

# THE DEATH OF ISLAMIC LAW

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*The entire system of government and administration, together with the necessary laws, lies ready for you . . . . [I]f laws are needed, Islam has established them all. There is no need for you, after establishing a government, to sit down and draw up laws, or, like rulers who worship foreigners and are infatuated with the West, run after others to borrow their laws. Everything is ready and waiting.*

—Ayatollah Ruhollah Khomeini<sup>1</sup>

*[F]inding out what the judges say is but the beginning of your task. You will have to take what they say and compare it with what they do. You will have to see whether what they say matches with what they do. You will have to be distrustful of whether they themselves know (any better than other men) the ways of their own doing, and of whether they describe it accurately, even if they know it.*

—Karl Llewellyn<sup>2</sup>

## I. INTRODUCTION

Of all of the myths relating to the Muslim state in our times, none is more persistent than that its legitimacy, and the legitimacy of the law it pronounces depends on the imprimatur of *shari'a*—that vast body of Muslim norms and rules developed from Muslim sacred text: namely, the Qur'an, the revealed word of God, and the Sunna, the actions and utterances of the Prophet Muhammad. While there is something romantic, and almost touching, in the notion that the Muslim world is somehow different from the rest of the globe in the primacy it affords to God's law in establishing the rules of the legal order, it has no basis in fact. Rather, precisely the reverse is true—*shari'a* in the modern Muslim state is only meaningful to the extent that the state chooses to make it so, and no reasonably developed state, no matter how Islamic it purports to be, seeks to incorporate *shari'a* in any sort of comprehensive fashion. The result is a broad phenomenon of legal selectivity that effectively recognizes the primacy of the state to determine when God's Law shall be used, and when it shall be cast aside for a favored alternative, more often than not a legal transplant from Europe. Thus, while *shari'a* makes an appearance

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<sup>1</sup> RUHOLLAH KHOMEINI, *Program for the Establishment of an Islamic Government*, in ISLAM AND REVOLUTION: WRITINGS AND DECLARATIONS OF IMAM KHOMEINI 126, 137 (Hamid Algar trans., 1981) [hereinafter KHOMEINI].

<sup>2</sup> KARL N. LLEWELLYN, THE BRAMBLE BUSH 7 (11th prtg. 2008).

in the Muslim state in our times, its status *qua* God's law is entitled to no presumption of validity, and, indeed, is virtually devoid of legal significance of any kind absent state recognition thereof. "Islamic law" is, therefore, dead, and all that remains is whatever, necessarily limited, remnants of it the state chooses to incorporate into the legal regime.

That lawmaking in many modern Muslim nation states appears to give rather short shrift to *shari'a*, seemingly ignoring it in all areas save the law of the family, and replacing it elsewhere with transplanted European law, has been discussed.<sup>3</sup> That the Muslim world is replete with political institutions and leaders (described herein, in their multitudinous varieties and approaches, as "Islamist") who seek a greater role for *shari'a* in the affairs of the state is obvious to anyone even faintly familiar with the region.

However, to come to the subject of this Article, left undiscussed is the fact that the Islamist, who derives his authority precisely on the basis of returning sovereignty to God in all matters of state and law, is no more enthused than anyone else<sup>4</sup> in permitting God's law to retain any real level of supremacy over

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<sup>3</sup> See, e.g., BERNARD G. WEISS, *THE SPIRIT OF ISLAMIC LAW* 188–89 (1998) (discussing the relationship between Islamic and secular law); Lama Abu-Odeh, *The Politics of (Mis)recognition: Islamic Law Pedagogy in American Academia*, 52 AM. J. COMP. L. 789, 791–92 (2004) (discussing the influence of the Western transplant in Islamic countries).

<sup>4</sup> Included within this non-Islamist category, therefore, would be anyone secular, devout or not, who holds to the notion that law could and should be determined on bases independent of the *shari'a*. It is therefore extremely important to distinguish between the Muslim, an adherent of the religion of Islam, however devout, and the Islamist, who seeks to incorporate more *shari'a* into the state. Thus, for example, the Muslim liberal, and avowedly non-Islamist, Ali Abd al-Raziq, in his well known work *Al-Islam wa usul al-hukm*, argued that Islam is a religion and not a state, that the Prophet was never a king or a founder of a political state, and that the message of the Qur'an was a religious call divorced from politics. See, e.g., LIBERAL ISLAM: A SOURCE BOOK 29–36 (Charles Kurzman ed., Joseph Massad trans., 1998) (translating portions of Abd al-Raziq's work). More recently, Abdullahi An-Na'im has produced an admirable and bracing work endorsing the notion of secularism using Islamic arguments, among which are that God's will is fundamentally unknowable and therefore cannot sensibly be coerced as a matter of law given the highly political manner in which law is produced. ABDULLAHI AHMED AN-NA'IM, *ISLAM AND THE SECULAR STATE: NEGOTIATING THE FUTURE OF SHARI'A* 11 (2008). It is dangerous, and inaccurate, to dismiss such secularist ideas as being marginal among believing Muslims. Turkey's ruling party, the Justice and Development Party (AKP), whose leadership is composed largely of devout Muslims, has proclaimed repeatedly and unambiguously that the *shari'a* has no role in the affairs of the state, using arguments not dissimilar, if less intellectually rigorous, than those advanced by An-Na'im. See Susanna Dokupil, *The Separation of Mosque and State: Islam and Democracy in Modern Turkey*, 105 W. VA. L. REV. 53, 126–27 (2002) (indicating that the leader of the AKP, Recep Tayyip Erdogan, has clearly stated that his party endorses secularism); *Don't Call AKP Islamists, Erdogan*, HÜRRİYET DAILY NEWS & ECON. REV., Sept. 5, 2002, available at <http://www.hurriyetdaily>

the law of the state. Yet this is amply demonstrated by the Islamist obsession with seizing state control and enacting *shari'a* selectively as state law, rather than attempting the type of complete law overhaul that would be necessary to ensure the permanent primacy of *shari'a*.<sup>5</sup> Such a comprehensive and entire approach, pure and logical as it may be, will not do for the Islamist. Thus, at the heart of Islamist legal thinking is a central incoherence, for this notion of state selectivity in the application of God's law sits uncomfortably with the Islamist notion that it is God and not humanity who is the ultimate legislator.

The selectivity, while puzzling to one in search of logic in the law, provides, in fact, much guidance to precisely *why* the Islamist has chosen this road of incoherence—demanding that the law of man lie subservient to the will of God on the one hand, and then gleefully ignoring the necessary consequences of taking such a notion seriously on the other. It is not enough to note that Islamist forces are often not in a position to assume the level of control necessary to put into practice that which they preach, because plainly this is not always true and legal selectivity reigns supreme even when Islamists are relatively free to enact a legislative and legal agenda of their choosing.

Iran provides the starkest example. If there was a time that an Islamist movement was going to truly render God's law the premier law of the land, one would assume the Iranian Revolution provided the perfect occasion, both because of the extensive power of the Islamist forces, and because of their identity as jurists responsible for determining God's law in the first place.<sup>6</sup> Yet even in Iran, transplanted law is used in lieu of *shari'a* in any number of areas.<sup>7</sup> That jurists would develop extensive sets of rules, insist those rules were God's law, further insist that God's law must be the law of the state, and then seize political control and ignore the very God's law they have developed in favor of a French transplant is an oddity that requires far more attention than it has been receiving. The only satisfactory explanation involves, necessarily,

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news.com/h.php?news=dont-call-akp-islamists-erdogan-2002-09-05 (stating that AKP was founded "to embrace all right politicians and . . . is not based on religion"); Ak Party, Development and Democratization (Feb. 2, 2007), <http://eng.akpartl.org.tr/english/partyprogramme.html> ("Our Party refuses to take advantage of sacred religious values and ethnicity and to use them for political purposes."). The conflation of secular, devout Muslims and Islamists seeking to place *shari'a* squarely into the affairs of the state is but another manifestation of the scholarly effort to raise the profile of *shari'a* as supreme Muslim law wherever practicable. See Haider Ala Hamoudi, *Orientalism and The Fall and Rise of the Islamic State*, 2 MIDDLE E. L. & GOVERNANCE: AN INTERDISC. J. 81, 95–97 (2010) (reviewing NOAH FELDMAN, *THE FALL AND RISE OF THE ISLAMIC STATE* (2008)) (criticizing one such effort).

<sup>5</sup> See *infra* Part III.B–C.

<sup>6</sup> See *infra* Part II.A (concerning role of jurists in determining *shari'a* content).

<sup>7</sup> See *infra* Part III.B.

dismissing the Islamist claim concerning the sovereignty of God's law over man's as not a true expression of that which the Islamist truly seeks, whether he recognizes it or not.

That is, while the Islamist may *say* that he wishes God's law to be supreme over that of man, there is nothing in his actions to suggest that this rhetoric, however sincerely held, is an accurate reflection of his actual aims. The Islamist does not want God's law to reign supreme in areas such as corporate law and the law of business entities, where the economic consequences might be dire.<sup>8</sup> He does not want God's law to obliterate a general theory of contract.<sup>9</sup> He does not want God's law to replace transplanted ideas of negligence.<sup>10</sup> On the other end lies the law of the family, where God's law is deemed a vital necessity, and any development, evolution, or alteration of the rules established centuries ago when caliphs walked the earth will meet with red-faced Islamist indignation at the suggestion of such outrageous sacrilege.<sup>11</sup> With the power of lawmaking safely in the hands of the state, the Islamist need only bring *shari'a* where he wishes it (which will necessarily depend on time and place), and leave all other, largely transplanted law where it lies, which is to say in as authoritative a position as any *shari'a*-derived enactment by the state.

The wide-scale adoption of secular, transplanted law and secular legal systems and their continuation in force even in the most thoroughly Islamized societies is not a matter very thoroughly discussed by our academy, except to the extent that it is asserted as largely unnecessary to the reestablishment of a true "Islamic state" where some form of *shari'a* does indeed reign supreme. Thus, much scholarly attention has been focused on the "repugnancy clauses" in various Muslim state constitutions, which prohibit the enactment of laws that are repugnant to *shari'a*, or at least its "certain rulings,"<sup>12</sup> its principles,<sup>13</sup> its "beliefs,"<sup>14</sup> or something broadly equivalent. The focus on such clauses is striking, and portentous phrases on their importance are rife in our scholarship,

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<sup>8</sup> See *infra* Part III.B.1.

<sup>9</sup> See *infra* Part III.B.1.

<sup>10</sup> See *infra* Part III.C.1.

<sup>11</sup> See *infra* Part III.C.3.

<sup>12</sup> IRAQ CONST. art. 2 (author's translation).

<sup>13</sup> EGYPT CONST. art. 2 (amended 1980).

<sup>14</sup> AFG. CONST. ch.1, art. 3.

among them the “Rise of the Islamic State,”<sup>15</sup> “theocratic constitutionalism,”<sup>16</sup> and “Islamic constitutionalism.”<sup>17</sup>

Under the theory of repugnancy, the task of the judicial branch, using a form of constitutional review, is to ensure that all state law is in broad conformity with *shari'a*. God's law will thus remain generally supreme over the state, given its recognition in constitutional text. I leave to others any evaluation of the historicity of such an approach, or its Islamic legitimacy under whatever standard,<sup>18</sup> and offer only two points. First, to the extent that an “Islamic state” can be formed under such a conception, it only seems to confirm how fundamentally limited the role of *shari'a* has become in the “Islamic state.” This is because *shari'a*, as it has been developed, is not the expression of broad constitutional norms, but a vast body of extensive and detailed substantive legal rules that bear almost no resemblance to the transplanted law that has replaced them in any number of areas. Yet through this approach the state has seemed to grant legitimacy to all of the transplanted law notwithstanding these differences, so long as it nowhere conflicts, not so much with *shari'a*, but with a “certain ruling” or some similar standard invented by the state of the vast corpus of *shari'a*. This seems to grant wide levels of control to the legislature in nearly all matters of law.

Or so one can assume. It is uncertain what the repugnancy clauses actually mean, as the Western scholarship extolling the importance of these clauses far outstrips the actual attention given to them in national courts, with the possible exception of Egypt. There, the approach has been so ludicrously idiosyncratic and odd that it hardly provides any sensible guidance in the development of a consistent evaluative methodology.<sup>19</sup> Nevertheless, it is safe to say that the legal order, reliant as it is on the legal transplants to the derogation of the rules of *shari'a*, does not seem to be in any danger. Such a state, it

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<sup>15</sup> NOAH FELDMAN, *THE FALL AND RISE OF THE ISLAMIC STATE* (2008).

<sup>16</sup> Larry Catá Backer, *God(s) Over Constitutions: International and Religious Transnational Constitutionalism in the 21st Century*, 27 *MISS. C. L. REV.* 11, 16 (2007).

<sup>17</sup> Intisar A. Rabb, “*We the Jurists*”: *Islamic Constitutionalism in Iraq*, 10 *U. PA. J. CONST. L.* 527, 527–28 (2008).

<sup>18</sup> See, e.g., Mohammad Fadel, *Back to the Future: The Paradoxical Revival of Aspirations for an Islamic State*, 14 *REV. CONST. STUD.* 105, 108–13 (2009) (reviewing FELDMAN, *supra* note 15) (discussing broad discretion given to executive authorities in the classical era to deviate from juristic determinations).

<sup>19</sup> See Haider Ala Hamoudi, *Baghdad Booksellers, Basra Carpet Merchants, and the Law of God and Man: Legal Pluralism and the Contemporary Muslim Experience*, 1 *BERKELEY J. MIDDLE E. & ISLAMIC L.* 83, 93–95 (2008) (criticizing recent decisions of the Egyptian Supreme Constitutional Court); cf. CLARK B. LOMBARDI, *STATE LAW AS ISLAMIC LAW IN MODERN EGYPT: THE INCORPORATION OF THE SHARI'A INTO EGYPTIAN CONSTITUTIONAL LAW* 174–268 (2006) (adopting a more sympathetic approach).

seems—irrespective of its historical legitimacy, irrespective of how “Islamic” it may be deemed under any given theoretical approach, grounded in classical legal thought or otherwise—is not one based on the substantive rules of *shari’a* in any serious way.

More importantly, and acting as a corollary to the first point, is the fact that precisely because the role of *shari’a* seems so limited under this conception of the “Islamic state,” it is not at all an accurate depiction of the role *shari’a* plays in either Muslim politics or law when it is raised. That is, the principle of repugnancy and broad legislative discretion is absolutely not the Islamist position with respect to questions of personal status. One could imagine any number of reforms that might well fit any theory of repugnancy—a required payment of alimony, for example, to a wife for two years following the dissolution of her marriage due to her husband’s unilateral decision to divorce. No rule exists among jurists explicitly banning such a practice, the jurists merely declare that the three month *iddah* is the only required payment from husband to wife following divorce.<sup>20</sup> Islamist objection in Egypt to such a provision, one of several in the widely ridiculed “Jihan’s law,” was fierce,<sup>21</sup> and certainly my experiences in Iraq lead me to conclude that the Islamist position is no less compromising there. The question has nothing to do with what is or is not “repugnant”; the rules of Revelation are assumed to be the only proper expression of God’s law in the matter of personal status.<sup>22</sup> The Islamist adoption of an equally rigorous standard elsewhere, for example in the law of contract or tort, is almost impossible to contemplate. Repugnancy, it seems, is hardly applied in a manner that would make it remotely coherent as a political theory of state organization.

