

# Baghdad Booksellers, Basra Carpet Merchants, and the Law of God and Man: Legal Pluralism and the Contemporary Muslim Experience

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## INTRODUCTION

Scholarship on Muslim law and the law of Muslim nations in the American legal academy is in a state of considerable crisis that will only loom larger in the years to come. A different approach is required, one that recognizes the hybridity of the contemporary Muslim legal experience, meaning that it pays serious and careful attention not only to the transplanted, positive law of the Muslim nations, but also to the importance of a modern form of pan-national Islamic law in the shaping of legal and social order in Muslim nations. Using the example of Iraq, and focusing in particular on commerce, this article attempts to demonstrate one of the many ways in which pan-national Islamic law and codified secular national law combine to create a pluralist social and legal order in one Muslim nation.

Much of the leading scholarship in this field of Muslim law-cum-law of Muslim nations may be divided into two camps. One contingent of scholars is not attuned to comprehending and engaging the Muslim world as that world actually exists. This camp prefers instead to limit its study of “Islamic law” almost exclusively to reconstructions of classical Islamic doctrine, and the means through which this highly casuistic and theoretical doctrine was created.<sup>1</sup> For this group, which comprises of most leading modern Muslim scholars today,

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1. Part I.A of this article provides specific examples in the areas of *jihad*, finance, and the compatibility of Islam and liberal democracy.

“Islamic law” is an academic construction, a brooding omnipresence whose relationship to the social order in Muslim societies is very much a matter of debate.<sup>2</sup>

This has been challenged recently in an article by Georgetown Professor Lama Abu Odeh, who alone comprises the second scholarly contingent. Though Professor Abu Odeh makes some passing references to “hybridity” in her piece, in the substance of her article she all but dismisses the very notion of “Islamic law,” effectively replacing the term with “the law of the Muslim nations.”<sup>3</sup> To her, the law of the Muslim states is overwhelmingly not based on the *shari’a*, the vast body of rules and norms derived from Islamic foundational texts. Instead, the law of Muslim states is a transplanted legal code taken from Europe, in all areas except the law of the family.<sup>4</sup> Under such an approach, the Muslim countries belong in the same legal family as the civil law nations of the European continent and the *shari’a* is more “trace” or residue than lived reality.<sup>5</sup>

This is a deeply unsatisfactory state of affairs. As to the first group of scholars, their approach seems more reflective of the study of *shari’a* in Islamic studies departments, a degree that many in our legal academy have.<sup>6</sup> The view of Joseph Schacht, perhaps the most influential Islamic studies scholar of the previous century, was that the *shari’a* was a highly idealized legal, moral and ethical worldview that in important respects bore very little resemblance to actual legal and social practices in the classical period.<sup>7</sup>

This is not at all to suggest that all Islamic studies scholars, particularly those following Schacht, were as convinced of the highly theoretical nature of the *shari’a*.<sup>8</sup> In any event, it is not my intention to attempt to relay, let alone criticize, the debates within a field that I regard as entirely separate from my own. Rather, I might only point out that if our leading Islamic legal scholars in this field are any guide, certainly the notion that the *shari’a* is some sort of autonomous system that is not necessarily connected to reality seems rather uncontroversial. Consequently, while our leading scholars may give us much information about the context surrounding juristic rules of 12<sup>th</sup> century *jihad*, we know comparatively little about the actual practice and rules of classical era war, and even

2. *Id.*

3. See generally, Lama Abu Odeh, *The Politics of (Mis)recognition: Islamic Law Pedagogy in American Academia*, 52 AM. J. COMP. L. 789 (2004).

4. *Id.* at 791-92.

5. *Id.*

6. To take only three examples, Khaled Abou El Fadl, currently at UCLA, has a doctorate in Islamic Studies from Princeton. Frank Vogel at Harvard has a doctoral degree in Islamic Law and Middle Eastern Studies from Harvard, and Sherman Jackson is primarily a Professor of Arabic and Islamic Studies at the University of Michigan (and an adjunct professor on the law faculty), with a doctorate in Oriental Studies. This information can be gleaned from the respective websites of the law schools of UCLA, Harvard University and the University of Michigan.

