Introduction to Islamic Law

Professor Dr. Ebrahim Afsah

v. 1.2

Tuesdays, 13:00–13:00, Juridicum, U16

Description

This course provides an accessible and systematic introduction to the study of Islamic law. Reflecting its traditional strengths in private law, this course focuses on Islamic family, commercial and contract law, treating Islamic public law only in passing. These also happen to be those areas most relevant to legal practitioners, as courts in Western legal systems often have to resolve private law matters with reference to Islamic legal principles. Those interested in constitutional law and Muslim governance more broadly should consider “Comparative Constitutional Law in an Islamic Context” taught at the Law Faculty by the same instructor.

This course examines the nature and development of Islamic law from three distinct but related angles: as dogma centred around the interpretation of authoritative texts; as practice centred around the observation of the way its norms are actually observed by human beings; and as contingency centred around the recognition of the diverse historical, social and cultural forms it can take.

This course is aimed at graduate students in law, oriental studies, political science and related disciplines. There are no linguistic or disciplinary prerequisites, all required material is in English, necessary terms will be explained in class and a glossary provided. Given the complexities of its historical and dogmatic genesis, the study of Islamic law can be a forbidding prospect for those setting out to enter this field. The inherent intricacies of the subject are confounded by an increasingly polarised political and scholarly debate surrounding political Islam, in which demands for religious law often take central stage.

Learning Outcomes

At the successful completion of the course, students will have obtained the following learning objectives. Students will:

Knowledge

• Know the basic contours of the historical development of Islamic law
Know the main protagonists
Know the main difference between *shari'a, ta'zir*, siyasa.
Know the key doctrinal differences between *Sunni* and *Shi'i* law and dogma
Know the orthodox Legal School, their geographical distribution and historical significance
Know key substantive norms regarding marriage, guardianship, inheritance, and maintenance
Know key substantive norms regarding interest, risk, capital accumulation, and lending
Know key substantive norms regarding contracts, testimony, court proceeding, and evidence
Know major divergences between the Legal Schools
Know key areas of modern legal reform in family law
Know key characteristics of Islamic banking

**Skills**
- Read translations of key doctrinal texts
- Identify major dogmatic debates, both historical and contemporary
- Identify ‘lines of parentage’ of key concepts and ideological positions
- Differentiate between private and public law
- Identify and evaluate major legal and bureaucratic institutions
- Identify social pressures for legal change
- Carry out independent interdisciplinary research
- Assess the feasibility of competing ideological positions
- Distinguish between dogmatic ideal and practical reality
- Communicate academic findings to an interdisciplinary audience
- Analyse the role of law in complex socio-political phenomena in current events
- Communicate these insights effectively

**Competencies**
- Conduct independent interdisciplinary research
- Critically examine the validity and reliability of dogmatic claims
- Disaggregate complex phenomena in the Islamic world
- Give basic legal advice on Islamic private law
- Distinguish legal from related argumentation
- Critically assess claims about cultural and legal immutability

Course materials can be downloaded here:
https://ucloud.univie.ac.at/index.php/f/127086221
Prerequisites

By choice and necessity, this course will be interdisciplinary and has no prerequisites. No knowledge of Arabic or other oriental languages is assumed; neither is previous familiarity with the study of religion in general and Islamic beliefs in particular. Previous knowledge of family, commercial, constitutional, international or administrative law is welcome but not a prerequisite. Students from beyond the law faculty are explicitly encouraged to join, and we will make reasonable accommodation to make the legal exegesis accessible. Rather than assuming a common frame of reference, it is expected that students’ diverse disciplinary backgrounds will complement each other. A sufficient command of English is necessary.

Much of the material will be made electronically available. Students should be prepared to purchase the most-widely used textbooks in this class, that is Schacht, Zubaida and Hallaq.

Exam

The grade for this course consists of one written, two day, open-book book exam of maximum 2000 words excluding footnotes. You can write your answer in either German, English or French.

Students will have to answer two questions out of six, thus accommodating to some degree personal preferences. The exam is aimed to motivate a renewed engagement with the course material and to cement the retention of the above stated Learning Outcomes, which will guide grading. Special emphasis will be given to the mastery of comparative approaches.