To be clear, *shari’a*-fication in a more consistent manner is possible in a modern state; it is just not possible in a manner appealing to the Islamist. All that it would take would be to repeal all law and empower judges simply to apply *shari’a*, or, perhaps, codify *shari’a* and develop institutional controls to ensure that the codification stayed faithful to *shari’a*.<sup>23</sup> The former types of

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<sup>20</sup> JOHN L. ESPOSITO & NATANA J. DELONG-BAS, *WOMEN IN MUSLIM FAMILY LAW* 20 (2d ed. 2001).

<sup>21</sup> LOMBARDI, *supra* note 19, at 169–70. See generally Dawoud S. El Alami, *Law No. 100 of 1985 Amending Certain Provisions of Egypt’s Personal Status Laws*, 1 ISLAMIC L. & SOC’Y 116 (1994) (discussing the provisions of “Jihan’s law” including the minimum two year compensation period in addition to the *iddah* when the man divorces the woman against her will and without cause).

<sup>22</sup> See *infra* Part III.C.3.

<sup>23</sup> As Part II.C shows, quite a few scholars, beginning with the renowned Islamic studies giant Joseph Schacht, have discussed the tensions between codification and the traditional development of *shari’a*, with Schacht going so far as to say that to codify *shari’a* necessarily

systems, in particular, exist, though for the most part (not exclusively), they tend to be in devastated societies where the catastrophic results of a wholesale application of *shari'a* private law, for example, would hardly be felt given more pressing problems.<sup>24</sup> Beyond this, Muslim states, and Islamist movements, are far too invested in their development to call for anything less than a selective application of *shari'a*, with the only real difference between the Islamist, the moderate, and the secularist being precisely how much to select. Logic and coherence, in the end, have been forced to give way to the hard realities of our times, which cannot afford to Divinity the primary role in the making of law.

Part II of this Article describes various approaches to making *shari'a* a reality in modern nation states, emphasizing the selectivity of state processes in giving voice to *shari'a*. Part III sets forth the central reasons that Islamists have chosen to continue this state of affairs, which in large part relates to the fact that they enable Islamists to retain important parts of the transplanted law, even as they Islamicize other areas. Part IV focuses on the repugnancy clauses and shows that, far from demonstrating the primacy of *shari'a* in the development of state law, the repugnancy clauses relegate *shari'a* to a largely inferior and minimal role and are, therefore, not the basis upon which Islamists make legal claims on the basis of *shari'a*. Part V concludes with broader implications of these considerations, specifically related to the role that *shari'a* is likely to play in Muslim nation-states in the years to come, and the role it should be playing in the legal academy as it considers questions of law in contemporary Muslim states.

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distorts it. JOSEPH SCHACHT, AN INTRODUCTION TO ISLAMIC LAW 100–01 (1964); *see also* SHERMAN A. JACKSON, ISLAMIC LAW AND THE STATE: THE CONSTITUTIONAL JURISPRUDENCE OF SHIH\_BAL-DINAL-QAR\_FL, at xvii–xviii (1996) (discussing how codification necessarily replaces the authority of the jurists with that of the state); WEISS, *supra* note 3, at 189 (discussing the challenges of legal codification of *shari'a*); Ann Elizabeth Mayer, *The Shari'ah: A Methodology or a Body of Substantive Rules?*, in ISLAMIC LAW AND JURISPRUDENCE 177 (Nicholas Heer ed., 1990) (discussing the history and codification of *shari'a*). I take no position on the question as it does not alter the thesis of this Article. Whether or not the codification of *shari'a* is or is not, by necessity, a distortion of *shari'a*, the fact remains that large portions of the legal systems of the most thoroughly Islamized nations in the world are codified in a manner that derogates sharply from *shari'a*.

<sup>24</sup> *See infra* Part II.A.



## II. SHARI'A AND MUSLIM POLITICS

A. *On the Nature of the Shari'a*

Islamist notions concerning the necessity of applying *shari'a* in the state are summarized succinctly and articulately in the following passage, written by Ruud Peters, surveying debates in the field in the middle of the 1980s:

Why must *Shari'a* be enforced? . . . . Because the supreme sovereignty belongs to God, man must submit to His will . . . . Since the *Shari'a* is of divine origin, it is naturally superior to any human law. The principles of the *Shari'a* are immutable and cannot, for that reason, become tools in the hands of despotic and tyrannical rulers. For they, like all other Muslims, have to follow the *Shari'a* and cannot amend it at their pleasure as rulers can where there is only man-made law.<sup>25</sup>

The position requires some elaboration. Certainly, it sounds sensible to insist on the supremacy of God's law, as set forth in Muslim sacred text, but the question nevertheless remains as to who is responsible for the determination of God's law. That is, whose interpretation of this sacred text is deemed to be authoritative and binding?

Ultimately, and omitting historical details of the early Islamic period not relevant for our purposes, *shari'a* developed into what the renowned Joseph Schacht called a "jurists' law."<sup>26</sup> Thus, the basic materials of *shari'a* in the Sunni tradition are the extensive and oft conflicting rules laid out in the manuals of medieval jurists from four schools of thought,<sup>27</sup> whereas within Shi'ism, the materials are similar juristic tomes, but prepared by currently living high jurists operating from Najaf in Iraq and Qom in Iran.<sup>28</sup> These rules are not in any individual sense Divine Law, as any jurist is capable of misapprehending or misinterpreting God's will, and even a casual look at the tomes reveals deep and significant differences of opinion between the schools on any number of matters.<sup>29</sup> Nevertheless, taken as a whole, the compilations

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<sup>25</sup> Rudolph Peters, *Divine Law or Man-Made Law? Egypt and the Application of the Shari'a*, 3 ARAB L.Q. 231, 244 (1988).

<sup>26</sup> SCHACHT, *supra* note 23, at 209.

<sup>27</sup> LOMBARDI, *supra* note 19, at 16.

<sup>28</sup> Haider Ala Hamoudi, *You Say You Want a Revolution: Interpretive Communities and the Origins of Islamic Finance*, 48 VA. J. INT'L L. 249, 267-69 (2008).

<sup>29</sup> LOMBARDI, *supra* note 19, at 17.

of the orthodox schools are understood to be the corpus of *shari'a*.<sup>30</sup> Importantly, the jurists are not, and never have been, appointed by the state, but rather operate within institutions independent of it, described as “guilds” by the late George Makdisi in the medieval Sunni context.<sup>31</sup>

### *B. Organizational Necessities*

Given the rather extensive material, the most direct way for any movement to ensure that the law remains true to the body of *shari'a* in any geographical area would be to create a judicial class and entrust it with the task of applying the volumes of material to all disputes appearing before it. With important qualifications, this was the theoretical basis of the classical system.<sup>32</sup> To take the simplest example, in such a system, were a party to seek compensation from another for harm done to her, she would bring her matter to the judge, and the judge would consult the relevant manuals to see if the harm was compensable. Several opinions may be present, in which case the judge may have to apply one; or perhaps the state makes clear which of the schools of thought has primacy, in which case the matter could at least in theory be more easily resolved. If the defendant were to argue that, in fact, it was not him, but a company in which he owned stock that caused the damage, and that, therefore, he could not be held personally responsible, then our judge would again consult the manuals, find nothing therein about limited liability or separate corporate personhood,<sup>33</sup> and dismiss such a defense as inconsistent with *shari'a*.

We could imagine in such a system, indeed we *must* imagine, that law might evolve through reconsideration of juristic rules of medieval origin, by judges applying such rules in new and creative ways, or by modern jurists reevaluating the conclusions of their forebearers. This already occurs, even in the current absence of *shari'a* supremacy over law. In the case of Islamic finance,

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<sup>30</sup> *Id.* at 16.

<sup>31</sup> See JACKSON, *supra* note 23, at 103–04 (discussing Makdisi).

<sup>32</sup> WEISS, *supra* note 3, at 187–88; Mayer, *supra* note 23, at 185. This broad, traditional notion that the classical system regarded positive legislation by the state as lying in some tension with *shari'a* as jurists' law has come under more sustained attack, as Part IV makes clear. In any event, as this Article concerns the relationship of *shari'a* to state law in the modern nation-state, extensive ruminations on classical theory and classical law lie well beyond its purview. My references to classical thought are therefore necessarily cursory and intended for illustrative purposes only.

<sup>33</sup> See Timur Kuran, *The Absence of the Corporation in Islamic Law: Origins and Persistence*, 53 AM. J. COMP. L. 785 (2005) (discussing the lack of standing for corporations in classical Islamic law).

classical juristic manuals are creatively read to develop theories that bear scant resemblance to anything the classical jurists could have possibly imagined.<sup>34</sup> In the case of slavery, the overwhelming Muslim consensus, on the basis of sacred text, is that the practice is forbidden—notwithstanding detailed juristic rules clearly permitting it.<sup>35</sup>

Reinterpretation of sacred text, as opposed to applying juristic rules in a more creative fashion, might be controversial, and in some cases unnecessary, but surely if the jurists are but mortal and fallible—a matter none in the modern world would dispute—then the system may well maintain its coherence and stability through such evolution. Reverting to new and fresh interpretations of sacred text rather than relying solely on classical jurists, often described as the fabled re-opening of the doors of *ijtihad*,<sup>36</sup> is therefore entirely consonant with the notion of *shari'a* supremacy. Shi'ism, in fact, is predicated on the principle that sacred text is supposed to be reevaluated by each generation of scholars. That sect requires each individual Shi'i to follow exclusively those rules of the single *living* high jurist who that individual Shi'i has determined is the most learned; the opinions of dead men (and they are all men) are of no moment.<sup>37</sup>

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<sup>34</sup> Hamoudi, *supra* note 28, at 255–58.

<sup>35</sup> Bernard K. Freamon, *Slavery, Freedom, and the Doctrine of Consensus in Islamic Jurisprudence*, 11 HARV. HUM. RTS. J. 1, 53 (1998).

<sup>36</sup> The literature on the “closing of the doors of *ijtihad*” is extensive and difficult to summarize. Early Islamic studies scholars, including Joseph Schacht and Noel Coulson, advanced the notion that, around the end of the first millennium C.E., a consensus was established that independent judgment to determine the meaning of sacred text was forbidden and that from that point forward, reliance was to be exclusively upon prior juristic determinations as set forth in the rules of the four Sunni schools. This led to an ossification of Islamic doctrine according to these scholars. SCHACHT, *supra* note 23, at 70–71; NOEL J. COULSON, *A HISTORY OF ISLAMIC LAW* 81–82 (1964). This has been challenged by later scholars, most prominently Wael Hallaq, who suggested that jurists continued to draw their own conclusions on the basis of sacred text long after the supposed closing of the doors. Wael B. Hallaq, *Was the Gate of Ijtihad Closed?*, 16 INT'L J. MIDDLE E. STUD. 3, 4 (1984). Others, such as Sherman Jackson, accept the notion that *ijtihad* was far more limited following the first millennium, but challenge the Schacht and Coulson position that ossification was a consequence of the closed doors. Instead, creative jurists used an alternative form of authority, medieval rules, in the place of sacred text to move *shari'a* forward in new and interesting ways. JACKSON, *supra* note 23, at 73–79. Despite the rich contributions of Jackson and Hallaq to the literature, the notion of the closed doors of *ijtihad*, and the supposed ossification resulting therefrom, has been a repeated bane of Muslim reformists, who have insisted on reinterpreting Islamic rules from sacred text rather than using the determinations of earlier jurists. See LOMBARDI, *supra* note 19, at 83–84 (describing the efforts of the Egyptian modernist Rashid Rida). The underlying point for our purposes, however, is that whether or not the gates to *ijtihad* are open or closed, the same structural issues respecting the role of *shari'a* in the state will persist.

<sup>37</sup> Hamoudi, *supra* note 28, at 267–68.

Such a system is not only technically possible, but to some extent, exists in the modern world. Saudi Arabia was formed precisely on such a basis, with administrative authority belonging to the king, and the law of the land being based on *shari'a* as interpreted by a puritanical strand of one of the four orthodox Sunni schools known as Wahhabism.<sup>38</sup> While over the years there have been important limitations on the model and a rise in edicts issued by the monarchy,<sup>39</sup> certainly judges generally have the ability to pronounce rulings based on *shari'a*.<sup>40</sup> Hence, for example, a woman may be convicted of witchcraft under the peculiarly Saudi version of *shari'a* on the grounds that witchcraft, at least under the standards of evidence that were available to the court, constitutes a “discretionary crime” without any statutory basis.<sup>41</sup>

More generally, however, models of this sort are prevalent in entirely devastated nations, such as present day Somalia<sup>42</sup> or Taliban-run Afghanistan,<sup>43</sup> which have suffered from the absence of civil society for decades. To use the latter example, about which there is considerably more literature, it does seem relatively clear that the Taliban officials responsible for enforcing law did at least conceive of themselves as *shari'a* authorities (however flawed) and did apply that version of *shari'a* liberally (and at times summarily) even in the absence of specific legislative code, though the law included administrative edicts from the Taliban central command as well.<sup>44</sup>

Similar substate forms of quasi-law existed in Iraq when Sadrist forces managed to seize control of Basra and areas of Baghdad, and Sunni extremists took control of the Anbar. In areas under Sadrist control, doctors were brought before “judges” who would often issue alleged *shari'a* punishments for them, including lashings, for such “crimes” as treating Sunni patients in a hospital.<sup>45</sup> In the Anbar, quasi-judges used their own forms of *shari'a* to ban, among other things, the sale of cucumbers and tomatoes together because of their sexual

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<sup>38</sup> ALBERT HOURANI, *A HISTORY OF THE ARAB PEOPLES 257–58* (1991); M.E. YAPP, *THE NEAR EAST SINCE THE FIRST WORLD WAR 189–90* (1991).

<sup>39</sup> See, e.g., FRANK E. VOGEL, *ISLAMIC LAW AND LEGAL SYSTEM: STUDIES OF SAUDI ARABIA*, at xiv (2000) (discussing the use of “decree laws” and “regulations” to create legal institutions that appear modern and western).

<sup>40</sup> *Id.*

<sup>41</sup> Islamic Law in Our Times, Saudi Witches and the Shari'a, <http://muslimlawprof.org/2008/02/15/saudi-witches-and-the-sharia.aspx> (Feb. 15, 2008, 17:50 EST).