7. JOSEPH SCHACHT, AN INTRODUCTION TO ISLAMIC LAW 71-85 (1964).

8. See Jorn Thielmann, *A Critical Survey of Western Law Studies in Arab-Muslim Countries in LEGAL PLURALISM IN THE ARAB WORLD* 42-45 (Baudouin Dupret, Maurits Berger and Laila al-Zwaini eds., 1999) [hereinafter LEGAL PLURALISM] (for some discussion on this subject).

less about the entirely different forms of *jihad* conducted in the modern world, and their relationship to the modern law of war.<sup>9</sup> We might learn rules on the nominate forms of contract in the classical world, or rules concerning medieval financing, but a careful review of these rules demonstrates that they have nothing to do with the practice of Islamic finance,<sup>10</sup> and in many cases are not an accurate reflection of medieval financing either.<sup>11</sup> The extensive and detailed classical rules of slavery may be fascinating to discuss and debate, but this will not change what Professor Bernard Freamon's scholarship has properly pointed out; namely, that the overwhelming consensus of modern Muslim scholars opposes the practice of slavery, and that the primary means of slave acquisition in the classical world violated the "letter, as well as the spirit" of the classical *shari'a*.<sup>12</sup>

Beyond the world of Islamic law, I wonder how many in our contemporary academy would truly describe as "law" a theoretical and academically constructed logic system that in important respects diverges wildly from anything that exists or has ever existed in the actual world. Indeed, a classical theory of partnerships that nobody bothered to follow in the classical era, a theory of war that has never been adhered to, and rules on slavery that were, when the practice of slavery was widespread, consistently ignored hardly seem like anything that we understand as "law" today.<sup>13</sup> If this is the *shari'a*, then it might best remain in Islamic studies departments.

Moreover, in law school, there is something wrong with addressing the *shari'a* as figurative ideal and not incomparable reality. It would be odd to suppose that Muslims who take the *shari'a* seriously, and who wish to incorporate it into the social order of their respective states, believe that its connection to the practical world should be anything but direct and immediate, that there is some form of religious legal order that is somehow severable from the manner in which they seek to live their lives. The insistence of scholars teaching in law schools and publishing in law reviews to ignore this reality, this contemporary *shari'a*, in favor of a construct of medieval theory, is entirely misguided.

This contingent, desperate as it is to have something to say to the rest of us in our post 9/11 world, filled with powerful and resilient Islamic movements,

9. Haider Ala Hamoudi, *The Muezzin's Call and the Tolling of the Dow Jones Bell: On the Necessity of Realism in the Study of Islamic Law*, 56 AM. J. COMP. L., Sec. I. (forthcoming Winter 2008) [hereinafter Hamoudi, *The Muezzin's Call*]. Cf. Sherman A. Jackson, *Jihad and the Modern World*, 7 J. ISLAMIC L. & CULTURE 1, 10-18 (2002).

10. Hamoudi, *The Muezzin's Call*, *supra* note 9, at Sec. III. Cf. FRANK E. VOGEL & SAMUEL L. HAYES III, *ISLAMIC LAW AND FINANCE: RELIGION, RISK AND RETURN* 37-38 (1998).

11. VOGEL & HAYES, *supra* note 10, at 132 note 4.

12. Bernard Freamon, *Slavery, Freedom and the Doctrine of Consensus in Islamic Jurisprudence*, 11 HARV. HUM. RTS. J. 1, 53 (1988).

13. Professor Freamon has also to his credit only recently pointed out the substantial dissatisfaction of many modern Muslims with classical rules, with a particular focus on the question of Qur'anic interpretation. See Bernard Freamon, *Some Reflections on Post-Enlightenment Qur'anic Hermeneutics*, 2006 MICH. ST. L. REV. 1403, 1420-22 (2006).

large and small, nationalist and pan-national, violent and democratic, attempts, at times desperately but never convincingly, to connect Muslim reality to the academic construct. However, given the very modality of operation (find the *shari'a* in the medieval scholarly texts, and connect it somehow to something in the real world), the effort is impossible. We all know, after all, that the law as practiced cannot be so simply derived from the “law” as written, particularly when several centuries separate the two.

As to Professor Abu Odeh’s national-centralist approach, the paradox is immediate and apparent. If the law in our Muslim nations truly belongs in the civil law family, and the *shari'a* bears only marginal relevance to the substance of the law, at least beyond the law of the family, then a question necessarily follows. What is it that makes the law of the several Muslim nations distinctive as a collective? That is, what commonalities link Indonesia to Morocco, Djibouti to Azerbaijan, and Egypt to Brunei? Indonesia has a civil code largely derived from the Dutch,<sup>14</sup> Egypt’s civil code has been developed by Abdul Razzaq al Sanhuri and is purported to be his own blend of Roman law and Islamic classical law,<sup>15</sup> and Brunei’s commercial legislation is adopted largely from English law.<sup>16</sup> Other than Islam, and a tenuous adherence to a common, pan-national set of principles understood to be “Islamic law”, what unites these countries’ legal systems? It seems that to the extent that the pan-national *shari'a* is no more than trace and of marginal relevance, and to the extent that Islam as a religion has been privatized and no longer operates in any significant fashion to shape legal order, then “the law of the Muslim nations” is not in any way a coherent concept, in that the legal systems of the disparate Muslim nations are not meaningfully related. Instead, Indonesia should be discussed alongside its Southeast Asian neighbors, Egypt should be placed in a Middle Eastern legal family, and Azerbaijan belongs with its fellow Central Asian republics of the former Soviet Union.

