Glossary of key terms

Terms defined here reflect a particular understanding of the Islamic legal tradition. To be understood properly, the book should therefore be read with these definitions in mind, since some terms here are given a specificity of meaning that they do not possess in the works of other writers (who may give them their own nuances). For instance, as I use it here, the word “jurist” has a particular meaning that should not be confused with such concepts as “judge” or “legist.” The same is true of the terms “school,” “substantive law” and so on.

**abrogation**: making a revealed text supersede another. The grounds on which abrogation can be made are many, one of which is the chronologically later provenance of the repealing text (reflecting a change of mind or position adopted in the earlier text); another reason for abrogation is when one text itself commands the abandonment of a matter specified in another text.

**adat**: usually unwritten customary laws prevailing in Malaysia and Indonesia.

**amicable settlement**: see peacemakers.

**author-jurist**: a highly learned legist (q.v.) who is capable of exercising certain faculties of *ijtihad* (q.v.) in writing legal manuals and/or long treatises on law.

**Azhar**: a religious university in Egypt (based mainly in Cairo) that originated as a *madrasa* (q.v.) and that has incorporated into its twentieth-century curriculum many fields in the sciences.

**caliph**: the political and religious head of Islamic government; a deputy of the Prophet, also known as the Commander of the Faithful and Imam (q.v.). After the ninth century, and with the ascendancy of tribal dynasties hailing mainly from Central Asia, the caliph lost his political and military powers, and was progressively reduced to a religious symbol. The effective ruler became the sultan. In 1924, the caliphate was abolished by Kemal Atatürk.
certifying-witness: functionary of the court whose task it was to examine and certify the integrity of witnesses produced, inter alia, by the litigating parties.

charitable endowment: see waqf.

chief justice (Qadi al-QuDAT): in the early period, the judge sitting in the capital, who appointed qadis to the provinces and cities of the empire; later, especially under the Ottomans, each province or city could have a chief justice, since the authority that appointed them was the Shaykh al-Islam (q.v.), the chief mufti of the Empire. A chief justice, however, could not quash or reverse decisions of other qadis, not even those whom he appointed; thus the hierarchy was administrative – one of appointment to office and dismissal – and not of legal authority.

circle: see study circle.

consensus: generally, the agreement of the community on a particular matter; the third source of Islamic law, technically defined as the agreement of mujtahids (q.v.) in a given age on a particular point of law. Consensus was determined in a back-projected manner, namely, when jurists looked back at earlier generations and observed that there was no disagreement amongst them on a particular point of law. Juristic disagreement, however, was the norm, whereas rules subject to consensus were relatively few. While a mujtahid (q.v.) was required merely to know the cases subject to consensus, the hallmark of his ijtihad (q.v.) was intimate knowledge of the reasons for juristic disagreement (an intellectually demanding field of enquiry).

Council of Guardians: having the powers of a constitutional court in the Islamic Republic of Iran, it consists of twelve members, six of whom are Shari’ah jurists while the rest are experts in other areas of the law; it has the power to veto any bill introduced by the Majlis (Parliament) on the grounds that it is repugnant to Shari’ah norms.

Court of Cassation: a high court that holds the power to review and overturn the decisions of lower courts; in some countries, it is the highest of all courts while in others it stands below the constitutional court.

darura: a legal principle, mainly in the law of rituals, allowing a person to set aside the law in a particular circumstance if fulfilling the legal obligation is believed to lead to undue hardship or harm. For example, stopping, while on travel, to pray is an obligation that may be waived if the life or security of the worshiper is in danger (for example, the threat of highway bandits).

divorce: marital dissolution in the Shari’ah takes one of at least three forms: (1) unilateral divorce by the husband (talaq) whereby he owes his wife financial compensation; (2) contractual dissolution (khul’) whereby the wife usually surrenders her entitlement to dowry plus
maintenance she would have received for three months had the husband divorced her unilaterally; and (3) judicial divorce by the court.

**faqih**: a legist (q.v.); an expert in the law; an ‘alim (pl. ulama, q.v.).

**fatwa**: legal opinion issued by a mufti (q.v.); although they were formally non-binding, judges adhered to fatwas routinely, as they were deemed authoritative statements on particular points of law.