Curriculum

1st Session: Introduction: The Study of Islamic Law

- Why does Zubaida consider the “fixity and clarity” of the shari’a to be problematic?
- How do Zubaida and Gellner differ regarding the potential for secularization?
- Why does Lewis deem Goldziher especially attuned to Muslim sentiments?
- What makes Islamic law, according to Jackson, the “very antithesis to Western law?”
- What does Schacht consider to lie at the centre of the Islamic faith?

Mandatory Material:


**Voluntary Material:**


Wael B. Hallaq, *Shari’a: Theory, Practice, Transformations* (Cambridge: Cambridge University Press, 2009), pp. 1–23. “Introduction.” Read with caution, in both senses of the word. The writer is perhaps the most well-known contemporary scholar of Islamic law, but he is also self-avowedly “heavily Foucauldian.” His post-modern approach is deliberately and proudly apologetic of the Islamic heritage and deliberately dismissive of Weberian ‘formal rationality.’ As such, I consider him to be of questionable utility for the comparative lawyer, because he goes beyond Goldziher’s “intuitive sympathy” into an uncritical, intellectually indefensible double-standard.


**2nd Session: Formation of Islamic Law**

- Which elements contributed to the shari’a’s “hybrid formation”?
- What are the four universally agreed sources of Islamic law?
- Where is the state in this process?
- What role is played by pre-existing norms and institutions?
- What is the ‘Gate of Ijtihad’ and why was it closed?

**Mandatory Material:**


Voluntary Material:
Schacht, An Introduction to Islamic Law, pp. 6–27. Chapters 2–5 “The Pre-Islamic Background,” “Muhammad and the Koran,” The First Century of Islam” and The Umayyad Administration and the First Specialists.”

3rd Session: Sources, Methods and Schools

- Have the two scriptural sources always been indisputably fixed?
- What is the name of the discipline deriving norms from these sources?
- What is the name of the methodology/theory deployed?
- What is siyasa shari’a, who established it and why does it matter?
- What is the functional role of the four (plus two) orthodox schools of law?

Mandatory Material:
Schacht, An Introduction to Islamic Law, pp. 112–23. Chapters 16 and 17 “The Original Sources” and “General Concepts.”
Hallaq, An Introduction to Islamic Law, pp. 31–37. Chapters 3 and 4 “The Legal Schools” and “Juristic, Legal Education and Politics.”

Voluntary Material:
4th Session: Methods and Rationality

- According to Weber, are the *fuqaha*, the scholars of Islamic law, rational people?
- Which three normative elements are covered by the classical *shari'a*? How are they sanctioned?
- What is the difference between ‘formal’ and ‘substantive’ rationality?
- Are *qadis*, judges, independent of worldly power? Whose law do they apply?
- Would Berman agree with Jackson’s earlier assessment of Islamic law as the “antithesis” of Western law? If so, what are the differences? If not, what the similarities? Where do they come from?

Mandatory Material:


Voluntary Material:


5th Session: Law and Political Authority

- What could the rulers generally not do throughout Islamic history?
- What was the relationship between the fuqaha and the state?
- Does Zubaida agree with the view espoused by Snouk about Islamic public law? Do you?
- According to Salzman, what is the great virtue of religion in a depressing reality?
- According to Hallaq, what is the relationship between siyasa shari’a and shari’a?

Mandatory Material:
Hallaq, An Introduction to Islamic Law, pp. 72–82. Chapter 6 “Pre-modern Governance: The Circle of Justice.”

Voluntary Material:
Hallaq, Shari’a: Theory, Practice, Transformations, pp. 159–222. Chapters 4 and 5 “Law and Society” and “The Circle of Justice and Later Dynasties.”