And indeed, such groupings may in certain contexts be entirely sensible. It would be foolish to suggest that the former Soviet Union Central Asian republics share nothing by the way of legal culture, or that Indonesia’s legal order has not been influenced by that of Thailand, or Singapore. Nevertheless, the fact remains that the *shari'a* has a fundamental influence on the manner in which law and rules are projected in the social orders of Muslim societies. This makes the study of the *shari'a*, as a *contemporary* concept operating in national jurisdictions alongside national law, important in our law schools in this post 9/11 era. The relationship of this influence on the social order, and on real outcomes in real disputes in contemporary societies, is central to understanding the operation

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14. THOMAS H. REYNOLDS AND ARTURO A. FLORES, III, A FOREIGN LAW GUIDE IN JURISDICTIONS OF THE WORLD: CURRENT SOURCES OF CODES AND BASIC LEGISLATION AT INDONESIA 1.

15. CLARK B. LOMBARDI, STATE LAW AS ISLAMIC LAW IN MODERN EGYPT 98 (2006).

16. Reynolds and Flores, *supra* note 14, at Brunei 1-2.

of law in much of the Muslim world. This article argues that to understand legal order in Muslim nations, one must take into account two primary bodies of law. The first is the national codified law and the second is a contemporary form of the pan-national *shari'a* as Muslims understand and approach it. In other words, the appropriate model is a legal pluralist one, defined for the purposes of this article in the words of Gordon R. Woodman, a premier scholar in the field, as “the condition in which a population observes more than one body of law.”<sup>17</sup>

The interaction of these two bodies of law takes many forms in the Muslim world, not all of which are pluralist. For example, an approach to *codify* modern understandings of *shari'a* is hardly pluralist *per se*, in that while *shari'a* has been borrowed, it no longer acts as an independent influence. Codification effectively collapses the two bodies of law, *shari'a* on the one hand and national law on the other, into one. Moreover, inasmuch as such “borrowing” occurs in the codification process, outside of Iran, it is almost always done in such a Sunni-centric manner as to render it entirely illegitimate in the view of the Shi'i world. This can be shown by the codification methodology employed by Abdul Razzaq Al Sanhuri, who claimed to have adopted much of Islamic law in drafting his Civil Codes for Egypt and Iraq that later became the template for the entire Middle East.<sup>18</sup> Sanhuri's method involved discovering the principles of the *shari'a* through extensive comparative study of the Sunni classical schools and then using those principles to draft legislation in conformity therewith.<sup>19</sup> There has been vigorous scholarly debate as to whether or not the Civil Code that emerged from this process was truly “Islamic,” particularly given its suspicious similarity to Roman law.<sup>20</sup> What is frequently overlooked, however, possibly because most of this debate has centered on Sanhuri's work in Egypt and not Iraq, is how fundamentally Sunni-centric this process is.

This is because within Shi'i Islam, the interpretation of the *shari'a* belongs to a select group of high scholars, each termed a *mujtahid*, with the entire group collectively referred to as the *marja'iyya*.<sup>21</sup> Shi'i lay persons are expected to select a single, living *mujtahid* whose rulings on *shari'a*, contained in a master

17. Gordon R. Woodman, *The Idea of Legal Pluralism* in LEGAL PLURALISM, *supra* note 8, at 3.

18. ENID HILL, AL-SANHURI AND ISLAMIC LAW 68-70 (1987).

19. LOMBARDI, *supra* note 15, at 93-100.

20. Hill, *supra* note 18, at 71-83 (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 the Civil Code*, 1 ISLAMIC Q. 29-46 (1954). See Amr Shalakany, *Between Identity and Redistribution: Sanhuri, Genealogy and the Will to Islamise*, ISLAMIC L. & SOC'Y. 201 (2001) (for a contemporary contribution).

