

Understanding Islamic Law (*Shari'a*)

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SECOND EDITION

Raj Bhala

ASSOCIATE DEAN FOR INTERNATIONAL AND COMPARATIVE LAW
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Bismillah ir Raḥmān ir Raḥīm

(In the Name of God, the Most Gracious, the Most Merciful)

Christians and Muslims are brothers and sisters. We must therefore consider ourselves and conduct ourselves as such. . . . Together, we must say no to hatred, to revenge and to violence, particularly that violence which is perpetrated in the name of a religion or of God himself. God is peace, salām.

His Holiness,
Pope Francis (1936–),
Bishop of Rome
Address and Meeting with the Muslim Community
Central Mosque
Bangui, Central African Republic
30 November 2015

*May the pure, brilliant sun of bodhicitta [enlightened mind]
Dawn in each and every heart and mind
Dispelling the darkness of suffering and confusion
Unstoppably — until all are illumined and awakened.*

Lama Surya Das, *Awakening the Buddha Within:
Tibetan Wisdom for the Western World*
(New York, New York: Broadway Books, 1997)

Dedication

To the trinity of great women in my life:

My patient mother, *Barbara Mae Mallory* (1937-2003), who in the 1960s introduced me to the beauty of Islam through Islamic arts and calligraphy exhibited at the New York Metropolitan Museum, and to the spiritualism of Islam from the poetry of Maulana Jalâluddîn Rumi (1207-1273), whom she read even on her last day.

My dear wife, *Kara Tan Bhala*, who grew up in a Muslim country, Malaysia, in a Buddhist Chinese family and attended Catholic Convent School, witnessed in many countries the evils of ignorance and extremism, and rightly pushed me to author this textbook out of her compassion for people, regardless of their faith, so that they may be better educated.

Our little gift from God (Allâh), our daughter, *Shera Tan Bhala*, who has travelled with us to no fewer than 29 countries, many of them Islamic, and helped us see them better through her loving eyes, generous heart, and empathetic spirit, and for whom I pray this textbook makes her world more peaceful than mine.

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Preface to the 2nd Edition

... One race did not settle everything, as I had thought it would.
One race is only the prelude to another.

Sir Roger Bannister (1929–)

The Four-Minute Mile 225 (Guilford, Connecticut: The Lyons Press, 1981),

First person to run a sub-4 minute mile

(3:59:4 on 6 May 1954 at the Iffley Road Track, Oxford University)

No background in law, religion, history, or foreign languages is required to read *Understanding Islamic Law (Shari‘a)*. Only a dedicated mind and open heart are needed. This textbook is for two audiences: law students and legal practitioners. It is a learning tool for future lawyers and reference for current ones. But, it cannot possibly resolve all issues about Islamic Law. It is a prelude for further study and contemplation, a point intimated in the above quotation from one of my heroes about one of my favorite activities. Completing the 1st edition in 2011 after nearly 3 years, and 2nd edition in 2016 after another 4 years, is like finishing a long run. It leaves me with the certitude I have more to learn, just as I seek to improve as a runner.

This textbook also is eminently suitable for students of other disciplines, and non-lawyers, who are interested in or need to know about the subject. Along with my law students, many non-law graduate students and professionals in other fields have completed successfully the Islamic Law (*Shari‘a*) course at the University of Kansas School of Law (KU Law School) since I first offered it in the fall 2003 semester. That also is true of the honorable men and women, for whom I have enormous respect, and who I am humbled to serve, in the United States Special Operations Forces (SOF). They began taking the course in the fall 2010 semester at the Command and General Staff College (CGSC) at Fort Leavenworth, Kansas. Thanks to them, this textbook is better. Indeed, to all who have taken the class, I owe much. Hailing from Bangladesh, Canada, China, Egypt, India, Iran, Korea, Pakistan, Saudi Arabia, Syria, Turkey, United Arab Emirates (UAE), and from cities, suburbs, or farms around Kansas and across the United States, the “students” taught the teacher about the subject, and constructively criticized earlier iterations of this book.

It sounds not only striking, but also supercilious, to state that *Understanding Islamic Law (Shari‘a)* is the first comprehensive textbook and treatise on the topic ever written for the English-speaking market by an American law professor. The book is the first work to incorporate systematically comparisons and contrasts with American law and Catholic Christian teaching.¹ And, it is the first such work to address frankly controversial

1. For an overview of the American legal system, see Gerald Paul McAlinn, Dan Rosen & John P. Stern, *An Introduction to American Law* (Durham, North Carolina: Carolina Academic Press, 2nd ed., 2010). For brief discussions of Catholicism, by the Chaplain to Cambridge University and a Professor of Philosophy at Boston College, respectively, see Alban McCoy, *An Intelligent Person’s*

matters from abortion to Wall Street, paying particular attention to women's issues. There is no genius on the part of the author, who is nothing more than a struggling student of the *Shari'a*. Rather, these facts reflect the under-developed state of Islamic Law in American legal education and practice.