<sup>42</sup> FELDMAN, *supra* note 15, at 139–40.

<sup>43</sup> John Burns, *Taliban's Taboos: Enforcers of Islamic Social Code Create a Minefield for Afghanistan's Women*, CHI. TRIB., Sept. 21, 1997, at 8, available at 1997 WLNR 5770055.

<sup>44</sup> *Id.*

<sup>45</sup> Islamic Law in Our Times, Stupidity and the Shari'a in Our Times, <http://muslimlawprof.org/2008/07/21/stupidity-and-the-sharia-in-our-times.aspx> (July 21, 2008, 4:05 EST).

suggestiveness.<sup>46</sup> Edicts were issued requiring the placing of diapers onto goats because of their unusually large genitalia.<sup>47</sup> For obvious reasons, the revert of these regions to Iraqi government control has been broadly welcomed, and the current Prime Minister has sought to take advantage of his reassertion of control through renaming his own political movement the “Alliance for the Nation of Law.”<sup>48</sup> He proved remarkably successful through this invocation of law, relative to the more Islamic parties, judging by his performance in the January 2009 provincial elections.<sup>49</sup>

The point of these examples, to be clear, in no way relates to the substantive applications of *shari'a*; it is perfectly clear that *shari'a* is capable of far more sophistication than these various absurd applications would ever suggest, and any glance at any juristic manual of any respected jurist, Sunni or Shi'i, will reveal a depth of thought that far outstrips these imaginative idiocies. The point, rather, is that in each system of state or quasi-state organization, inherent to it is the rigorous quasi judicial application of law understood, one must assume sincerely, to be *shari'a*.

### C. Origins of Codification in the Muslim World

Nevertheless, the primary means of giving life to *shari'a* in the modern state has been through codification.<sup>50</sup> There has been a lively and fascinating discussion within Islamic studies literature concerning the extent to which the very process of codification is *ipso facto* a distortion of *shari'a*. This debate usually centers on modern efforts by Islamists to enact *shari'a* as code rather than empower judges to simply refer directly to *shari'a*.<sup>51</sup> Those arguing that the coherent codification of *shari'a* is impossible rely on the fact that, in the words of Joseph Schacht, the *shari'a* is “a doctrine and a method” which cannot be made into a single, uniform legal code without distortion.<sup>52</sup>

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<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> Posting of Haider Ala Hamoudi to Islamic Law in Our Times, Islam and the Alliance for the Nation of Law, <http://muslimlawprof.org/2009/01/25/islam-and-the-alliance-for-the-nation-of-law.aspx> (Jan. 25, 2009, 13:48 EST).

<sup>49</sup> Islamic Law in Our Times, Caprice and the Shari'a: Translated Qurans and Nations of Law, <http://muslimlawprof.org/2009/02/15/caprice-and-the-sharia-translated-qurans-and-nations-of-law.aspx> (Feb. 15, 2009, 20:40 EST).

<sup>50</sup> JACKSON, *supra* note 23, at xvi–xvii.

<sup>51</sup> See, e.g., *id.* (outlining differences between traditional *shar'a* and codified *shari'a*); Mayer, *supra* note 23, at 181–82 (providing a history of codification attempts).

<sup>52</sup> Joseph Schacht, *Problems of Modern Islamic Legislation*, 12 *STUDIA ISLAMICA* 99, 108 (1960).

As a result, most accounts of the Muslim codification phenomenon begin with a description of the *Mecelle*.<sup>53</sup> At the end of the nineteenth century, in the late Ottoman period, a law commission headed by Ahmet Cevdet Pasha promulgated what was intended to be a Muslim civil code,<sup>54</sup> covering nearly all areas of private law except family law<sup>55</sup> and acting as the template for any number of nations following the dissolution of the empire.<sup>56</sup> The ultimate effect of the enactment of the *Mecelle* in weakening the powers of the juristic class is a matter much reported,<sup>57</sup> as was its influence in paving the way for a broader codification phenomenon.<sup>58</sup>

In point of fact, however, the *Mecelle* is not terribly interesting as an exercise in the potential perils of codification in the modern Islamic state, and the issue of the *shari'a* as method is largely orthogonal to a more central question concerning the primacy of God's Law. Obviously codification can be said to distort the very basis of the *shari'a* as a jurist's law, not as a positive product of the state, regardless of the substance of what is enacted.<sup>59</sup> However, when the rules that are ultimately enacted are themselves based on juristic thought, at least some justification can be attempted on the theory that the caliph has some discretion to select which of the conflicting rules of juristic opinion shall be followed.<sup>60</sup> It could be argued that the Ottomans have done nothing more than this in their enactment of the *Mecelle*.<sup>61</sup> One rising scholar has made precisely this argument.<sup>62</sup> Moreover, sufficient institutional controls could well be put into a state, through a Council of Guardians, for example, to ensure that the legislation that is based on *shari'a* remains that way.<sup>63</sup> A decent

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<sup>53</sup> See, e.g., Mayer, *supra* note 23, at 181–82.

<sup>54</sup> See Seval Yildirim, *Aftermath of a Revolution: A Case Study of Turkish Family Law*, 17 PACE INT'L L. REV. 347, 353 n.22 (2005) (stating that "Cevdet Pasha, the main proponent and the architect of the Mecelle, found support for codification . . .").

<sup>55</sup> See generally THE MEJELLE: BEING AN ENGLISH TRANSLATION OF MAJALLAH EL-AHKAM-I-ADLIYA AND A COMPLETE CODE ON ISLAMIC CIVIL LAW (C.R. Tyser et al. trans., 2001) [hereinafter MECELLE] (including several areas of private law, but excluding family law).

<sup>56</sup> AN-NA'IM, *supra* note 4, at 17–18.

<sup>57</sup> See, e.g., FELDMAN, *supra* note 15, at 63–64 (discussing how codified rules deprived the scholarly class of power by assuming final authority over the content of the law).

<sup>58</sup> See, e.g., AN-NA'IM, *supra* note 4, at 17–18 (discussing how the *Mecelle* led to the creation of the Egyptian Civil Code of 1948).

<sup>59</sup> See Mayer, *supra* note 23, at 177–78 (discussing the quote of Schacht regarding the distortion of *shari'a* by codification).

<sup>60</sup> See LOMBARDI, *supra* note 19, at 50–51 (discussing how a ruler can place limits on juristic opinion by demanding that rules be taken only by decisions of a specific guild).

<sup>61</sup> Fadel, *supra* note 18, at 118–19.

<sup>62</sup> *Id.*

<sup>63</sup> CHIBLI MALLAT, THE RENEWAL OF ISLAMIC LAW 94–95 (1993).

claim to Islamicity, and divine supremacy in matters of law, might well be made if all of this were done. In any event, this Article takes no position on the rich debate concerning whether or not the codification of the rules of the *shari'a* is absolutely incompatible with the notion of *shari'a*.

More devastating to the notion of God's law reigning supreme is the fact that, from the outset of the codification phenomenon, there has been no real attempt of any significant kind to codify *all* law along the lines of *shari'a*. The fact is that *Mecelle* is the *last* of the Ottoman legal reforms known as the *Tanzimat*, preceded as it was by a penal code, a property code, a commercial code, a commercial procedure code, and a maritime code, *all modeled almost entirely on Napoleonic law*.<sup>64</sup> Which is to say that, contemporaneous with codification, and indeed preceding it, was the phenomenon of secularization of the content of the law. As Schacht himself noted, this becomes far easier to achieve once the state, and not *shari'a* enunciated by the jurists, becomes the authority that pronounces law.<sup>65</sup>

The process in fact seems inevitable. Once codification becomes the means by which law is created, it becomes terribly tempting for the state actors, when faced with a legal problem that the *shari'a* is not capable of solving, to simply alter the legislation, transplant law from Europe, and conveniently shunt aside God's law. Only politics prevent such a move, and political influences are not always firmly on God's side. As a result, divergence from traditional *shari'a* rules was an inherent part of the codification process in the Muslim world. Forms of partnership and organization, rules of property and admiralty, and even criminal rules, were introduced without the slightest *shari'a* precedent—transplanted from France (and, in the case of property, Germany) even before the *Mecelle* had been enacted.<sup>66</sup> This is far more relevant to the fall of God's law than the matter of the *Mecelle*. It would be possible to at least claim to give supremacy to God's law in a land of codified *shari'a*; the matter is much harder when that law has been replaced with European transplant.

Unsurprisingly, as the shortcomings of *shari'a* to govern vast areas of law became ever clearer, this process of secular codification only accelerated. The fate of the *Mecelle* is possibly the most interesting example. Though billed as a civil code, the *Mecelle* is not a code as any civilian lawyer would understand the term.<sup>67</sup> Most importantly, there is no general theory of obligation.<sup>68</sup> Even

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<sup>64</sup> COULSON, *supra* note 36, at 151–52.

<sup>65</sup> SCHACHT, *supra* note 23, at 101.

<sup>66</sup> COULSON, *supra* note 36, at 151–52.

<sup>67</sup> Dan E. Stigall, *Iraqi Civil Law: Its Sources, Substance, and Sundering*, 16 J. TRANSNAT'L L. & POL'Y 1, 8 (2006).

<sup>68</sup> Haider Ala Hamoudi, *The Muezzin's Call and the Dow Jones Bell: On the Necessity of*

a general theory of contract is absent from the *Mecelle*.<sup>69</sup> The *Mecelle* instead divides the area of contract<sup>70</sup> into a series of nominate forms, among them sale, hire, partnership, and agency, each with its own rules—leaving one to wonder as to whether contracts that do not fall neatly into any given category will be enforceable, and if so, under which set of rules.<sup>71</sup> Tort is likewise divided into categories, such as destruction of property and usurpation; a general theory of negligence is absent.<sup>72</sup> This form of atomistic organization effectively obliterated any hope of the *Mecelle* operating as a code in the manner of a continental civil code, because it neither internally referenced itself, nor were its general provisions applicable in a manner that ensured internal consistency

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*Realism in the Study of Islamic Law*, 56 AM. J. COMP. L. 423, 438–39 (2008).

<sup>69</sup> *Id.*

<sup>70</sup> There has been much debate among Islamic Studies scholars as to the extent to which the *shari'a*, as reflected in the juristic manuals, allows for freedom of contract. Schacht and Coulson, for example, have both taken the position that there is not so much a law of contract within Islam as a law of contracts, and that while Islam may well permit freedom within the nominate forms, it cannot be said to permit a freedom to contract beyond this. NOEL J. COULSON, *COMMERCIAL LAW IN THE GULF STATES: THE ISLAMIC LEGAL TRADITION* 17, 27–31 (1984); SCHACHT, *supra* note 23, at 144. Other work has pointed out potential limitations on this. Baber Johansen, for example, has shown through careful studies of one school of thought that while commercial exchange was certainly never discussed as a separate book within any juristic manual, certainly jurists did distinguish between it and contracts that reflected social arrangements mediated through kinship, such as marriage. Baber Johansen, *Commercial Exchange and Social Order in Hanafite Law*, in *LAW AND THE ISLAMIC WORLD: PAST AND PRESENT* 81, 81–95 (Christopher Toll & Jakob Skovgaard-Petersen eds., 1995). Jeanette Wakin has done excellent work on the means through which jurists negotiated the divide between theory and practice with respect to one particularly troublesome rule within the juristic manuals: the requirement that a contract be oral and the concomitant denial of a writing as having any legal authority of any kind. Jeanette A. Wakin, *Introduction*, in *THE FUNCTION OF DOCUMENTS IN ISLAMIC LAW* 1, 6, 10–11 (Jeanette A. Wakin ed., 1972); *see also* PAUL R. POWERS, *INTENT IN ISLAMIC LAW* 100 (2006) (“Freedom to contract is generally supported in Islamic law, and the various rules governing contracts and commerce function to provide the parameters of this freedom.”); Hussein Hassan, *Contracts in Islamic Law: The Principles of Commutative Justice and Liberty*, 13 J. ISLAMIC STUD. 257 (2002) (arguing that the nominate form system was not intended to and did not in fact restrict freedom to contract). It is not my intention to enter into a very fascinating debate respecting the function and role of *shari'a* in regulating commerce in the classical era or whether it provides for or inhibits “freedom of contract” as an abstract matter. As one who approaches these texts first and foremost from the point of view of a contemporary commercial law scholar, instead I raise the rules of the juristic manuals for one purpose: to demonstrate that as written, without a general theory of contract or general rules of contract, and without any allowance for a joint stock limited liability vehicle, they cannot reasonably operate as the basis of any contemporary commercial system. Of this conclusion, I am confident.

<sup>71</sup> Hamoudi, *supra* note 68, at 438, 439 n.65.

<sup>72</sup> *See* MECELLE, *supra* note 55, at 137–47.



across the entire *Mecelle*.<sup>73</sup> There are other substantive difficulties with the *Mecelle*. It lacks any concept of legal personhood.<sup>74</sup> Limited liability companies are not among the forms of business organization that the *Mecelle* suggests may be formed through contract.<sup>75</sup> The partnerships it does describe dissolve upon the death of any single partner, at least as concerns the share of that partner.<sup>76</sup> It is hard to conceive of any modern society being able to govern itself by such rules, and indeed the Ottomans had already incorporated French law to address some of these shortcomings, including the adoption of the Napoleonic company law.<sup>77</sup>

It is important to note that the drafters of the *Mecelle*, in addition to being some of the most respected minds in the Ottoman Empire, had considerable compass in determining the code's content from the disparate rules of the medieval jurists. While the *Mecelle* purported to draw primarily from one of four Sunni schools of thought, it consciously adopted rules from any one of the three other schools when it found them convenient.<sup>78</sup> At times, when pressed, as in the nearly universal *shari'a* limitations on stipulations varying the nominate forms of contract, it adopted the view of a single jurist of a single school—and even then on a highly contentious reading—to the derogation of all other jurists.<sup>79</sup> Yet despite this considerable latitude and the drafters' considerable prowess, in setting down the disparate rules into a single code, the drafters could do no better than this.

If a judicial class were responsible for the enforcement of uncoded *shari'a*, or if *shari'a* were codified with institutional controls designed in a manner that prevented its easy amendment, then these problems could only be overcome through the process of evolution of thought concerning prohibitions and permissions of the *shari'a*. This could be undertaken either by the judges through clever reinterpretation of what the jurists actually meant, or by a living juristic class extending *shari'a* in ever more changing directions. This is obviously always a possibility, as Timur Kuran properly notes in his work on the inhibitive role that Islamic doctrine has played at times in Islamic history in developing commercial institutions and vehicles.<sup>80</sup> But given that no

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<sup>73</sup> Stigall, *supra* note 67, at 8.

<sup>74</sup> See MECELLE, *supra* note 55, at 166–210.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* at 222.

<sup>77</sup> COULSON, *supra* note 36, at 151.