**formative period**: the first three and a half centuries of Islam (roughly 620–960 AD) when Islamic law took its full form. Thereafter, the law continued to change in a piecemeal fashion and on a case-by-case basis, but its major principles and chief characteristics maintained remarkable continuity.

**four sources**: the main sources of the law, i.e., the Quran, the Prophetic Sunna (q.v.), consensus (q.v.) and qiyas (q.v.).

**habous**: see waqf.

**hadith**: Prophetic traditions or reports of what the Prophet had said, done or tacitly approved with regard to a particular matter. The term is both singular and plural. See recurrence and Sunna.

**Hanafi**: a legal school (q.v.); a legist (q.v.) loyal to the principles and substantive law of Hanafism. See legal schools.

**Hanbal**: a legal school (q.v.); a legist (q.v.) loyal to the principles and substantive law of Hanbalism. See legal schools.

**hudud**: severe punishments for certain offenses specified in the Quran, rarely applied in pre-modern Islam because of the strict requirements of procedural law. For example, to prove adultery/fornication, four male witnesses must independently testify to the fact that they have, among other things, seen the man’s sexual organ penetrate the woman. Should any of the four testimonies contradict the other three in any fashion (e.g., with regard to the position of the two while having sex or where they were having it), the four witnesses will be charged with slander and whipped eighty lashes each.

**ijtihad**: legal methods of interpretation and reasoning by which a mujtahid (q.v.) derives or rationalizes law on the basis of the Quran, the Sunna and/or consensus; also, a judge’s evaluation of customary practices as they bear on a case brought before him. See also consensus, mujtahid and qiyas.

**imam**: leader of Friday prayer; a preacher in a mosque; a caliph (q.v.) in Sunni Islam.

**Imam**: The infallible head of the Shi‘i Muslim community who is a descendant of Imam ‘Ali and who is in hiding (occultation).

**Imamate**: the institution embodying the Imam in Shi‘ism.

**istihsan**: literally, preference; technically, a method of inference preferred over qiyas (q.v.) and taking as its basis alternative textual evidence on
the grounds that this preferred evidence leads to a more reasonable result that does not involve an undue hardship.

**istantlah**: literally, to find something good or serving a certain lawful interest; technically, a method of inference that does not resort directly to a revealed text as the foundation of reasoning, but rather draws on rational arguments grounded in the five universals of the law, i.e., protection of life, mind, religion, private property and family.

**jihad**: literally, striving to do, or be, good; acting morally in deed and in thought; technically in law, rules regulating conduct of war and peace treaties.

**judge**: see jurist and qadi.

**jurist**: a legist (q.v.) who achieved a remarkably high level of legal knowledge, usually as a *mufti* (q.v.) and/or an author-jurist (q.v.); every jurist was a legist, but not every legist or even judge was a jurist.

**khul’**: see divorce.

**legal norm**: one of five legal values that a *mujtahid* (q.v.) applies to a case or a particular set of facts; the five norms/values are: forbidden, permissible, obligatory, disapproved and recommended.

**legal school**: a non-formal association of jurists who share loyalty to a particular set of legal precepts, a particular methodology of interpretation and of deriving law; in Sunni Islam, the legal schools that have survived after the eleventh century are four, the Hanafi (q.v.), Maliki (q.v.), Shafi’i (q.v.) and Hanbali (q.v.), each named after a master-jurist (q.v.) to whom a particular methodology of doing law is attributed.

**legist**: someone learned in the law, be it a *mufti* (q.v.), an author-jurist (q.v.), a judge or a law student.

**madhhhab**: a legal opinion or juristic principle adopted by a legist; a legal school (q.v.).

**madrasa**: college of law that is usually part of an endowment (q.v. *waqf*); madrasas regularly taught language, *hadith* (q.v.) and Quranic studies, and often offered study circles (q.v.) in mathematics, astronomy, logic and medicine.

**majlis (al-hukm)**: the Islamic court of law in session.

**Maliki**: a legal school (q.v.); a legist (q.v.) loyal to the principles and substantive law of Malikism. See legal school.