21. Haider Ala Hamoudi, *You Say You Want a Revolution: Interpretive Communities and the Origins of Islamic Finance*, 48 VA. J. INT'L. L. 249, 267-70 (2008) [hereinafter Hamoudi, *Revolution*]. This article focuses on the dominant (and well nigh exclusive) form of Shi'ism that exists within Iraq known as Twelver Shi'ism, and all references to Shi'ism should therefore be understood to be references to that particular form. See Hamoudi, *Revolution*, *supra* note 21, at 254 note 19.

work known as the *risala 'amaliyya*, they must follow without question.<sup>22</sup> It is unthinkable within the Shi'i paradigm that a state judge seeking a rule on *shari'a* would go beyond an answer provided by the *mujtahids*.<sup>23</sup> The notion that *shari'a* may be determined from judicial or legislative perusal of classical texts is therefore entirely rejected in Shi'i Islam.

This point often seems lost on contemporary scholars more schooled in Sunni Islam than Shi'i. They correctly indicate that the Iraqi Civil Code has a "gap filler" clause that permits recourse to the *shari'a* "without limitation as to school of thought"<sup>24</sup> to supply a rule where the Code is silent and no rule of ordinary custom or usage applies.<sup>25</sup> They further indicate, again correctly, that this methodology was meant to appeal to the Shi'a.<sup>26</sup> What is missing, however, is a discussion of how inadequate such an attempt is within the Shi'i framework. The entire Code was developed without reference to the views of the *marja'iyya* but rather to medieval Sunni authorities. The notion that thus developed the Code is "Islamic" in the Shi'i context because it permits reference to Shi'i *shari'a* rules as gap fillers seems highly suspect. It is as if a code were written that claimed to be Christian, exclusively using sources such as the works of Martin Luther and John Calvin, and then indicated that, only when the code was silent, then rulings of the Pope, or of leading Protestant theologians, could be adopted by the court. It is hard to see how any plausible claim of Catholicity could be made.

Nevertheless, while the role of generalized *shari'a* is necessarily limited when it acts solely as gap filler to a national code, it cannot be ignored entirely. Any judge choosing to apply *shari'a* would necessarily rely on pan-national understandings.<sup>27</sup> This is particularly the case if the judge were to select Shi'i rules, which would necessarily be taken from one of the several living *mujtahids*, whose rulings transcend national boundaries in that they are adopted by lay Shi'is from different countries.<sup>28</sup> There is thus some limited level of pluralism in

22. *Id.*

23. Haider Ala Hamoudi, *Money Laundering Amidst Mortars: Legislative Process and State Authority in Post-Invasion Iraq*, 16 *TRANSNAT'L L. & CONTEMP. PROBS.* 523, 539 (2007) [hereinafter Hamoudi, *Money Laundering*].

24. *Al Qanun Al Madani Raqm 40 li sanat 1951 wa ta'deelatihi* [Law 40/1951, the Iraq Civil Code, together with its amendments] (3d ed. 2002) [hereinafter "IRAQ CIV. CODE"] at art. 1(2).

25. See, e.g., Zuhair E. Jwaideh, *The New Civil Code of Iraq*, 22 *GEO. WASH. L. REV.* 176, 181 (1953); Kristen A. Stilt, *Islamic Law and the Making and the Remaking of the Iraqi Legal System*, 36 *GEO. WASH. INT'L. L. REV.* 695, 747-48 (2004); Dan E. Stigall, *Iraqi Civil Law: Its Sources, Substance and Sundering*, 16 *J. TRANSNAT'L. L. & POL'Y.* 1, 15-16 (quoting Jwaideh and Stilt).

26. Jwaideh, *supra* note 25, at 181; Stilt, *supra* note 25, at 747-48; Stigall, *supra* note 25, at 15-16.

27. For an interesting treatment of the role of gap filler clauses and their effects on unfair terms in contracts clauses and the manner in which they can transcend any single nation-state, see *The Treatment of Unfair Terms in Arab Countries* in *LEGAL PLURALISM*, *supra* note 8, at 125-32.

28. Hamoudi, *Revolution*, *supra* note 21, at 268.

this process, given the relevance of both the national code and the *shari'a* as gap filler.

In other contexts, the role of *shari'a* in a pluralistic structure might be much more pronounced. One such example is where a constitutional provision requires that legislation be in conformity with the *shari'a*. Examples of such forms of pluralism are replete in the Muslim world, appearing in nations as disparate as Malaysia,<sup>29</sup> Afghanistan,<sup>30</sup> Iraq,<sup>31</sup> and parts of Nigeria.<sup>32</sup> In these cases, the *shari'a* is at least technically supreme over the national law, rendering any dismissal of it as “trace” at least subject to contention.