<sup>78</sup> AN-NA'IM, *supra* note 4, at 17.

<sup>79</sup> Hamoudi, *supra* note 68, at 445–47.

<sup>80</sup> Timur Kuran, *The Scale of Entrepreneurship in Middle Eastern History: Inhibitive Roles of Islamic Institutions* 21–24 (Econ. Res. Initiatives at Duke, Working Paper No. 10, 2008), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1265117](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1265117).

principle of intrinsic *shari'a* primacy exists, an easier route is readily available—the code can simply be changed. As a result, the *Mecelle* was slowly but nearly entirely eclipsed throughout the following century.<sup>81</sup> In the Arab world, for example, it was largely replaced by a civil code drafted by the brilliant and renowned Arab jurist Abdul Razzaq al Sanhuri.<sup>82</sup> While the Islamicity of Sanhuri's Code is and has been a matter of intense debate,<sup>83</sup> far too extensive and nuanced to engage here, it is fair to say that Sanhuri's Code is not, as the *Mecelle* was, an attempt to set down particular rules of the *shari'a* on the basis of the derivations of jurists from the four Sunni schools of thought. It was, at most, an exploration of some of the supposed fundamental principles of these medieval Sunni rules, informed heavily by Roman law and Continental European law, and containing some provisions in clear derogation of *shari'a*—at least as understood by modern Muslims.<sup>84</sup> It is moreover a code in the civilian sense; it is internally consistent, has extensive provisions concerning obligation and contract, and preempts the entire area of private law beyond personal status.<sup>85</sup> Many of its provisions are virtual translations of European codes.<sup>86</sup>

There is no doubt that some Islamic concepts remain—the *waqf*, which operates in the Civil Code largely as a land trust, is perhaps the most obvious and extensively discussed single feature of *shari'a*.<sup>87</sup> Nevertheless, the Civil Code is a substantial and significant departure from the *Mecelle*, and a turn towards Continental Europe in a manner that renders the *shari'a*, in large part, less relevant than it had been.<sup>88</sup>

If this is true with respect to the Sanhuri Civil Code, it is emphatically more so with respect to company laws throughout the Muslim world, which by and large endorse the notion of joint stock limited liability companies with separate personhood, notwithstanding the fact that the *shari'a* never recognized such

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<sup>81</sup> See AN-NA'IM, *supra* note 4, at 17 (discussing codes subsequent to the *Mecelle*).

<sup>82</sup> *Id.* at 17–18.

<sup>83</sup> ENID HILL, AL-SANHURI AND ISLAMIC LAW 71–83 (1987) (describing the scholarly debate at length and taking the position that the Civil Code was in fact more Islamic than is commonly believed); cf. J.N.D. Anderson, *The Shari'a and Civil Law: The Debt Owed by the New Civil Codes of Egypt and Syria to the Shari'a*, 1 ISLAMIC Q. 29 (1954) (describing the Code as more European than Islamic). For a contemporary contribution, see Amr Shalakany, *Between Identity and Redistribution: Sanhuri, Genealogy and the Will to Islamise*, 8 ISLAMIC L. & SOC'Y 201 (2001).

<sup>84</sup> LOMBARDI, *supra* note 19, at 92–99.

<sup>85</sup> Hamoudi, *supra* note 68, at 439.

<sup>86</sup> *Id.*

<sup>87</sup> See, e.g., Stigall, *supra* note 67, at 17–19 (describing the *waqf* in the Iraqi Civil Code).

<sup>88</sup> See AN-NA'IM, *supra* note 4, at 18 (discussing departures of Sanhuri's Code from strict rules of *shari'a*).

a form of commercial organization.<sup>89</sup> Likewise criminal law, constitutional law, and financial law have all been (largely, with notable exceptions discussed below) transplanted from Western sources in a manner that preempts and obliterates previously existing laws. This can be done either through the enactment of a code, in the civil law context, or, for nations ultimately adopting common law under English influence, through the enactment of statutes and the gradual use of English common law to decide cases in civil courts.<sup>90</sup>

With the adoption of secular transplanted law, other secularization processes—the bureaucratization of state function, the extension of central authority, and, most importantly, the professionalization of the judiciary—quickly followed.<sup>91</sup> As a result, judges in nearly all Muslim states are trained in professional law schools,<sup>92</sup> and their training is in law of the civilian or common law variety, as the case may be, and not *shari'a*.<sup>93</sup> Certainly in my own experience in various parts of the Middle East—from Qatar to Jordan to Iraq—the interest of aspiring scholars in a foreign law degree far exceeds any interest in *shari'a*.

It was therefore only time and distance that made the juristic manuals ever more obsolete as Muslim states enacted more and more by way of transplant and paid less and less attention to *shari'a*. Vast areas of private law, for example, from the laws of partnership and agency to the rules of tort, have been so transformed as to render *shari'a* largely obsolete in them.<sup>94</sup> This is to say nothing of the entire reorganization of criminal law along transplanted lines,<sup>95</sup> with significant exceptions to be discussed below. In fact, as scholars such as Bernard Weiss and Lama Abu-Odeh point out, the only area of law in which *shari'a* remains both broadly and deeply influential, both in rulemaking and application, is that of personal status law.<sup>96</sup>

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<sup>89</sup> See Kuran, *supra* note 80, at 16 (discussing how Islamic law does not cover the concept of legal personhood).

<sup>90</sup> See, e.g., Donald L. Horowitz, *The Qur'an and the Common Law: Islamic Law Reform and the Theory of Legal Change* (pt. 1), 42 AM. J. COMP. L. 233, 256–58 (1994) (describing this process of evolution in Malaysia); Edward R. Leahy & Mark D. Davis, *National Banking Laws Governing the Rights and Responsibilities of Non-resident Depositors*, 19 INT'L LAW. 1119, 1144 (1985) (“Under Pakistani law, the fundamental rights and obligations of bank depositors are not very different from those prevailing in the United States. Pakistan inherited its legal system from the British, and its substantive laws still bear the imprint of English common law.”).

<sup>91</sup> RUDOLPH PETERS, *CRIME AND PUNISHMENT IN ISLAMIC LAW* 103–05 (2005).

<sup>92</sup> See Abu-Odeh, *supra* note 3, at 791 (discussing the author’s own law school education in Jordan).

<sup>93</sup> *Id.*

<sup>94</sup> WEISS, *supra* note 3, at 188.

<sup>95</sup> COULSON, *supra* note 36, at 152.

<sup>96</sup> WEISS, *supra* note 3, at 188; Abu-Odeh, *supra* note 3, at 791–92.

## III. ISLAMIST RULE AND THE SECULAR PROJECT

A. *Islamist Acceptance*

One can imagine why secularist elements within Muslim society might very well welcome broad change along such lines. More perplexing, however, is why Islamist movements have come along for this ride. For while it is apparent that Islamists are quite often unhappy with the state of the law as it exists, and seek something that purports to be based more closely on the substantive rules of *shari'a*, Islamists do not seek to disturb the central principle of selectivity. The Islamist desire, then, to “*sharia-fy*” is to change the state law to bring it closer to *shari'a* norms in certain areas, but not others. Nevertheless, selectivity does not seem to prevent the Islamist from insisting that *shari'a* is the only legitimate law because it is God’s, and God’s judgment is superior to humanity’s, even as the Islamist ignores his own claim in any number of areas of law. This reveals a confounding jumble of rhetoric and reality that at first glance seems difficult to unpack.

Modern models do exist for approaches that are more comprehensive and consistent. Saudi Arabia is perhaps the most notable example of a state granting wide power to a judicial class to apply *shari'a*.<sup>97</sup> Given that Saudi Arabia has proven remarkably adept at exporting much of its Wahhabist ideology through the liberal use of petrodollars,<sup>98</sup> it might come as some surprise that Islamist movements seem barely interested in replicating it—aside from the devastated society examples of Afghanistan and Somalia.<sup>99</sup>

One explanation could be the relative weakness of the Islamist movements in some cases for any number of reasons. Thus, for example, while Egypt’s Islamist Muslim Brotherhood may well have considerable popular support, the movement itself is technically banned and certainly does not wield power.<sup>100</sup> It could therefore be argued that given this situation, the wholesale reorientation of the state is not an option and therefore the movement is forced to compromise, at least temporarily, on its long term ambitions. The Islamists,

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<sup>97</sup> See *supra* Part II.B.

<sup>98</sup> KHALED ABOU EL FADL, *THE GREAT THEFT* 72 (2005).

<sup>99</sup> See *supra* Part II.B.

<sup>100</sup> See, e.g., Human Rights Watch, *Egypt: Jailing 800 Activists Casts Doubt on Elections*, (Mar. 29, 2008), <http://www.hrw.org/en/news/2008/03/29/egypt-jailing-800-activists-casts-doubt-elections> (describing the arrest of at least 148 would-be candidates for the 2008 municipal council and local elections, and noting that the Muslim Brotherhood has been banned in Egypt since 1954).

under this theory, field candidates where they can and seek to maximize influence where possible.<sup>101</sup>

However, Islamist weakness is not a useful explanation for why Islamism has chosen the path of selective codification, because even when Islamist regimes manage to acquire sole power, as in the case of Sunni Sudan or Shi'i Iran, or when they have a friend in power, as in the case of Pakistan,<sup>102</sup> the clear trend remains in favor of selective codification.<sup>103</sup> In fact, aside from the devastated society, neither Islamists nor average Muslims seem particularly enthused about the prospect of entire rule by *shari'a*. All seem to have adopted well the notion that the state determines which portions of God's law deserve recognition, even as the Islamist insists, however incoherently, that *shari'a* cannot be subverted by human will.

Unfortunately, this matter has not received very much attention. Most of the focus on Islamist lawmaking tends to address, not the more interesting question of the perduring power of the transplant, but rather the Islamist penchant for codification of what was once uncoded *shari'a*. Thus, for example, in explaining why it is that Islamists prefer the codification of *shari'a* and what this might mean for the future of *sharia*, the renowned scholar Ann Elizabeth Mayer posited an explanation regarding power dynamics; namely, that if an Islamist party were to seize control of a government, that party would then be obviously reluctant to cede considerable levels of the power it had just obtained to a scholarly-minded judicial class to which it might not necessarily belong—and codes ensure that the power remains with the state.<sup>104</sup> This continues to be a widely accepted explanation.<sup>105</sup>

While this makes sense, a larger question, which Mayer does not address, looms. This is why Islamist forces, even in thoroughly Islamized states such as Iran, not only rely on codification in order to bring the state in closer conformity with *shari'a*, but also in large part use the same process of codification to derogate from *shari'a* in favor of the continuation of transplanted law—even when the scholarly class is itself in control of the state, and has developed extensive legal rules that bear no resemblance to the transplant. This curiosity is the subject of the next section.

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<sup>101</sup> *See id.*

<sup>102</sup> Hamoudi, *supra* note 4, at 101.

<sup>103</sup> For specific examples in the area of criminal law, see PETERS, *supra* note 91, at 155–69 (discussing the present state Islamic criminal law in Pakistan, Iran, and the Sudan).

<sup>104</sup> Mayer, *supra* note 23, at 182–83.

<sup>105</sup> *See, e.g.*, FELDMAN, *supra* note 15, at 109–11 (discussing the replacement of *shari'a* scholars with ordinary Muslim laymen in the interpretation of *shari'a*); JACKSON, *supra* note 23, at xvii (stating that any attempt to codify involves replacing the authority of the jurists with that of the state).

*B. Understanding Selectivity: The Case of Iran*

Unlike Sunnism, where the scholarly classes suffered significant reversals at the dawn of the colonial era,<sup>106</sup> the juristic institutions of Shi'ism are alive and thriving.<sup>107</sup> Specifically, and in brief, Shi'i doctrine requires each Shi'i to select among a certain, small group of high jurists the jurist that she considers the most learned, to follow the rules established by that jurist to the exclusion of all others, and to tithe a significant portion of her income to him.<sup>108</sup> Jurists, who operate primarily from two centers, Najaf in Iraq and Qom in Iran, then compete for followers, even as they train the next class of jurists beneath them. Those jurists-in-training become high jurists in their own right once they reach a particular level of scholarly capability and publish a multivolume comprehensive work known as the *risala*, containing the substantive rules of *shari'a* as derived by them.<sup>109</sup> Generally these compilations cover all areas of private law, from rules of purchase and sale to family law (and are quite extensive on ritual), but do not engage issues of public law.<sup>110</sup> They are meant to guide the believer to live in accordance with God's will (which necessarily makes public law considerably less relevant). Thus, until the rise of the Islamist movement, Shi'i elements preferred less to confront the state than to ignore it, waiting instead, as per Shi'i eschatological doctrine, for a lineal male descendant of the Prophet, known as the Mahdi, to reemerge from hiding, where he has been for over a millennium, and institute just rule.<sup>111</sup>

Beginning in the 1960s, however, two influential clerics, Muhammad Baqir al-Sadr and Ruhollah Khomeini, began to assert that such quietism was unwarranted and that the proper Islamic path was for Muslims to seize control of the state pending the reemergence of the Mahdi.<sup>112</sup> Naturally, as scholars, the most logical protectors of the *shari'a* to their mind once control was seized were the jurists themselves.<sup>113</sup> The idea, as coined by Khomeini in a series of lectures in Najaf (though it must be said that Sadr was responsible for much of

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<sup>106</sup> LOMBARDI, *supra* note 19, at 73.

<sup>107</sup> See Hamoudi, *supra* note 28, at 267–68.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.* at 268–69; see also Devin J. Stewart, *The Portrayal of an Academic Rivalry: Najaf and Qom in the Writings and Speeches of Khomeini, 1964–78*, in *THE MOST LEARNED OF THE SHI'A* 216 (Linda S. Walbridge ed., 2001) (discussing the position of high jurists).

<sup>110</sup> Hamoudi, *supra* note 19, at 110–11.

<sup>111</sup> Abbas Amanat, *From Ijtihad to Wilayat-i Faqih: The Evolution of the Shi'ite Legal Authority to Political Power*, in *SHARI'A: ISLAMIC LAW IN THE CONTEMPORARY CONTEXT* 120, 122–23 (Abbas Amanat & Frank Griffel eds., 2007).

<sup>112</sup> MALLAT, *supra* note 63, at 71–75.

