective), see Randy Peerenboom, "The Future of Rule of Law: Challenges and Prospects for the Field," *Hague Journal of the Rule of Law* 1 (2009): 1–10. For a general overview of the meaning of "Rule of Law" and the implications of different approaches to defining this concept, see Tamanaha, *On the Rule of Law*.

Sharīʿa as Rule of Law that, as suggested herein, identifies the mutually constitutive relationship between the law and enterprise of governance. The features examined are meant to be illustrative and not exclusive. In the aggregate, they help paint a picture of the boundaries that delimited the premodern claim space of Sharīʿa, and thereby conditioned the intelligibility of legal doctrines, such as the *dhimmī* rules.

Chapter 6 explores whether and to what extent the development of the modern state in Muslim lands has altered the boundaries of the state's claim space of Rule of Law, and the implications of those changes on the intelligibility of premodern Islamic legal rules, such as the *dhimmī* rules, in modern contexts. Muslim-majority countries have been criticized on various grounds for invoking the *dhimmī* rules or contributing to a culture of religious intolerance that in some fashion draws upon the premodern Islamic tradition. Human rights advocacy groups launch and justify their critiques by relying on international human rights treaties and declarations that uphold religious freedom and the right to be free from religious discrimination. Wealthy nations impose sanctions or financial constraints on countries that violate such human rights norms. Yet, such strategies have not been entirely successful. Leaders of Muslim states and Islamist groups accuse human rights activists of a type of hegemony and colonialism that has less to do with the merit of human rights than with the power of certain groups to enforce their own particular moral vision. Indeed, some of the most poignant examples that fuel the cultural relativists come from the Muslim world and the doctrines so often associated with Sharīʿa.[57]

To contend with the *dhimmī* rules as they are invoked in contemporary contexts suggests that any Rule of Law analysis will necessarily have a historical component. Using the *dhimmī* rules as a mechanism for comparing premodern and modern conditions of intelligibility, Chapter 6 explores whether and how historical shifts in underlying sovereign models—namely the shift from the imperial model, to the colonial model, to the modern state in an international system of equally sovereign states—calls for deliberation not only about the intelligibility of the premodern *dhimmī* rules, but also about Sharīʿa as Rule of Law across historical periods. A review of two case studies from the countries of Saudi Arabia and Malaysia will reveal that what made Islamic legal doctrines intelligible in the premodern world, arguably, inhibits them

[57] Elisabeth Reichert, "Human Rights: An Examination of Universalism and Cultural Relativism," *Journal of Comparative Social Welfare* 22, no. 1 (2006): 23–36; Catherine E. Polisi, "Universal Rights and Cultural Relativism: Hinduism and Islam Deconstructed," *World Affairs* 167, no. 1 (2004): 41–7; Abdullahi Ahmed An-Na'im, "Religious Minorities under Islamic Law and the Limits of Cultural Relativism," *Human Rights Quarterly* 9, no. 1 (1987): 1–18.

from retaining that same intelligibility in the modern world. This does not mean that premodern doctrines are *wrong* in some abstract, metaphysical sense. Indeed the question of right and wrong runs the risk of anachronism when considering a legal tradition as old as Islamic law. Rather, premodern rules such as the *dhimmī* rules might be viewed as *inappropriate* answers to modern questions of governance amidst diversity, non-responsive if not entirely irrelevant. One cannot assume that premodern doctrines such as the *dhimmī* rules retain some original intelligibility when the conditions that gave them such intelligibility have fundamentally altered. If the *dhimmī* rules anticipated an imperial model of governance, that model has yielded to the modern nation-state model. The era of globalization has also ushered in transnational networks of knowledge transfer, particularly via the internet, that lack political authority but offer persuasive authority for those living in vastly different parts of the globe. Chapter 6 shows how any Rule of Law analysis of the *dhimmī* rules today cannot appreciate their intelligibility without also taking account of fundamental historical shifts in the way law relates to and constitutes the prevailing political order.

This study concludes with Chapter 7, which shifts gears entirely to illustrate how the Rule of Law dynamics revealed by the premodern *dhimmī* rules are not unique to the Islamic legal tradition, but plague any enterprise of governance that must contend with diversity. As such, this study contributes to the growing literature on Rule of Law, governance, and pluralism[58] and argues that democratic liberal states and their legal systems also suffer from a hegemonic potential when confronted by a minority claimant. Chapter 7 addresses recent controversies in law and governance in Europe and North America, where various governments have had to contend with the scope and limits of their multicultural and accommodationist policies.[59] Specifically, it analyzes in detail recent

[58] Sujit Choudhry, ed., *Constitutional Design for Divided Societies: Integration or Accommodation* (Oxford: Oxford University Press, 2007); Ayelet Shachar, *Multicultural Jurisdictions: Cultural Differences and Women's Rights* (Cambridge: Cambridge University Press, 2001); Suzanne Last Stone, "The Intervention of American Law in Jewish Divorce: A Pluralist Analysis," *Israel Law Review* 34 (Summer 2000): 170–210, 190.

[59] For studies on this issue in different contexts and from different disciplines, see Anver M. Emon, "Conceiving Islamic Law in a Pluralist Society: History, Politics, and Multicultural Jurisprudence," *Singapore Journal of Legal Studies* (December 2006): 331–55; Ayelet Shachar, *Multicultural Jurisdictions*. For recent court decisions involving questions of accommodation, see *Multani v. Commission scolaire Marguerite-Bourgeoys*, [2006] 1 SCR 256, 2006 SCC 6; *Bruker v. Marcovitz*, [2007] 3 SCR 607, 2007 SCC 54. The Quebec provincial government, after various public outcries about the scope of religious accommodation, created a special "reasonable accommodation" commission led by the philosopher Charles Taylor and the historian Gerard Bouchard, to investigate and delineate policies of accommodation: Charles Taylor and Gérard Bouchard, *Building the Future, a Time for Reconciliaton: Report* (Quebec City: Commission

court decisions and legislation concerning the covered Muslim woman. In the United States, Canada, the United Kingdom, and continental Europe, the covered Muslim woman provides an important trope for debates about the values of a nation. The covered Muslim woman who seeks an accommodation from the state offers a focal point for examining the mutually constitutive relationship between the law and the democratic constitutional enterprise of governance. As will be shown in Chapter 7, that mutually constitutive relationship makes hegemony against the minority claimant both possible and likely inescapable.

Returning to the themes of this study, the *dhimmī* rules reflect an important discursive site about how the minority claimant all too often becomes a vehicle for defining the limits of tolerance and the nature of and mutual relationship between law and governance. There is much that this study hopes to accomplish, though by the end of the book, the reader will likely be left wanting. The study begins with a discussion of the *dhimmī* rules, and ends by situating the *dhimmī* in a larger dynamic that is, at the very least, sobering. The end is not a happy one; there is no "solution" proffered, but only a reminder to remain vigilant. Whether the "problem" concerns the *dhimmī* rules, or the plight of minorities more generally (religious or otherwise), this study asks the reader to contend with and be ever mindful of the hegemony that arises from the mutually constitutive relationship of the law and the enterprise of governance, particularly in cases where minorities make claims upon the state.

de consultation sur le pratiques d'accomodement reliées aux differences culturelles, 2008).