6th Session: Material Scope of Islamic Law

- What purpose played the madhabs in the development of Islamic law?
- How does Hallaq treat the legal discrimination of women in classical Islamic law?
- How does Schacht see the relationship between theory and practice in Islamic law?
- What is the relative strength of private and public law provisions in Islamic law?
- How and how much does Islamic law regulate the exercise of public power?
Mandatory Material:

Voluntary Material:
Rohe, *Das islamische Recht: Geschichte und Gegenwart*, pp. 76–164. Erster Teil, Kapitel IV „Die Regelungsbereiche des klassischen islamischen Rechts.“

7th Session: Modernity and Legal Reform

- Is jurisdiction primarily territorial or personal under Islamic law?
- What was the impetus and the challenges for colonial codification efforts?
- Was all legal reform initiated by colonial powers?
- Which areas of Islamic law proved particularly resilient towards reform?
- Can modern states operate effectively through Islamic law?

Mandatory Material:

Voluntary Material:
Hallaq, *An Introduction to Islamic Law*, pp. 85–139. Chapters 7 and 8 “Colonizing the Muslim World and ist Shari’a” and “The Law in an Age of Nation-States.”


8th Session: Family Law

- How would you legally classify a Muslim marriage? Can you state an alternative tradition?
- What impediments to marriage exist under Islamic law? Do all of them render it invalid?
- What are the legal effects of marriage?
- How have states attempted to change marriage laws and why?
- Regarding dissolution, what is the difference between talaq and khul?

Mandatory Material:


Hallaq, Shari’a: Theory, Practice, Transformations, pp. 271–95. Chapter 8 “Family Law and Succession.”

Voluntary Material:


Menski and Pearl, Muslim Family Law. (newer edition of Pearl’s book above; you can use either.)


Charfi, “L’influence de la religion dans le droit international privé des pays musulmans.”

9th Session: Contracts & Obligations, Property & Ownership

- Reading the material, what is the relationship between general principles and casuistry?
- What are the ingredients of the contract of sale?
- How does *bival* permit circumventing undesirable dogmatic rules?
- How are spiritual concerns affecting civil liabilities?
- What is the modern significance of *gharar, kafala* and *hawala*?

Mandatory Material:


Voluntary Material:


10th Session: Finance

- What is the difference between ‘Islamic banking’ and ‘Islamic Economics’?
- What does Sadr consider the central economic problem?
- How does he solve it? How is his ‘law and economics’ different from the Western school of the same name?
- Why does Hamoudi consider the Islamic bank to be impossible in America? Why is it nevertheless desired? Would your assessment be different in a Muslim-majority country?
- What is the relationship of these Islamic models to economic science?
11th Session: Offences and Penal Law

- Why does Hallay, unlike Schacht and most people, reject the term ‘penal law’?
- Schacht identifies which two sources of all penal law?
- What is remarkable about the procedural requirements of *hudud*?
- What is the difference between *qisas* and *ta’zir*?
- What is *hisba* and which contemporary significance does it have?

Mandatory Material:


Voluntary Material:


12th Session: State, Administrative and International Law

- What is meant by the etatization of religion and law?
- What is the dogmatic role of *siyar* and how has reality affected it?
- Who controls the interpretation of Islamic law in Egypt?
- Is it true that in Egypt “there seem to be no secularists” (Zubaida, p. 173)?
- The theory of *jihad* is premised on a victorious Islam. How has it been applied in a Westphalian world?

**Mandatory Material:**


**Voluntary Material:**


Afsah, “Contested Universalities of International Law.” (repeated from Week 7)


Rohe, *Das islamische Recht: Geschichte und Gegenwart*, pp. 140–166, 243–263. „Staats- und Verwaltungsrecht.“


13th Session: Review and Outlook

- Do you share Hallaq’s nostalgic reminiscing about the nature of classical Islamic law?
- Do you consider his notion of an ‘anthropological historical sharia’a’ to be useful?
- How does Zubaida disagree with this depiction of a historical Muslim society governed by the holy law?
- Why have modern states found it hard to institute the shari’a? Why do they still try?
- What is the proper role of the shari’a in the diaspora?

Mandatory Material:
Hallaq, An Introduction to Islamic Law, pp. 163–70. Chapter 10 “Shari’a Then and Now: Concluding Notes.”

Voluntary Material:
Rohe, Das islamische Recht: Geschichte und Gegenwart, pp. 397–405. Vierter Teil „Perspektiven des islamischen Rechts in einer globalisierten Welt.“