<sup>113</sup> *Id.*

the underlying theory), was known as “Guardianship of the Jurist.”<sup>114</sup> Both Sadr and Khomeini realized that the highly decentralized structure of the seminaries, where each jurist operates independently of the other, required some adjustment. They made this adjustment in the form of a central, leading jurist, a Supreme Leader, under whose authority the state would be organized, while other jurists would operate in subsidiary positions, retaining tithing followers and training academies but with less control over law.<sup>115</sup>

This would seem to make the transplant largely unnecessary. Certainly the compendia had extensive rules of private law.<sup>116</sup> One could simply refer judges to the compendium already written by the Supreme Leader to find all necessary rules concerning, for example, contract, tort, and permissible business organizations, or a new code could be enacted that does nothing but repeat the rules already developed. Khomeini himself suggests as much in one of the best known compilations of his writings and speeches, *Islam and Revolution*.<sup>117</sup> In one notable portion, Khomeini derides the drafters of transplanted law as wasting time and “worship[ing] foreigners” because *shari’a* already has the necessary answers as to “[t]he entire system of government and administration.”<sup>118</sup> The severe rhetoric should not be gainsaid; Khomeini has likened the enactment of transplants (worshiping foreigners) to idolatry—an act described in the Qur’an as one for which no forgiveness is possible.<sup>119</sup>

One therefore wonders why, when the 1979 Islamic Revolution took place in Iran, and Khomeini became Supreme Leader, a significant role remained for the transplant.<sup>120</sup> To be sure, the Iranian Constitution adopts a series of institutional controls to ensure that all legislation is carefully vetted by the juristic classes to ensure Islamicity. The juristic classes also have supervisory authority over the Iranian President, suggesting levels of executive juristic control far greater than any court exercising judicial review.<sup>121</sup> However, this did not prevent the continuation of a civil code, for example, in largely the same form it had been before the Revolution.<sup>122</sup>

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<sup>114</sup> *Id.* at 59 (discussing *wilayat al-faqih*, which can be translated as “Guardianship of the Jurist”).

<sup>115</sup> *Id.* at 75–76.

<sup>116</sup> Hamoudi, *supra* note 19, at 110–11.

<sup>117</sup> KHOMEINI, *supra* note 1, at 126–49.

<sup>118</sup> *Id.* at 137.

<sup>119</sup> THE HOLY QUR’AN 4:48 (Chapter of the Women) (“And God shall not forgive the polytheizing of Him, and He forgives all but that to whom He wills, but he who has worshiped others has committed a mighty sin.” (author’s translation)).

<sup>120</sup> Mayer, *supra* note 23, at 191.

<sup>121</sup> MALLAT, *supra* note 163, at 80–81.

<sup>122</sup> *Compare* Qanun-i Madani [Civil Code] 2007 (Iran) (Mostafa Shahabi trans.) (post-

This is quite remarkable. Having taken over the state, on the theory of juristic rule, and having insisted that the law of the state must reflect the well-established and extensive rules of *shari'a*, the juristic classes decided to retain a transplanted civil code rather than establish the *shari'a* private law rules they had themselves developed over a period of decades.

The same confusion emerges from the seminaries in Najaf today. I have had the privilege of speaking extensively with one of the most intelligent men I have met in Najaf, Sheikh Bashir Al-Najafi, one of Iraq's Four Grand Ayatollahs.<sup>123</sup> He has emphasized repeatedly that Islam as a legal system is superior to all other legislative systems because it is not "reactive," in that laws are not issued in Islam in response to whatever political need may arise, but rather the rules lie in Sacred Text, and have been for the past fourteen centuries, awaiting discovery by the careful scholar. As to why, if this was the case, Sheikh Bashir, along with his contemporaries in Najaf, most prominently Sayyid Ali Sistani, likewise emphasized their strong desire not to involve themselves with the state affairs in Baghdad, I could never get a satisfactory, nor even coherent, answer, even from the otherwise brilliant Sheikh Bashir. Needless to say, if Islam has the rules, and the jurists are spending their lives "discovering" them, it seems only sensible that some effort be made by someone to put those rules into practical effect in Shi'i majority Iraq, rather than leave them to collect dust in the seminaries in Najaf.

One need look no further than the juristic rules of any high jurist, from Ali Sistani of Iraq to Ayatollah Khomeini himself,<sup>124</sup> to develop a reasonable explanation for why these rules are not seriously considered as worthy of state implementation. Much like the *Mecelle*, juristic rules are compilation and not code; they are a collection of atomistic rules, rather than an internally referenced and coherent body of sections that are intended to work together to govern an entire area of law. To take the simplest example, in the compendia, contracts are divided into nominate forms with separate rules governing each.<sup>125</sup>

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Revolution Code), with *Qanun-i Madani* [Civil Code] 1973 (Iran) (Musa Sabi trans.) (pre-Revolution Code).

<sup>123</sup> Discussions with Sheikh Bashir Al-Najafi, in Najaf, Iraq (Oct. 20, 2009).

<sup>124</sup> The compendium of Ayatollah Khomeini is available in English translation. AYATOLLAH KHOMEINI, A CLARIFICATION OF QUESTIONS: AN UNABRIDGED TRANSLATION OF RESALEH TOWZIH AL-MASAEL (J. Borujerdi trans., 1984) [hereinafter KHOMEINI RISALA]. Grand Ayatollah Sistani's compendium is widely sold in Arabic in Iraq. ALI SISTANI, MINHAJ AL-SALHEEN (13th prtg. 2008), available at <http://www.sistani.org/local.php?modules'nav&nid'2&bid'24> [hereinafter SISTANI RISALA]. While the two are remarkably similar, I make reference to both in order to emphasize that the primary shortcomings of the juristic rules do not vary according to the jurist in question.

<sup>125</sup> SISTANI RISALA *supra* note 124, at vol. 2, 21-429 (dividing contracts into nominate forms,



For the same reason that the *Mecelle* was ultimately discarded, this would be difficult to use in a society with even the slightest level of economic development. If one forms a contract with another party that does not seem to fall within the nominate forms, is it enforced? If so, to what extent? Under what rules? The answers are unclear, and will remain so absent a general theory of contract.

The Civil Code of Iran addresses this problem because it contains broad and general provisions concerning contract. The relevant section concerning contract validity generally, Article 190, appears to be the same now as it was in 1974—before the Revolution had taken place. It reads as follows: “For the validity of the contract the following conditions are essential: 1. The intention and mutual consent of both parties to the contract. 2. The competence of both parties. 3. There must be a definite thing which forms the subject matter of the contract. 4. The cause of the transaction must be lawful.”<sup>126</sup>

This is not a juristic rule; nothing in the juristic rules attempts to address contract validity along such general lines. Instead, this is precisely the civilian standard for validity; a virtual translation of the French Code Civil.<sup>127</sup>

The same exercise could well be undertaken concerning partnerships and corporations, where again the juristic rules do not sanction anything approaching a modern corporation. Instead, they seem to assume partnerships among natural persons that seem fairly limited in scope and duration.<sup>128</sup> Yet Iran has a commercial code, enacted after the Revolution, and its first article specifically authorizes the creation of joint stock limited liability

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and analyzing each under separate rules); KHOMEINI RISALA, *supra* note 124, ¶¶ 2051–2362.

<sup>126</sup> Qanun-i Madani [Civil Code] 1973, art. 190 (Iran) (Musa Sabi trans.) (pre-Revolution Code). The English translation of the most recent version of the Iranian Civil Code reads similarly: “For the validity of any transaction the following conditions are essential: 1. Intent and consent of the parties. 2. Capacity of the parties. 3. A definite subject which is the object of the transaction. 4. Legitimacy of the purpose of the transaction.” Qanun-i Madani [Civil Code] 2007, art. 190 (Iran) (Mostafa Shahabi trans.) (post-Revolution Code). The differences appear to be a matter of translation.

<sup>127</sup> See CODE CIVIL [C. CIV.] art. 1108 (Fr.), available at [http://www.legifrance.gouv.fr/html/codes\\_traduits/code\\_civil\\_textA.htm#CHAPTERII-OF-THE-ESSENTIAL-REQUIREMENTS](http://www.legifrance.gouv.fr/html/codes_traduits/code_civil_textA.htm#CHAPTERII-OF-THE-ESSENTIAL-REQUIREMENTS) (“Four requisites are essential for the validity of an agreement: The consent of the party who binds himself; His capacity to contract; A definite object which forms the subject-matter of the undertaking; A lawful cause in the obligation.”).

<sup>128</sup> See, e.g., SISTANI RISALA, *supra* note 124, at 161–209 (describing various forms of partnership); KHOMEINI RISALA, *supra* note 124, ¶¶ 2142–2159, 2228–2250 (same, but in less detail). For a broader treatment of this in the context of Sunni classical rules, see generally Kuran, *supra* note 80.

vehicles—another obvious foreign transplant that is not present in the Islamic rules that Khomeini had insisted were entirely comprehensive.<sup>129</sup>

Now that the jurists are in control, why has Iran continued to “worship” foreigners through such transplants? At the very least, why haven’t the institutional controls meant to assure juristic rule been deployed to prevent the enactment of material of obviously Western origin? None of the explanations offered by leading scholars to date seem very helpful. The problems with the approaches to date, it seems, is that they fail to take account of Llewellyn’s well-known adage to law students to be distrustful of whether decision makers in fact know the relationship between what they say and what they do.<sup>130</sup> Rather than simply assume that Islamists want God’s Law to reign supreme because they keep saying it, Iran seems to provide an alternative, more direct explanation, based less on rhetoric and more on substance. Islamists do *not* want juristic rules to govern in every instance; rather, they want, as much as anyone else, to be selective in determining which rules apply.

A brief consideration of the options available to harmonize the law of contract with the juristic rules of Shi’ism’s high scholars illustrates the basis of the Islamist desire for selectivity.

### 1. *The Devastated Society*

The easiest way for the Islamist forces in Iran to achieve absolute consistency would be to do away with codes entirely, and thereby obliterate a general theory of contract, a joint stock limited liability commercial vehicle, and anything else that was not reflected in the juristic compendia—particularly when it is of foreign origin. Alternatively, the state could simply enact Khomeini’s compendium, at least as it concerns private law, and grant Khomeini, or some class of jurists, the sole ability to change it—or at least to approve changes to it. In the devastated society model, something along these lines might well be possible. Of all the problems Somalia faces today, the inability of a merchant to enforce a contract in court beyond the nominate forms is comparatively less important. This might help explain why devastated societies have had an easier time of abandoning codes and transplanted concepts altogether, thereby giving primacy to their own highly contested versions of *shari’a*.<sup>131</sup>

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<sup>129</sup> Majmua-hi Kamili Qava’nini Va Muqarra’ti Bazergani Va Tijari [Code of the Commercial Laws and Regulations] Tehran 1370 [1990] art. 1 (Iran) [hereinafter Iran Commercial Code].

<sup>130</sup> LLEWELLYN, *supra* note 2, at 7.

<sup>131</sup> Another explanation is available—one offered by the excellent work of Timur Kuran on the subject of the role of *shari’a* in fostering or inhibiting Muslim commerce over time. The

Beyond the devastated society, however, this option hardly seems plausible. It is hard to believe that the Iranian jurists, for example, or at least some of their economic advisers, would not be concerned with the damage done by the repeal of a general theory of contract and its replacement with a rule that every contract take one of several nominate forms. The Civil Code must remain, the Commercial Code must be enacted, and thus this option, conceptually the simplest, is foreclosed.

## 2. *The “Discovery” of Transplanted Concepts*

A second option would be for the jurists to “discover,” to their amazement, that, in fact, sacred text has all along adopted a general theory of contract, and that its elements are consent, capacity, cause, and lawful object. The curious similarity to the civilian standard might well be explained by the allegation that the civilians must have somehow stolen it from earlier Islamic civilizations, or by the fact that the civilians have learned by trial and error that which Islam knew all along. Again in Najaf I have heard from sharp rising scholars, such as Sayyid Ja’afar al-Hakim, a general endorsement of this latter notion. To quote Sayyid Ja’afar more precisely, “the theoretical processes of discovery in Najaf correlate closely with the praxiological processes of experimentation in countries of advanced development.”<sup>132</sup>

Beyond, Najaf, Sanhuri develops his general theory of obligation, and a general theory of contract, on the basis of a supposed careful reading of the underlying principles of the *shari’a*, as laid out in the four Sunni schools of thought. He ends up determining that these principles—nowhere actually discussed—are in fact Roman ideas of obligation.<sup>133</sup> In addition, in a far less intellectually sophisticated fashion, books on Islam written for the layperson are replete with allegations that ideas of clearly Western origin, ranging from democratic rule<sup>134</sup> to legality in criminal matters,<sup>135</sup> are in fact originally Islamic. These ideas can gain currency in the Muslim world, and far be it for

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*shari’a* rules, as difficult as they might be in a developed, complex society such as Iran’s, are in fact well-suited to a milieu wherein most transactions are personal, and entrepreneurship is on a smaller scale. Kuran, *supra* note 80, at 3. Given this, even were Islamists in Somalia keen to encourage commercial enterprise, the juristic rules are not necessarily bad ones under the circumstances.

<sup>132</sup> Discussions with Sayyid Ja’afar Al Hakim, in Najaf, Iraq (Oct. 21, 2009).

<sup>133</sup> See LOMBARDI, *supra* note 19, at 92–99 (discussing Sanhuri’s neo-*taglid* method of drafting Islamic legislation).

<sup>134</sup> NOAH FELDMAN, *AFTER JIHAD: AMERICA AND THE STRUGGLE FOR ISLAMIC DEMOCRACY* 53–54 (2003).

<sup>135</sup> Hamoudi, *supra* note 68, at 435–36.

me to object to such salutary developments for reasons no better than historicity.

Yet surely there are limits to the viability of a practice of this sort. Even if the civilian standard of contract validity were to be developed, would the Ayatollahs then find authority for the joint stock limited liability vehicle? Could a negligence standard be so justified? There will come a point at which the jurist's ability to credibly adopt transplanted notions and deem them Islamic in origin will come to an end. Indeed, it was the overwhelming influence of transplanted law in Sanhuri's Civil Code that led to its being dismissed by many Islamists in its time as not being Islamic enough.<sup>136</sup>

### 3. *Parallel Development*

A third option would be for jurists to attempt to develop *shari'a* so that it employs a more progressive set of rules concerning not only contract, but commercial concepts generally, that would neither be transplants nor an economic disaster. Rather, they would be well-functioning, yet different enough to claim Islamicity, rooted as they would be in the Muslim tradition and based on values, such as social justice, with ample reference in Muslim sacred text. It was an aspiration of this sort that led to the rise of the so-called "Islamic economics" movement, led by Sadr, among others, in the middle of the twentieth century.<sup>137</sup> It clearly sought to liberate Muslim doctrine from its hidebound past, yet locate in it an alternative form of economic and social order that was both Islamic and independent of the West.<sup>138</sup> The title of Sadr's crowning work on the subject, *Our Economics*, betrays this fundamental aim, contrasting "Muslim economics" with its capitalist and communist competitors.<sup>139</sup>

The effort never really succeeded largely because, as Timur Kuran has indicated in any number of absorbing pieces on the subject, it was driven less by a coherent and sensible economic theory and more by the need to establish an independent Muslim identity.<sup>140</sup> An independent form of economic organization that may compete with the dominant global paradigm seems even

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<sup>136</sup> LOMBARDI, *supra* note 19, at 98.