True, Dr. Majid Khadduri (1909–2007) and Dr. Herbert J. Liebesny (1911–1985), edited a collection of 15 essays, *Law in the Middle East*, published by the Middle East Institute in Washington, D.C. in 1955. In 1975, Dr. Liebesny produced *The Law of the Near & Middle East — Readings, Cases, & Materials*, published by the State University of New York Press, which compiled materials from a graduate seminar he taught at The George Washington University. Nevertheless, and despite more books appearing on a variety of Islamic topics in the intervening decades, no full-length, English-language treatment of Muslim law, religion, and history, covering not just the Arab world (in which roughly 300 million Muslims live), but also East Asia, Africa, and other regions (where the other 1 billion Muslims live), has appeared.

That a major text and reference work did not emerge after the Iran Hostage Crisis, which ran for 444 days starting on 4 November 1979, is shocking. After all, that debacle was a rude awakening involving legal issues and *Shi'ite* Islam. Before the terrorist atrocities of 11 September 2001, discourse on Islamic Law was the province a small group of law professors, many of whom were Muslim, and a niche area of practice for precious few specialist practitioners. Since then, the circle has expanded only modestly, even though the group never was a cabal. To the contrary, *Shari'a* experts are delighted and pleasantly welcome newcomers to the field.

The problem has been a lack of attention to modernizing the international and comparative law curriculum and practice in the United States in the wake of paradigmatic shifts around the globe. More accurately, the problem has been a lack of including Islam and the *Shari'a* in the modernization plans. Perhaps we in the American legal academy have been too complacent in our familiar Euro-centrism. Perhaps now we are too dazzled by China, and forget that even the Chinese Communist Party (CCP) has an uneasy time in its rule over a vast Muslim population, the Uyghurs, in the Far West of the People's Republic. Perhaps we exalt too much the preciously-placed law review article as a mode of scholarship over the old-fashioned book that is useful to students and practitioners. We use student law review editors as means to an end, especially when we leverage one journal over another. In so doing, we miss the opportunity to orient ourselves to be instruments of service through the patient preparation of teaching materials.

To be sure, Islamic legal scholarship is as old as Islam. Hence, there are innumerable volumes on the *Shari'a* — in Arabic, written by Muslims, with a Muslim audience in mind. There also are countless books in English, many written by Muslims, on the religion and history of Islam, and on specialty Islamic fields, such as Family Law, Inheritance Law, and International Law. Some such books are written originally in English. Others are in translation from Arabic, French, or German. With a few notable exceptions, many of which are cited herein, the authors tend not to be foreign lawyers or law professors. None of these books is oriented to the needs of the contemporary English-speaking legal classroom or demands of modern legal practice. Likewise, within the American

Guide to Catholicism (London, England: Continuum, 2005) and Peter Kreeft, *Fundamentals of the Faith — Essays in Christian Apologetics* (San Francisco, California: Ignatius Press, 1988). For a monumental work on the religion and history of Christianity, see Diarmaid MacCulloch, *Christianity — The First Three Thousand Years* (New York, New York: Viking, 2009).

legal academy and among practitioners, fine law review articles and books have been written on focused Islamic legal topics. But, the bottom-line is where can a newcomer, an average English-speaking law student or legal practitioner, learn about the breadth and depth of Islamic Law?

There certainly is nothing wrong with a book on Islamic Law written by a Muslim. But, it is not the same as one written by a non-Muslim. In first case, the author is writing from inside the system to which she adheres. It is difficult to see outside the paradigm, even if the author creatively and courageously advocates certain reforms against centuries of tradition and understanding. In the second case, the author is doing her best to empathize, but still is explaining and assessing the paradigm from the outside looking in. Her instincts may be less honed, her appreciation of nuances less sophisticated, than her Muslim counterpart. But, in contrast to her Muslim counterpart, perhaps she can view the paradigm more systemically and systematically, and ask different questions. One type of work is not better than the other. Both kinds of contributions are necessary for a full understanding and appraisal. Writing this book puts me in both positions. I am a non-Muslim writing about the *Shari'a*. I am an American lawyer and a Catholic comparing the subject to American law and Catholicism.

In the present age of globalization, such is the status of many law students and young lawyers in America. They — or shall I say, we? — are blended and mixed in ways scarcely imaginable when the last Kansan to become President, Dwight D. Eisenhower (1890–1969), occupied the White House. We are on the inside of some paradigms angling for a more holistic view, and on the outside of other systems yearning to get in. This problem is a good one to have. It suggests we are unwilling and even unable to be limited and defined by traditional boundaries. That spirit of adventure, along with a dedicated mind and open heart, surely ought to lead to greater peace, tolerance, and understanding.

In keeping with the present age and contemporary Kansas, *Understanding Islamic Law (Shari'a)* is the product of a decidedly mixed author: an imperfect Roman Catholic in love with his faith, who is proud of his half-Indian (Punjabi), half-Canadian (Scottish) heritage. These influences, plus the impressions of my Malaysian-Chinese wife, our blessedly mixed daughter, and our travels around the world, resonate throughout this book. I try to ensure they do so transparently, as teaching is not supposed to be an exercise in veiled indoctrination.