**Marja’-Taqlid**: a relatively recent Twelver-Shi’i concept to the effect that a *mujtahid* (q.v.) acts as the legal and political leader of the community whilst the Imam (q.v.) is in hiding.

**maslaḥa**: see istislah.

**master-jurist**: a *mujtahid* (q.v.) of the highest caliber who is capable of performing the entire range of *ijtihat* (q.v.), and usually one who is credited with having established a legal school (q.v.). The four doctrinal
schools that survived in Sunni Islam are said to have been founded by Abu Hanifa (d. 767), Malik b. Anas (d. 795), Ibn Idris al-Shafi’i (d. 820) and Ahmad b. Hanbal (d. 855).

mazalim: the ruler’s courts of grievances that prosecute public officials, including qadis (q.v.), usually on charges of abuse of power. See also siyasa shar’iyya.

mediation: see peacemakers.

mufti: jurisconsult; usually a learned jurist who issues fatwas (q.v.); a jurist capable of one degree of ijtihad (q.v.) or another.

muhtasib: market inspector whose functions ranged from auditing weights and measures in the marketplace to bringing government officials to the Shari’a court for abuse of their powers.

mujtahid: a highly learned jurist who is capable of ijtihad, i.e., reasoning about the law through applying complex methods and principles of interpretation. Mujtahids are of various ranks, the highest of which is reserved for the one who is said to have fashioned the very methods and principles that he and others in his school apply, while those who are loyal to, and capable of applying, these principles belong to lower ranks. See also consensus, ijtihad and master-jurist.

mullah: a Twelver-Shi’i religious intellectual, jurist and/or theologian.

munasabah: see istislah and suitability.

necessity: see darura.

opinion: statement of law or normative rule espoused by a jurist with regard to a particular case. A fatwa (q.v.) is such an opinion. Islamic substantive law largely consists of opinions.

Ottoman: referring to the Ottoman Empire that existed between 1389 and 1922, first in Anatolia, but later extending its domains to South-East Europe, North Africa, Egypt, Greater Syria and the Hejaz.

peacemakers (muslihun): persons who mediate between parties in dispute with a view to reaching an amicable settlement; such persons as appointed by a judge, especially in the case of marital discord.

positive law: the body of rules legislated or sanctioned by the modern state, including those that originally belonged to the Shari’a. The decrees issued by pre-modern Muslim governments do not qualify as positive law. See also substantive law.

post-formative period: occurring roughly between the second half of the tenth century and the end of the eighteenth. See also formative period.

qadi: the magistrate or judge of the Shari’a court who also exercised extra-judicial functions, such as mediation, guardianship over orphans and minors, and supervision and auditing of public works. When faced with difficult cases, a qadi petitioned the mufti (q.v.) who provided a
fatwa (q.v.) or legal opinion (q.v.) on the basis of which he rendered a decision. See also jurist.

qadi-askar: Ottoman chief justice, usually appointed in pairs, one to the European side of the Empire, the other to the Asian side.

qanun: edicts and decrees legislated by the Ottoman sultans, often asserting provisions of Islamic legal doctrine and at times supplementing it on matters related to taxes, land, public order, and court procedure and evidence (e.g., allowing torture to extract evidence). Qanuns contradicting Shari’a provisions (which abhorred torture) were at times resisted and ignored by qadis and jurists.

qiyas: the fourth source of Islamic law; a general term referring to various methods of legal reasoning, analogy being the most common; other methods subsumed under qiyaṣ are the syllogistic, relational, a fortiori, e contrario and reductio ad absurdum arguments.

ratio legis (ʿilla): cause; occasional factor; the attribute or set of attributes common between two cases and which justify the transference, through inference, of a norm from one case (that has the norm) to another (that does not have it). See also qiyaṣ.

recurrence: a mode of transmitting Prophetic hadith (q.v.). Recurrence obtains when a hadith is narrated through so many channels and by so many people that collusion upon forgery is deemed inconceivable (because of the assumption that such a large number of transmitters cannot find ways to conspire amongst themselves); knowledge engendered by this type of hadith is considered certain.

Shafii: a legal school (q.v.); a legist (q.v.) loyal to the principles and substantive law of Shafi’ism. See legal school.