<sup>137</sup> Hamoudi, *supra* note 28, at 250–52.

<sup>138</sup> *Id.*

<sup>139</sup> *Id.* at 252, 273.

<sup>140</sup> TIMUR KURAN, ISLAM AND MAMMON: THE ECONOMIC PREDICAMENTS OF ISLAMISM 82–102 (2004); Timur Kuran, *The Discontents of Islamic Economic Morality*, 86 AM. ECON. REV. (PAPERS & PROC.) 438, 438–39 (1996); Timur Kuran, *The Genesis of Islamic Economics: A Chapter in the Politics of Muslim Identity*, 64 SOC. RES. 301, 301–05 (1997).

more implausible now, as commercial laws across the globe have become increasingly uniform and less tolerant of deviation.

That said, there are some limited prospects for the success of parallel development. For example, Islamic economics did manage to spawn the practice of Islamic finance, which is far more conservative and therefore compatible with global demands than its revolutionary predecessor.<sup>141</sup> In essence, Islamic finance mostly replicates conventional financing techniques as closely as possible while purporting to avoid prohibitions on money interest and excessive speculation.<sup>142</sup> As a result, the legal changes necessary to implement an Islamic finance system do not require wholesale reorganization of private law or even commercial law. In fact, the practice often relies on the use of New York or English law in order to ensure that agreements made in accordance with its principles are enforceable, suggesting that Islamic finance may expand for years to come without any changes at all in state law.<sup>143</sup>

In this sense, Islamic finance is an interesting practical example of a theory of legal change first raised by Professor Donald Horowitz in the context of the Islamization of Malaysian family law. Horowitz showed how Malaysian courts, following a process of Islamization, not only approached the interpretation of *shari'a* from distinctly common law biases, but effectively syncretized common law and *shari'a* in a manner that brought the two legal systems together without necessarily casting doubt on the authenticity of the latter.<sup>144</sup> The syncretization process, whereby the revolutionary ideas of Islamic economics were taken by persons more familiar with conventional economics and developed into an Islamic finance practice more harmonious with global expectations, seems to be at work here as well.

It is possible, indeed likely, that over the process of decades, the same theory of legal change might well lead to a collapsing of *shari'a* notions into conventional ones, so that *shari'a* would still apply, but in a manner that did not cast doubt on its authenticity through wholesale transplant. Yet the process would hardly be appealing given the rather severe consequences that would attach to Iran's economic and commercial interests, at least in the short term.

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<sup>141</sup> Hamoudi, *supra* note 28, at 250.

<sup>142</sup> Haider Ala Hamoudi, *Muhammad's Social Justice or Muslim Cant?: Langdellianism and the Failures of Islamic Finance*, 40 CORNELL INT'L L.J. 89, 90–91 (2007).

<sup>143</sup> Umar F. Moghul & Arshad A. Ahmed, *Contractual Forms in Islamic Finance Law and Islamic Inv. Co. of the Gulf (Bahamas) Ltd. v. Symphony Gems N.V. & Ors.: A First Impression of Islamic Finance*, 27 FORDHAM INT'L L.J. 150, 189–90 (2003) (“Parties to Islamic finance transactions often assert English or New York law as the governing law relying on the probability that the contracts are more likely to be enforced as written.”).

<sup>144</sup> Donald L. Horowitz, *The Qur'an and the Common Law: Islamic Law Reform and the Theory of Legal Change* (pt. 2), 42 AM. J. COMP. L. 543 (1994).

It is one thing to work through interpretations of sacred text concerning polygamy over a period of time in order to develop rules that in fact syncretize common law and *shari'a*. It is quite another to obliterate a civil code and a commercial code and wait for jurists and judges to develop tools and techniques that will bring ideas like a general theory of contract or a limited liability commercial vehicle back into existence through reapplication of *ijtihad*. The short term consequences of such an approach would be dire, particularly given broad global expectations concerning the substance of commercial law in particular.

### *C. Selective Codification and its Consequences*

All of the above options have been employed in one fashion or another. As we have seen, absolute rejection has been used in the devastated society, the supposed Islamicity of transplants works well with notions like democratic rule, and Islamic finance is a good example of something like parallel development. Each, however, is limited in its applicability and feasibility, leaving the Islamist with a single option (or at least a single easy option)—to dispense with trying to faithfully do what he says concerning the supremacy of God's law and instead simply adopt the transplant. This then allows the Islamist to develop the state law using some mixture of transplanted and juristic concepts, and avoid any direct justificatory efforts for the transplant.

Under this approach, the Islamist does not need to actually try to demonstrate where the general theory of contract comes from in any detail, and the difficulties of parallel development or transplant discovery do not present themselves. Instead, the state may operate, rhetorically, as "Islamic" but in fact, through the establishment of a separation between the institutions that proclaim the *shari'a* (the juristic academies, or lay scholars, as the case may be) and those that proclaim the law (the state and its legislatures), the Islamist may select what of God's law he happens to like, and enact only that. The following section outlines the vast realm within which Islamist selectivity along these lines operates beyond the single question of Iran and its Civil Code.

It should be noted that while I believe that the reluctance to adopt *shari'a* private law seems to stem largely from economic concerns, I do not attempt any comprehensive explanation as to why some areas of law within the paradigm appear favored over others. I am certain any number of economic or sociological theories might be drawn to explain the method in the seeming madness of the legal selectivity phenomenon, and I look forward to further studies on the subject. For purposes of this Article, however, the point is that the very existence of selectivity lies in clear tension with the Islamist claim that God, and not man, should be responsible for rulemaking.

1. *The Obsolescence of Shari'a Private Law*

In the area of private law (other than personal status), *shari'a* has become largely obsolete. In the Arab nations, for example, the Sanhuri Civil Code has not only managed to survive several decades, but it has also spread and developed such deep and lasting legitimacy that it is no longer seriously questioned, even by Islamists. While a very small number of provisions might well be subject to attack from time to time (among them, provisions permitting the taking of interest on a loan),<sup>145</sup> the basic elements of the Sanhuri Civil Code, its general theories of obligation, contract and negligence, for example, are not subject to dispute.<sup>146</sup>

Thus, in Iraq, where Islamists managed in 2005 to secure a clear majority of voters (even if they are divided among Sunni and Shi'a parties), the notion that the Civil Code needs amendment has yet to be raised in any capacity in which I, as an adviser on the Iraqi constitutional and legislative process, am aware. No jurist has been able to explain to my satisfaction how Sanhuri's Code, in force in Iraq,<sup>147</sup> can possibly be reconciled with juristic rules, nor have they even attempted to do so. The division between law, as product of the state, and *shari'a*, as product of the jurist, allows them to avoid the question.

Likewise, the Sudan adopted its 1984 Civil Transactions Code a year before its Islamic coup, and yet despite the enactment of other Islamic laws (to which I shall turn soon), the Code, largely based on Sanhuri's Code, remains in force complete with recognition of legal personality for companies,<sup>148</sup> a general theory of contract,<sup>149</sup> and broad general provisions<sup>150</sup> reminiscent far more of Continental Europe than the *Mecelle*.

Beyond the Arab world and the influence of Sanhuri, much the same is true. Pakistan was subject to Islamist coup when General Zia ul-Haq assumed power in 1977, killing the democratically elected Zulfikar Ali Bhutto in the process. Though legislative changes discussed below did take place, the Contract Act of 1872 remained, and remains, in full effect, despite its having been enacted when Pakistan was still a British colony.<sup>151</sup> Any one of my American law

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<sup>145</sup> Peters, *supra* note 25, at 234–35 (describing objections to interest in Egypt).

<sup>146</sup> *Id.* at 237–38 (noting Islamist proposed adoption of commercial code that is not based on *shari'a*).

<sup>147</sup> Stigall, *supra* note 67, at 13.

<sup>148</sup> QANUN AL-MUAMALAT AL-MADANIYALI SANA [Civil Transactions Law of 1984] arts. 17, 23 (Sudan), available at <http://www.sudanlaws.net/downloads/laws/moaamalatl1.pdf>.

<sup>149</sup> *Id.* art. 33.

<sup>150</sup> *Id.*

<sup>151</sup> Jared M. Lee, *Pakistan's Political Upheaval: The Demise of a Nuclear Democracy*, 17

students will instantly recognize in it the common law system of contract, with its requirements of offer, acceptance and, most peculiarly to the common law, with no civilian or Islamic counterpart, consideration.<sup>152</sup>

## 2. *The Near Universal Transplantation of Company Law*

If this is the case with private law generally, it is emphatically more so with commercial law. Professor Kuran notes that the idea of a joint stock limited liability vehicle has no antecedents in *shari'a*.<sup>153</sup> I find this interesting, and even more so, that no Muslim nation and no Islamist movement to my knowledge (again, excluding devastated societies) has sought to alter the transplant. Even in the most thoroughly Islamized nations, the trend is precisely the reverse.

Iran's Commercial Code permits the creation of joint stock companies of limited liability,<sup>154</sup> as does the Sudan.<sup>155</sup> Even Saudi Arabia, which continues to allow its judges, graduates of *shari'a* seminaries and thoroughly versed in the Wahhabist strain of *shari'a*, to decide matters according to uncodified *shari'a*,<sup>156</sup> has been forced to adjust this traditionalist *shari'a* system, and take a step in favor of the measured incoherence of the broader Islamist movements in the Muslim world to accommodate a transplanted commercial system. The settlement of commercial disputes in the Saudi Arabian Kingdom are not undertaken by the *shari'a* judiciary, but by a professionalized commission acting under the authority of the King, not the clerics. The rules employed are Royal Regulation in place of *shari'a* and they adopt clearly transplanted concepts such as limited liability.<sup>157</sup> The state is thereby seeking to limit the role of *shari'a* in this realm.

More important than the actual substance of the law, however, is the trend, precisely in the opposite direction of "*shari'afication*" in this area, even when Islamist groups are in charge. To the extent that the Sanhuri Civil Code might contain some *shari'a* influence, and to the extent that Saudi Arabia remains largely an isolated, and limited, exception to the broader rule respecting obsolescence of *shari'a* in private law, the more important point is that no

J. TRANSNAT'L L. & POL'Y 177, 177 (2007) (indicating Pakistan became independent of Great Britain in 1947).

<sup>152</sup> The Contract Act of 1872, art. 10 (Pak.).

<sup>153</sup> See Kuran, *supra* note 33, at 785–86 (noting that before 1851 joint stock companies were unknown in Islamic law).

<sup>154</sup> Iran Commercial Code, *supra* note 129, art. 1.

<sup>155</sup> QANUN AL SHARAKAT LI SANAT [Company Law of 1925] art. 4 (Sudan).

<sup>156</sup> VOGEL, *supra* note 39, at xiv.

<sup>157</sup> NIDHAM AL SHARAKAT [Regulations for Companies] art. 48 (Saudi Arabia) (as amended).



Islamic movement, including the Sunni Islamists who control the Sudan,<sup>158</sup> the Shi'i Islamists who control Iran,<sup>159</sup> or the Islamists, Sunni and Shi'i, who have become leading voices in Iraq following the fall of Saddam Hussein, seek the Islamization of private law and the withdrawal of developments such as the Sanhuri Civil Code. Nothing along these lines has been seriously put forward by influential Islamists in other nations as well, such as Egypt,<sup>160</sup> suggesting that even as interest in Islam has consistently risen across the Muslim world since the 1979 Islamic Revolution in Iran, interest in Muslim private law has waned considerably. It is not on the agenda of the movements, which simply would not be possible had the movements been forced to take seriously their rhetorical claim that the *shari'a* must reign supreme in Muslim land.

### 3. *The Obsession of Personal Status*

While most of *shari'a* private law seems well on its way to obsolescence, such is not the case with personal status law (composed primarily of law of the family and inheritance), where Islamists insist that the rules must be based entirely on *shari'a*, with any reform being dismissed as some sort of unacceptable deviation. Any number of examples may be brought: from the storm of protest that followed the relatively modest reforms in Egypt known as Jihan's Law<sup>161</sup> to the severe objections to the 1974 Marriage Law in largely secular Indonesia.<sup>162</sup>

To offer a stark, recent example from Iraq, Shi'i Islamists sought to repeal, almost immediately after the removal of Saddam from power, the Personal Status Code and replace it with uncodified *shari'a*.<sup>163</sup> Though widely publicized as returning women to second class status while they had enjoyed near equality under Saddam's Code, in fact the Personal Status Code was already based largely on *shari'a*.<sup>164</sup> Nevertheless, for reasons probably relating

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<sup>158</sup> QANUN AL SHARAKAT LI SANAT [Company Law of 1925] art. 4 (Sudan).

<sup>159</sup> Iran Commercial Code, *supra* note 129, art. 1.

<sup>160</sup> Peters, *supra* note 25, at 237–38.

<sup>161</sup> LOMBARDI, *supra* note 19, at 169–71. Among other things, Jihan's Law entitled a woman to a divorce if her husband took a second wife, granted a woman a right to two years of alimony beyond the three months required by *shari'a*, and increased rights of custody for women. *Id.* at 170.

<sup>162</sup> See Mark Cammack et al., *Legislating Social Change in an Islamic Society—Indonesia's Marriage Law*, 44 AM. J. COMP. L. 45 (1996) (noting the resistance to the Marriage Act and the resulting effects of its passage).

<sup>163</sup> Haider Ala Hamoudi, *Money Laundering Amidst Mortars: Legislative Process and State Authority in Post-Invasion Iraq*, 16 TRANSNAT'L L. & CONTEMP. PROBS. 523, 543–44 (2007).

<sup>164</sup> *Id.* at 544–46.

to a juristic assertion of power, Iraq's Islamists immediately sought to bring law into conformity with *shari'a* through code repeal, and then through specific statutory authorization to permit judges alone to apply *shari'a*.<sup>165</sup> As Iraq was not even sovereign at the time but rather under U.S. control, the effort quickly fizzled.<sup>166</sup> However, nerves were frayed to the point where one prominent Shi'i Islamist led a Shi'i walkout of a meeting of the body of Iraqis advising the U.S., known as the Governing Council, in protest of a planned attempt to overrule a former recommendation of repeal.<sup>167</sup> The attempt to repeal the Personal Status Code, at least for those who wish to be governed by *shari'a*, remains a top legislative priority for the Islamists with whom I speak regularly, as well as for the jurists in Najaf.

By contrast, and as alluded to above, the notion of repealing Sanhuri's Civil Code has not been mentioned once, even though its changes from *shari'a* are far more significant. Moreover, the fact that the Iranian Civil Code has remained largely intact even following the Revolution suggests that the Shi'a Islamists are hardly interested in repealing their own civil code. Even measures that are far more controversial among Islamists elsewhere, such as the paying of interest on a loan, hardly seem to garner Islamist attention in Iraq. The same Islamist who led the walkout in protest of the personal status issue, Adel Abdul Mahdi, successfully negotiated a considerable reduction of Iraq's debt with the Paris Club, which led to an agreement by Iraq to obligate itself to a diminished, but very real, continued payment of interest.<sup>168</sup> Only personal status, it seems, raises Islamist fury in Iraq.