I confess a special exertion in respect of the influence of my faith. When drawing comparisons and contrasts to Catholic Christianity, I rely on the three recognized sources of Catholicism: Sacred Scripture (*i.e.*, the Bible), the Magisterium (*i.e.*, the teachings of the Church through the Popes, Cardinals, Bishops, Priests, and Nuns), and Sacred Tradition (*i.e.*, the practices of the Church, many of which are from its earliest days). The *Catechism of the Catholic Church* provides a single-volume summary of the substance of all three sources.²

Notably, in writing *Understanding Islamic Law (Shari'a)*, I am mindful of two quotes from such sources. First, there is the 2000 document, *Dominus Iesus*. In this Declaration, Pope John Paul II (1920–2005) states that “to consider the Church as one way of salvation alongside those constituted by the other religions” is “contrary to the faith.”

2. See CATECHISM OF THE CATHOLIC CHURCH (United States Catholic Conference, Inc., Washington, D.C.: Libreria Editrice Vaticana, 2nd ed. 1997).

Likewise, his successor, Pope Benedict XVI (1927-) warns repeatedly that one danger of relativism is the trivialization of different religions by equating them all. In turn, one consequence is false ecumenism and inauthentic inter-faith dialogue.

Second, in respect of Muslims, the Church teaches in the document from the Second Vatican Council, *Lumen Gentium*, that:

The plan of salvation also includes those who acknowledge the Creator, *in the first place amongst whom are the Muslims*; these profess to hold the faith of Abraham, and together with us they adore the one merciful God, mankind's judge on the last day.³

Dominus Iesus is (*inter alia*) an admonition against relativism, against trivializing Catholicism by equating it with, or subordinating it to, other paths to salvation. *Lumen Gentium* is (*inter alia*) an admonition against pride, against arrogance. It is the province of God, not man, to judge fitness for salvation.

Until then, there are many joys from writing this book to cherish: a greater admiration for Islam and the *Shari'a*, a better appreciation of the gift of the Catholic faith, and a clearer understanding of the common points, amidst undeniable differences, shared by Muslims and Christians, and Muslim and Christian lawyers, in our common human dignity derived from God.

For now, *Understanding Islamic Law (Shari'a)* spells the beginning of the end of one conventional excuse for not teaching a course in Islamic Law, namely, there are no readily available, user-friendly teaching materials. In time, there may well be more choices than this volume, and so there should be. Let 100 flowers bloom, particularly in a field as rich and elegant as the *Shari'a*.

Raj Bhala
Kansas City, Missouri
June 2016

3. *Lumen Gentium*, ¶16, quoted in CATECHISM, *supra*, at ¶841 (emphasis added).

Acknowledgments

We cannot do great things on this Earth, only small things with great love.

Saint Mother Teresa of Calcutta (1910–1997),
Missionaries of Charity

I did nothing great in writing this book. Rather, I had great help from my Research Assistants (RAs). We all collaborated with great love for our endeavor, hoping our respective small contributions would help make the world a better place. So, “blessed” hardly is too strong a word to describe how I feel about my RAs and their substantive contributions to this textbook. Without the help of this elite but understated team, the result would have been much diminished.

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abroad and at home — with the Istanbul office of the British law firm Denton Wilde Sapte, and with the Lawrence, Kansas firm of Wisler, Trevino, and Rosenthal. In college, Ellen was inducted into the Classics Honor Society, *Eta Sigma Phi*, and at KU Law School she earned top honors in Islamic Law. Active in the Law School community, she served as Treasurer for the International Law Society and Women in Law. Ellen was a referee for youth and adult soccer, and an instructor to teach others to be referees.

Ellen carefully edited virtually every Chapter, re-drafted sections of several Chapters, and her insights on many points added great value. Her research memoranda on analogical reasoning (*ijma'*), consensus (*qiyās*), and *ijtihād* (independent reasoning) formed part of the basis of the Chapter on the Four Sources of Islamic Law (*uṣūl al-fiqh*), and on additional sources. A Latin scholar, Ellen also provided all Latin translations.

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Jomana's research memos on abortion, contraception, women's dress, and women's employment are the bases for portions of the Chapters on Family Law. Her memo on *hawāla* banking is the basis for a portion of a Chapter on Finance. Her memo on the meaning of "*jihād*" is the basis for a portion of a Chapter on International Law.

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Eric served in the U.S. Army in Bosnia, Germany, and briefly in Korea. Eric switched from active Army to National Guard so he could attend Penn State University, where he completed his Bachelor's degree in two years. Eric taught English in Los Angeles, learned Old English at UMKC, and landed at KU Law School. He served as a Staff Editor on the *Journal of Law and Public Policy*, and interned at Immigration & Customs Enforcement (ICE).

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As the RAs and I worked collaboratively on this book, they became part of my family. My wife, Kara, our daughter, Shera, and I miss them. We shall always remember them well.

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