Shaykh al-Islam: before the Ottomans (q.v.), a leading mufti (q.v.) who, inter alia, supervised legal education in a city; under the Ottomans, the head of the judicial hierarchy, appointing and dismissing judges, opining on points of law, and wielding significant political powers which he at times exercised to depose sultans.

siyasa sharʿiyya: the ruler’s governance according to juristic political theory; discretionary legal powers of the ruler to enforce Shari’a court judgments and to supplement the religious law with administrative regulations (see qanun); the ruler’s extra-judicial powers to prosecute government officials on charges of misconduct (see mazalim).

softa: an Ottoman term meaning a law student. See also legist.

solitary: a Prophetic hadith (q.v.) transmitted through fewer channels than recurrent reports (see recurrence). Knowledge engendered by this report is considered probable.

stare decisis: a doctrine of British, American and other Western courts to the effect that judges should stand by precedents and established
principles and apply them to all future cases where facts are substantially the same.

**study circle:** literally referring to the form in which a group *sat down* to study with a professor; a study session with a particular specialization (mostly in law), usually held in mosques (but also in private homes). The circle was the medium of Islamic education.

**substantive law:** the body of rules and general principles of which the law manuals of Shari‘a consist. As there is no technical distinction in the Shari‘a between procedural and other laws, the expression “substantive law” may be used to cover procedural law as well. See pp. 29–30 above, for a list of topics making up substantive law.

**suitability:** a rational method of inferring the *ratio legis* (q.v.) in *qiyas* (q.v.). See also *istiṣlah*.

**Sunna:** the second, but most substantial, source of Islamic law; the exemplary biography of the Prophet. The *hadiths* (q.v.) are the literary expressions and context-specific accounts of the Sunna.

**takhayyur:** literally, picking, selecting or choosing; a reforming method – prohibited by traditional Shari‘a – of selecting opinions from various schools in order to create a modernized body of law. It is mostly applied in regard to the law of personal status.

**talaq:** see divorce.

**talfiq:** literally, patching, fabricating, amalgamating or concocting; a reforming method of bringing together different parts of a doctrine/opinion from various schools so as to create, on a specific point of law, a modernized doctrine.

**tawatur:** see recurrence.

**ta‘zir:** discretionary punishments; determined and meted out by a *qadi* (q.v.), these punishments cannot reach or exceed *hudud* penalties (q.v.).

**traditionist:** one who studies and transmits *ḥadīth* (q.v.).

**Twelver-Shi‘i:** follower of the infallible Imam (q.v.), also known as Ja‘fari; a theological and political group that believes Imam ‘Ali and his descendants to be the legitimate successors to the Prophet; a layperson belonging to the Twelver-Shi‘i community, or a jurist who is a member of the Twelver-Shi‘i legal school. This community and its jurists are now predominant in Iran, southern Iraq and Southern Lebanon. There are substantial populations of Shi‘is in Bahrain and Azerbaijan as well.

**ulama:** referring to the learned class, especially the legists (q.v.); in this technical sense, the word is of later provenance, probably dating to the twelfth century or thereabouts.

**usul al-fiqh:** a discipline or a field of study specializing in methods of interpretation and reasoning (q.v. *ijtiḥād*), with the aim of arriving at
new legal norms for unprecedented cases or rationalizing existing ones. This discipline produced many important treatises dealing with the subject, and referred to as usul al-fiqh works.

**usury (interest; Ar. riba):** categorically prohibited in Islamic law; literally meaning “excess,” riba refers to receiving or giving a lawful thing having monetary value in excess of that for which the thing was exchanged; interest charged on a debt is a prime example.

**Vilayat-i Faqih:** see Marja’-Taqlid.

**waqf (also habous in North Africa):** a charitable endowment; usually, immovable property alienated and endowed to serve the interest of certain beneficiaries, such as members of the family, the poor, wayfarers, scholars, mystics, the general public, etc. Constituting more than half of real property in many parts of the Muslim world, endowments sustained the legal system and its institutions, and supported public life and a flourishing civil society. Examples of endowments are: mosques, schools and graduate colleges, hospitals, soup-kitchens, public drinking fountains, bridges, street lights and real estate.