#### 4. *Islamic Criminal Law*

The Islamist agenda in criminal law lies somewhere between the near entire neglect of commercial law and the obsession of personal status. Libya, Pakistan, the Sudan, Iran, and some Muslim dominated regions of northern Nigeria, among others, give some role to *shari'a* in their criminal law.<sup>169</sup> Nearly all of these codes address the issue of fornication,<sup>170</sup> and it is of little

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<sup>165</sup> *Id.* at 546.

<sup>166</sup> See Kristen A. Stilt, *Islamic Law and the Making and Remaking of the Iraqi Legal System*, 36 GEO. WASH. INT'L L. REV. 695, 748–54 (2004) (discussing the history of personal status law in Iraq and the 2003 effort to return the law to uncodified *shari'a*).

<sup>167</sup> LARRY DIAMOND, *SQUANDERED VICTORY* 172 (2005).

<sup>168</sup> Hamoudi, *supra* note 163, at 534 n.56.

<sup>169</sup> See PETERS, *supra* note 91, at 142–85 (discussing the reintroduction of Islamic criminal law, including its application to a legal system that was essentially Western).

<sup>170</sup> *Id.* at 150 (Saudi Arabia), 154 (Libya), 156–57 (Pakistan), 162 (Iran), 166–67 (Sudan), 171 (Northern Nigeria).

surprise that religious conservatives in the Muslim world are as curiously fixated on illicit sex as their counterparts around the world. Beyond this, however, there is considerable variation, both in scope of application and emphasis. In a nation such as Libya, where a professional judiciary schooled in transplanted law has been left to apply those Islamic crimes that have been codified, there has been little, if any, actual enforcement of the criminal codes respecting *shari'a*.<sup>171</sup> In Pakistan, much the same is true except for enforcement of blasphemy laws that are designed to target a religious minority that is a particular bane of the Pakistani Islamists—the Ahmadiyya, who claim to be Muslim but also believe that there is an Apostle after Muhammad.<sup>172</sup> Government corruption seems to have been a higher priority in the Sudan, where *shari'a* rules of theft are extended so far as to encompass acts of embezzlement.<sup>173</sup> In Iran, the first focus of attention following the Revolution was political crimes, tried under *shari'a*.<sup>174</sup>

The case of criminal law also demonstrates amply that selectivity of “*shari'afication*” by Islamist forces spans not only areas of law, but also geography. In fact, the role of *shari'a* in the area of criminal law depends not only on the relative strength of Islamist forces, but also on the relative priorities of their respective selective legislative agendas. The Islamists of Pakistan, Iran and the Sudan have seemed rather aggressive and broad in their approaches, seeking a prominent role for *shari'a* in any number of areas. By comparison, and perhaps on the other extreme, Iraq's Islamists, have comparatively little on their public legislative agenda in terms of *shari'a* beyond personal status, save, at least for the Shi'a Islamists, ensuring seats on the Federal Supreme Court for appointees of the jurists of Najaf. This more limited agenda may be attributed to dependence on American influence and support, and divisions between the Sunni, the Shi'a, and the generally secular Kurds.<sup>175</sup> Certainly, criminal law has not been mentioned by the Iraqis at all in any prominent capacity. Hamas seems likewise relatively unconcerned with a broad legislative agenda.<sup>176</sup> Regional Islamist parties in Indonesia probably lie somewhere between these

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<sup>171</sup> *Id.* at 155.

<sup>172</sup> *Id.* at 158, 160.

<sup>173</sup> *Id.* at 166.

<sup>174</sup> *Id.* at 160–61.

<sup>175</sup> Posting of Haider Ala Hamoudi to Islamic Law in Our Times: Fundamental Misunderstandings of Law and Islam in Iraq, <http://muslimlawprof.org/2008/09/29/sharia.aspx> (Sept. 29, 2008, 8:29 EST).

<sup>176</sup> Ian Fisher et al., *Palestinians Debate Shades of Islamic Law*, N.Y. TIMES, Feb. 1, 2006, at A12.

two poles—more committed to aspects of *shari'a* than Iraq's Islamists, but also limited in the amount of *shari'a* they wish to, or can, adopt.<sup>177</sup>

#### IV. THE INCOHERENCE OF REPUGNANCY

##### A. *The Theory of Repugnancy*

The supposed salvation to the incoherence of Islamist legal selectivity often comes in the repugnancy clause of various Muslim state constitutions. This clause, either as enacted or as subsequently interpreted by the judiciary, requires that all law conform to something equivalent to the core tenets of the *shari'a*. Egypt's Supreme Constitutional Court has declared that a 1980 Amendment to the Constitution indicating that the principles of the *shari'a* are the main source of legislation has this effect,<sup>178</sup> and the constitutions of both Afghanistan and Iraq have more explicit provisions requiring conformity. The Iraqi Constitution's Article 2 prohibits legislation that conflicts with the "certain rulings" of Islam, the rights granted in the Constitution, and the principles of democracy.<sup>179</sup> Afghanistan's Constitution goes further, voiding legislation that conflicts with the "beliefs and provisions" of Islam.<sup>180</sup>

With this, some form of Islamicity is assumed to return to state structure. Under this approach, the juristic manuals may well reflect *shari'a*, yet the law is permitted to deviate from that, and even adopt transplanted law, so long as it does not create some sort of irreconcilable conflict with *shari'a*. Certainly scholars in our legal academy seem to think that this trend towards repugnancy clauses portends increased focus on *shari'a* in the Muslim state. Rabb and Lombardi offer nuanced and careful portrayals of the phenomenon they call, respectively, "Islamic constitutionalism" and "constitutional Islamization" in the specific contexts of Iraq and Egypt, but leave no doubt that these trends signify something important about the increasing role of Islam in the state.<sup>181</sup> Larry Backer has also commented on the rise in "theocratic constitutionalism," using repugnancy as one example of this broader epiphenomenon.<sup>182</sup>

Moreover, some scholars have begun to challenge the traditional notion that the juristic rules that form the corpus of the *shari'a* ever were, by necessity,

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<sup>177</sup> Moch. Nur Ichwan, *The Politics of Shari'atization: Central Governmental and Regional Discourses of Shari'a Implementation in Aceh*, in *ISLAMIC LAW IN CONTEMPORARY INDONESIA: IDEAS AND INSTITUTIONS* 193, 210–15 (R. Michael Feener & Mark E. Cammack eds., 2007).

<sup>178</sup> LOMBARDI, *supra* note 19, at 167.

<sup>179</sup> IRAQ CONST. art. 2 (author's translation).

<sup>180</sup> AFG. CONST. ch. 1, art. 3.

<sup>181</sup> Rabb, *supra* note 17, at 528–29; LOMBARDI, *supra* note 19, at 1.

<sup>182</sup> Backer, *supra* note 16, at 16, 39–43.

the rules on which the legal order was based. One scholar has suggested that wide compass was granted to the caliph under classical constitutional theory to enact legislation so long as it conformed to particular notions of the public interest and did not violate consensus determinations of the jurists.<sup>183</sup> Lombardi has raised similar ideas in his work on the Supreme Constitutional Court in Egypt.<sup>184</sup> Finally, Asifa Qureishi suggests in her work that there is an interplay between caliphal determination and *shari'a* that expands the possibilities of transplanted legislation considerably, again so long as certain public interest indicia and consistency with broad notions of *shari'a* are met.<sup>185</sup>

Might then the Islamist project be resurrected on the basis of such ideas? Not likely, for the reasons provided below.

#### *B. The Islamic State, Without Islamic Law*

Perhaps the most important point to make about the repugnancy clauses is that, to the extent that they posit an “Islamic State,” it appears to be one largely divorced from Islamic law, rather than some vague notion of Islamic values. This may well be legitimate from a historical perspective or under some other theory, but it hardly portends the rise of Islamic law, so much as the non-*shari'a* based Islamic state.

Under the repugnancy approach, God’s law has been reduced from lengthy and extensive rules in virtually all areas of law into a series of limited prohibitions and grants of permission unrelated to one another that operate against a separate, transplanted legal system. I do not wish to enter the fray and voice any opinion in these few lines on whether the classical system actually countenanced something akin to this—namely, the right of the legislature to obliterate *shari'a* entirely, preventing resort to it subject only to some vague notion of public interest as well as absolute prohibitions contained in *shari'a*, whatever those may be. I will only say that if this is actually a classical theory, then it would perhaps be a mistake to suggest as I have, that *shari'a* died with the advent of the colonial era. Perhaps it would be more accurate to state that the *shari'a* never lived at all, as its relevance in the actual legal order seems remarkably small.

Iraq provides the best example of the limits of repugnancy. Article 2 of the Iraqi Constitution reads in relevant part: “A. No law may be enacted that

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<sup>183</sup> *Id.* at 39–40.

<sup>184</sup> LOMBARDI, *supra* note 19, at 47–54.

<sup>185</sup> See Asifa Quraishi, *Who Says Shari'a Demands the Stoning of Women? A Description of Islamic Law and Constitutionalism*, 1 BERK. J. MIDDLE E. & ISLAMIC L. 163 (2008) (discussing the interaction between *shari'a*, the caliph, and the public good).

contradicts the certain rulings of Islam. B. No law may be enacted that contradicts the principles of democracy. C. No law may be enacted that contradicts the rights and basic freedoms stipulated in this Constitution.”<sup>186</sup>

It is hard to see how any theory in which God’s law is supposed to be supreme could be reconciled with a clause that puts God’s law, when sufficiently established, on equal status with rights and freedoms established by man’s law. God’s law under this approach is no more or less important than the constitutional right to learn Aramaic in public school, which is a separate constitutional right.<sup>187</sup>

These clauses are, in addition, at times given more attention than they deserve in terms of their use to meaningfully change the legal order to reassert the primacy of God’s law. Iraq’s repugnancy clause, for example, has received attention from any number of respected scholars.<sup>188</sup> Noah Feldman goes so far as to use the constitutional scheme to demonstrate the primacy of *shari’a* in the new legal framework.<sup>189</sup> All of this attention, ironically enough, concerns a provision that has not been interpreted even once in Iraq by the nation’s highest tribunal despite rulings and advisory opinions in dozens, and perhaps hundreds, of other constitutional matters over the past five years.<sup>190</sup> One would think that were repugnancy to have such a profound effect on law and legal order in Iraq, the courts would have begun providing some level of definition to it by now.

It is true that the Egyptian Supreme Constitutional Court has a long history of interpreting its own repugnancy clause.<sup>191</sup> I have always been deeply skeptical of the quality and consistency of the Court’s reasoning, for reasons that need not be recounted here.<sup>192</sup> However, it suffices to say that repugnancy in Egypt does not herald the end of the transplant. In fact, the Court decided in one of its earliest cases that laws in force prior to the amendment of Article 2 in 1980, wherein repugnancy was established, could not be challenged in court

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<sup>186</sup> IRAQ CONST. art. 2 (author’s translation).

<sup>187</sup> *Id.* art. 4.

<sup>188</sup> Backer, *supra* note 16, at 47; Rabb, *supra* note 17, at 535–40.

<sup>189</sup> FELDMAN, *supra* note 15, at 2–4.

<sup>190</sup> In my current role as a consultant on a project to revise the Iraqi Constitution, I have had occasion to read through the extensive opinions of the Iraqi Supreme Federal Court, available in Arabic at <http://www.iraqijudicature.org>.

<sup>191</sup> See LOMBARDI, *supra* note 19, at 174–269 (outlining the history, application, and reception of Egypt’s Article 2 jurisprudence).

<sup>192</sup> See Hamoudi, *supra* note 19, at 94–97 (explaining the court’s inconsistent application of its principles).

on the grounds of repugnancy.<sup>193</sup> Nearly all transplanted law is, therefore, immune from constitutional challenge.

*C. The Irrelevance of Repugnancy to Shari'a Debate*

Even more importantly, whether or not the state, with transplanted codes and repugnancy as so understood, may be deemed an Islamic state under some set of norms, such a view of the relatively marginal role of *shari'a* is entirely *inconsistent* with the position of Islamists, who demand considerably more *shari'a* conformity in certain areas. One need look no further than to the vociferous Islamist objection to Jihan's Law, a piece of legislation advocated by Egypt's former President Sadat as a means to advance women's rights in Egypt.<sup>194</sup> One of the provisions to which there was so much objection was the obligation of a man to provide alimony for his wife for a period of two years following a divorce.<sup>195</sup> Yet no jurist has suggested that a man *cannot* support his wife for two years, only that the *shari'a* obligation terminates after three months.<sup>196</sup> To be sure this law constitutes a wealth transfer from one private party to another beyond that contemplated by the *shari'a*, and thereby establishes a theory of corrective justice that the *shari'a* nowhere recognizes, but this hardly seems to qualify under the higher bar of "repugnancy."

After all, a worse criticism might be leveled against a transplanted law of negligence because it frees a party from an obligation to pay for a damage that she may well have not been required to pay under *shari'a*. That is, the juristic texts make a party liable for causing a direct injury to another irrespective of intention or negligence (including, for example, striking someone with a car under circumstances where the injury could not reasonably have been avoided by the driver). Commentaries of Muslim countries that have adopted negligence point this out, and then point out it has been dropped in favor of a theory of negligence originating in Roman law.<sup>197</sup> Yet these provisions of

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<sup>193</sup> Rector of the Azhar Univ. v. President of the Republic, [1985] (Egypt), reprinted in *Supreme Constitutional Court (Egypt) - Shari'a and Riba: Decision in Case No. 20 of Judicial Year No. 1*, 1 ARAB L.Q. 100, 104 (1985).

<sup>194</sup> LOMBARDI, *supra* note 19, at 169–70. Among other things, Jihan's Law entitled a woman to a divorce if her husband took a second wife, granted a woman a right to two years alimony beyond the three months required by *shari'a*, and increased rights of custody for women. See generally El Alami, *supra* note 21, at 116 (discussing Jihan's law).

<sup>195</sup> LOMBARDI, *supra* note 19, at 170.

<sup>196</sup> ESPOSITO, *supra* note 20, at 20.

<sup>197</sup> See, e.g., 1 ABDUL MAJID AL HAKIM, AL WAJIZ NADHIRIYAT AL ILTIZAM [THE SUMMARY OF THE THEORY OF OBLIGATION] 218 (1980) (indicating that under Islamic Law all direct injuries are compensable while Iraqi law adopts the French theory that intent or negligence is necessary);

modern civil codes are, as this Article has pointed out, uncontested. The conclusion is that in tort, certain transfers of wealth that God's law *requires* may be ignored in favor of Western rules, yet the *silence* of God's law on particular wealth transfers in family law cannot be supplemented with man's law. No theory of repugnancy can possibly coherently incorporate this incredible discrepancy.

Even starker examples are available. Even as the Iraq Civil Code permits the taking of interest, and Islamist members of the cabinet accept the principle of the payment of interest, Islamist desire with respect to personal status in Iraq is quite different. It is not merely to deny the legislature the latitude implied by repugnancy in enacting legislation, it is to strip the legislature of any control over all matters of personal status, directing judges instead to apply the *shari'a* in its uncodified form.<sup>198</sup>

## V. LAW AND EXPERIENCE IN THE BROADER MUSLIM WORLD

### A. *The Future of Shari'a*

That there is an incoherence to the Islamist view of the role of *shari'a* in the state does not preclude considerations of future paths to the *shari'a*. Inconsistency in logic is fundamentally different from idiosyncratic unpredictability, and given the obvious and durable preference for selectivity, one might well be able to make some prognostications for the relationship of *shari'a* to law in the Muslim world in the years to come.

*First*, it seems relatively obvious that the broad divergence in *shari'a* adoption across both subject matter and geographical location in various Muslim states will only increase with time. It is perfectly clear, for example, that even as Iran adopts a post-Revolution Commercial Code that relies heavily on transplanted ideas,<sup>199</sup> and even as Saudi Arabia manages to wrestle commercial disputes out of the hands of religious authorities,<sup>200</sup> the trend in personal status in Iraq appears to be in the other direction.<sup>201</sup>

Likewise, the broad diversity of agendas that selectivity permits Islamist movements to bear will continue, or even increase. When Islamists are able

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*see also* ABDUL RAZZAQ AL SANHURI, AL WAJIZ FI AL HADHIRIYA AL-'AAMA LIL ILTIZAM [THE SUMMARY OF THE GENERAL THEORY OF OBLIGATION] 320–21 (2004) (describing Western origins of theory of negligence).

<sup>198</sup> Hamoudi, *supra* note 163, at 543–46.

<sup>199</sup> Iran Commercial Code, *supra* note 129, art. 1.

<sup>200</sup> VOGEL, *supra* note 39, at 304–05.

<sup>201</sup> Hamoudi, *supra* note 163, at 543–44.



to succeed by coup or revolution, as in the Sudan<sup>202</sup> or Iran,<sup>203</sup> they have a freer hand in operations and tend to implement considerably more. Yet for every Sudan and Iran, there is a Hamas—popular, violent, and inspiring to the Muslim imagination because of its association with resistance to colonialism, of which Zionism is seen in much of the Muslim world as a premier example.<sup>204</sup> However, Hamas is severely limited in its legislative agenda given the primacy attached to conflict with Israel, the continuing political and military competition with Mahmoud Abbas and his more secular Fatah movement, and a substantial secular (not to mention Christian) population.<sup>205</sup> The use of the *shari'a* as a vehicle of resistance against the West and its perceived client, Israel, serves Hamas well, but a proposal to stone adulterers would not.

*Second*, the selective adoption of *shari'a* in a manner that both confronts the West in spectacle, while remaining broadly faithful to global expectations respecting commerce in particular, is only likely to continue. The trend of resistance to perceived Western imperialism, and the anger induced thereby, extends far beyond the simple question of Israel. The term *muqawama*, or resistance, has become something of a mantra for various revivalist groups notwithstanding the fact that the term has no Islamic pedigree.<sup>206</sup> The notion that the *shari'a* can provide an independent form of order, thereby enabling Muslims to establish an authentic and legitimate alternative to the hegemonic West runs strong.<sup>207</sup> While few movements would in fact cause significant economic damage to themselves by taking such rhetoric seriously, other, largely symbolic acts of resistance are likely to continue. Homosexuality, for example, is likely to remain deeply repressed, and anything suggesting of sexual freedom commonly associated with the West—whether that be the veil, interactions between the genders, or co-education is likely to remain controversial. The stoning of adulterers may be the most dramatic means of expressing an identitarian distinction from the supposed decadent and licentious West, but it is hardly the only one.

*Finally*, diversity in the manner in which *shari'a* is applicable extends well beyond what may be enacted as state law. The main role that *shari'a* plays in the lives of ordinary Muslims is through the extensive rules on ritual and

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<sup>202</sup> Abdullahi An-Na'im, *The Contingent Universality Of Human Rights: The Case of Freedom of Expression in African and Islamic Contexts*, 11 EMORY INT'L L. REV. 29, 58-59 (1997).

<sup>203</sup> See *supra* Part III.B.

<sup>204</sup> Hamoudi, *supra* note 68, at 464-65.

<sup>205</sup> Fisher et al., *supra* note 176.

<sup>206</sup> Hamoudi, *supra* note 68, at 463-64.

<sup>207</sup> Hamoudi, *supra* note 28, at 251.

worship, none of which receive very much recognition by way of state law.<sup>208</sup> In addition, Islamic finance thrives most often through the use of legal systems that claim no adherence to the *shari'a* of any kind.<sup>209</sup> The practice has continued to expand unabated.<sup>210</sup> Aside from Islamic finance, other merchant communities will likely continue to rely on their own informal rules, derived largely from *shari'a*, in regulating their own commercial practices.<sup>211</sup> It is one thing to suggest that the wholesale adoption of *shari'a* private and commercial law would be disastrous for a national economy, but it is another to suggest that small, insular merchant communities will not be able to engage in their own self-policing beyond state regulation in a manner that relies more heavily, though not exclusively, on *shari'a*.

It is, in the end, quite difficult to know, with any degree of reliability, precisely how important *shari'a* will be in the Muslim states in the years to come. However, one thing has become absolutely clear. The idea that God must legitimize the state and that the law of the state can only be deemed acceptable if somehow in conformity with God's law, as reflected, however imperfectly, in the juristic manuals, is a notion of the past. While *shari'a* continues to play a role in the modern Muslim state, it is but one of many influences in the tumultuous, politicized, state-driven process through which law is made and interpreted. The idea that its role should be anything more prominent than this, that it should, in other words, be the standard by which the state operates, exclusively or even primarily, is, in practice even if not in rhetoric, dead. Some may lament its passing, others may celebrate it, but as scholars, more than anything else, we must recognize it.

#### *B. Shari'a in Our Scholarship—The Brooding Omnipresence*

The notion here presented, that logic does not give life to the law, and that there is a distinction that can be discerned between the actions of decision makers and their words, is, of course, hardly unique to the Muslim world. In fact, for all the criticisms that might be made of Islamic movements, it is not a failing of Islamists that their legal theory is fundamentally incoherent, as no other choice avails itself. They cannot demand the significant retraction of the state's transplanted law over *shari'a*, in light of the many areas where the

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<sup>208</sup> For an extensive treatment of such rules in the Shi'i tradition, see generally SISTANI RISALA, *supra* note 124, at vol. 1.

<sup>209</sup> Moghul & Ahmed, *supra* note 143, at 189–90.

<sup>210</sup> IBRAHIM WARDE, ISLAMIC FINANCE IN THE GLOBAL ECONOMY 1 (2000).

<sup>211</sup> See generally Hamoudi, *supra* note 19, at 116–22 (discussing commercial practices and the use of informal rules based on *shari'a* by Shi'i merchants in Iraq).

*shari'a* is simply unequipped to deal with current political and economic conditions. Nor can they support some form of complete separation of *shari'a* from law given their own ideological preferences in the structure of the family, for example. The inconsistency, born of hard experience, is fundamentally a necessity. Nevertheless, the search for logic and consistency dies hard, and many scholars resist the broader notion that even Islamists implicitly and willingly accept that the state and not Islam proclaims and enforces all law. Assumptions respecting the ubiquity of *shari'a* appear with some frequency in our scholarship as a result, presumably on the basis of the demonstrably rising interest in Islam throughout the Muslim world over the past several decades.

After all, anyone can see that the number of veils on a street in Cairo or Baghdad is much higher than it was, say, four decades ago, and surely, one might be led to assume, this must mean that *shari'a* is poised to return as the supreme law of the land. Seemingly on the basis of such assumptions, *shari'a*, as an all encompassing, comprehensive legal system, begins to creep into scholarly ruminations of the law, as if once the veil is adopted, then the commitment to Islam, and to *shari'a*, as supreme and sole law is absolute. Religion then begins to take on an outsized role relative to its importance in particular areas of law. The trial of Osama Bin Laden under rules of *shari'a* has been a recurring curiosity of mine, whether raised as a theoretical exercise in an essay in a prestigious law journal<sup>212</sup> or as a policy to be considered by the United States at the Annual Meeting of the American Society of Comparative Law,<sup>213</sup> at least partially on the assumption, it seems, that such a trial would be viewed as more legitimate to the world's Muslims. In an area far closer to my area of expertise, suggestions have appeared in scholarship to suggest that Iraq should be urged to adopt something akin to Article 9 of the Uniform Commercial Code as promulgated in the U.S., concerning the taking of security on a debt, through a justificatory exercise relying on *shari'a*, and Islamic finance in particular.<sup>214</sup>

There is something coherent and logical in suggesting that once one accepts part of the *shari'a* as God's law, then there is no choice but to accept all of it, in all areas encompassed by it, as absolutely sovereign. Yet the actualities of law in the Muslim state hardly seem to give credence to the constructed mythology of an exotic *shari'a* acting as invisible puppet master, pulling the

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<sup>212</sup> Frank E. Vogel, *The Trial of Terrorists Under Classical Islamic Law*, 43 HARV. INT'L L.J. 53 (2002).

<sup>213</sup> Faiz Ahmed, Remarks at the Annual Meeting of the American Society of Comparative Law, *The West and the Rest* (Oct. 2, 2008) (on file with author).

<sup>214</sup> Mark J. Sundahl, *Iraq, Secured Transactions, and the Promise of Islamic Law*, 40 VAND. J. TRANSNAT'L L. 1301, 1306 (2007).

requisite strings as law is developed in the state, ensuring broad conformity with the will of God. The overwhelming majority of Muslim lawyers in the world, of widely varying levels of religiosity, would be as perplexed as any American lawyer in applying Islamic criminal law to a trial of Bin Laden, because they have operated under entirely different, and largely transplanted, legal systems for nearly a century.<sup>215</sup> The idea that most of them would not accept a trial of Bin Laden under the same transplanted principles of criminal justice to which they are themselves subject seems difficult to understand or accept.

The popular mantra of more reductive accounts is that this can generally be explained by a lack of democracy; that, in other words, Muslims are overwhelmingly committed to the *shari'a* and view it as the touchstone of all legal legitimacy, but that institutions of power prevent their exercising this preference in a manner that will lead to substantive change.<sup>216</sup> This is far too simplistic an explanation, and is in any event generally outdated. Any number of democracies now exist in the Muslim world, including in nations like Indonesia<sup>217</sup> and Iraq<sup>218</sup> which have endured their share of terrorist violence,<sup>219</sup> and yet in these two countries in particular, there are no calls to deal with this violence through the reinstatement of *shari'a* criminal law. In Iraq, Grand Ayatollah Ali Sistani has repeatedly asked the state to ensure the security of the Shi'i Holy Sites,<sup>220</sup> and surely he is aware that they will not be using *shari'a* methods to enforce the criminal laws when they provide this protection. In Indonesia, calls for *shari'a* in the criminal law are generally localized in regions such as Aceh.<sup>221</sup>

With respect to the question of *shari'a* financing in Iraq, the situation is even starker. Professor Sundahl has provided careful and comprehensive information on the relationship of Islamic finance to questions of obtaining

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<sup>215</sup> Abu-Odeh, *supra* note 3, at 791–92.

<sup>216</sup> FELDMAN, *supra* note 15, at 142–45.

<sup>217</sup> Hamoudi, *supra* note 4.

<sup>218</sup> I was a witness and, indeed, a participant in Iraq's first democratic election, held in January of 2005.

<sup>219</sup> See, e.g., Dan Murphy, *Indonesian Cleric Fights for a Muslim State*, CHRISTIAN SCI. MONITOR, May 2, 2002, at 7, available at <http://www.csmonitor.com/2002/0502/p07s01-woap.html> (discussing the alleged terrorist network lead by Abu Bakar Bashir); Edward Wong & Robert F. Worth, *Shi'ite Fury Explodes in Iraq; Scores are Killed Sunnis Breck Off Talks to Form Unified Government*, INT'L HERALD TRIB., Feb. 24, 2006, at 1R, available at 2006 WL 3225498 (describing reverse attacks in Baghdad after the bombing of a Shi'ite shrine).

<sup>220</sup> Wong & Worth, *supra* note 219.

<sup>221</sup> Ichwan, *supra* note 177, at 210–11.

security over a loan,<sup>222</sup> and for this he deserves commendation. It is only when Iraq is included that one is left perplexed. Merchants in Iraq have lived for decades without Islamic finance and even Islamist parties appear relatively unconcerned with the practice.<sup>223</sup> In the area of finance in Iraq, *shari'a* is simply not part of the conversation. What then is the justification for discussing all of this in the context of Iraq? Professor Sundahl provides only one—the enactment of the Iraq Constitution, complete with its repugnancy clause.<sup>224</sup> Once a nation expresses its commitment to *shari'a*, the logic seems to run, it must be complete and entire.

It is not unusual to hear scholars lament the broad Western hostility to entertain or consider *shari'a* as a potential source of law, whether that be reluctance to engage in *shari'a* financing<sup>225</sup> or unwillingness to allow Islamist control of states.<sup>226</sup> Certainly it is true that the broad and largely unreflective demonization of *shari'a* is not helpful to understanding the region, but I am concerned with a different phenomenon, one grounded not in American unwillingness to countenance *shari'a*, but rather in what my colleague Lama Abu-Odeh refers to as “The Politics of (Mis)recognition”<sup>227</sup>—the notion that the Muslim world must somehow be understood *solely* through the lens of *shari'a* and that legitimacy in law cannot be achieved without it. I defer to no one in my distaste for American efforts in failing to grapple with the realities of *shari'a* in the Muslim state and instead seek to minimize its impact in the hopes that one day it might disappear. Still, there are different manners of hegemony in the world, and they can run in opposing directions. Personally, as one intimately connected to law in one Middle Eastern country, Iraq, I can think of nothing more insulting to the millions of Muslim lawyers, judges and law professors, some secular, some devout, many devoted to the rule of law, than to dismiss the work to which they have dedicated their lives as somehow illegitimate, inauthentic or fantastical in the eyes of their fellow citizens. There is simply no evidence to sustain such a proposition.

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<sup>222</sup> Sundahl, *supra* note 214.

<sup>223</sup> Hamoudi, *supra* note 163, at 534 n.56

<sup>224</sup> Sundahl, *supra* note 214, at 1303–04.

<sup>225</sup> *Id.* at 1306.

<sup>226</sup> FELDMAN, *supra* note 15, at 145.

<sup>227</sup> Abu-Odeh, *supra* note 3.