At other times, questions of supremacy are inexact and in any event inapposite to the matter. For example, it hardly seems sensible to wonder whether state or Islamic regulatory rules are “supreme” in the governance of Islamic financial institutions. I have never heard of an Islamic bank that would claim to flout local law; but, at the same time, it is obvious that Islamic finance operates internationally according to a set of modern Islamic rules that are by and large pan-national and that are administered far more by Muslim scholars than state authorities.<sup>33</sup> The modern Muslim law of war is another such example, governed by both international law and modern conceptions of *jihad*.<sup>34</sup>

This article focuses on a slightly different plane of interaction between *shari'a* and national law, one in which the role of *shari'a* is pronounced, but in a less formal capacity than in the examples provided above. It focuses on the particular case of Iraq, and Shi'i merchants within it. The point is not to demonstrate any universality to the specific Iraqi experiences I highlight, clearly the diversity in the Muslim world demonstrates that the interplay of state law to *shari'a* will take a multiplicity of forms depending on context and circumstance. However, the example is instructive because it is a concrete example of a particular type of interaction that has been dramatically understudied.<sup>35</sup> Specifically, this article demonstrates how commercial order in Iraq, and in particular among specific categories of Shi'i Iraqi merchants, booksellers and textile dealers, has been organized through two central sets of rules and principles. The first of these influences is the national law, the civil code, drafted by Abdul Razzaq al-Sanhuri,<sup>36</sup> reflecting modern conceptions similar to those prevailing in civil

29. IBRAHIM WARDE, *ISLAMIC FINANCE IN THE GLOBAL ECONOMY* 125-26 (2000).

30. AFGHAN. CONST. art. III (not permitting laws that violate Islamic beliefs and provisions).

31. IRAQ CIV. CODE *supra* note 24, at art. I (gap filler); IRAQ CONST. art. II (not permitting laws that contradict the universal tenets of *shari'a*).

32. Ogechi E. Anyanwu, *Crime and Justice in Postcolonial Nigeria: The Justifications and Challenges of Islamic Law of Shari'ah*, 21 J. L. & RELIGION 315, 316-17 (2006).

33. See *infra* Section II.B for further discussion on this.

34. Hamoudi, *The Muezzin's Call*, *supra* note 9, at Sec. VI.

35. Though understudied, this is not the first paper to focus on the more informal role of *shari'a* in the contemporary context. For another modern example using Syria, see Maurits Berger, *The Shari'a and Legal Pluralism: The Example of Syria*, in *LEGAL PLURALISM*, *supra* note 8, at 113-24.

36. Hill, *supra* note 18, at 68-70.

law countries in the West. The second set of rules and principles, which is administered and enforced on a more informal and localized basis, is the *shari'a* as developed by the Najaf-based clerical authorities.

On their own, clerical notions of economic and commercial order are entirely impossible, for primarily four reasons. First, the rules are imprecise. Second, they focus largely on matters of little concern to modern merchants. Third, they suggest notions of charity and good deeds that are inapposite in the context of the commercial cultures in question, and finally, they leave significant gaps in governance.<sup>37</sup> For that reason, transactions in goods among Shi'i Iraqi merchants largely reflect the rules and structures of the Iraqi Civil Code.

However, the rules proffered by the *marja'iyya* loom large in two contexts. First, they are important when the religious rules unambiguously forbid particular activities that the Iraq Civil Code permits, such as collecting or paying interest on a loan. In these cases, commercial practice follows the central commercial prohibitions, because violating the *shari'a* significantly diminishes any realistic hope of enforcement. This is not to say that debt-based financing is not practiced in these industries, it most certainly is, but artifices explicitly sanctioned by the *marja'iyya* are used, usually to achieve the equivalent of a loan with interest at extraordinarily high effective interest rates.

The second area where the role of the *shari'a* is of central importance is where the *shari'a* provides rules that are considerably more flexible than the Civil Code, such as taking security against a debt. Iraqi law requires either a transfer of a title document or something akin to possession to impose a security interest, neither of which is convenient in the case of securing portable goods such as books and textiles.<sup>38</sup> In such cases, commercial actors do not hesitate to take advantage of the *shari'a*'s superior attributes, which do not include the state law requirements, in order to facilitate commerce, knowing that state law provisions will not hinder a merchant's ability to enforce a debt through his security interest even if state requirements are not met respecting the perfection of the security interest. Thus, it is neither national law nor the *shari'a* that defines the commercial order but rather a hybrid of the two, and failure to take either the modern *shari'a*, or the law, seriously, will lead to a fundamental misunderstanding of parts of Iraqi commerce.

I have divided this article into six parts. Part I engages current approaches to legal scholarship in the Muslim world and highlights the fundamental problems with these approaches. Part II discusses alternative, hybridic understandings of the manner in which various legal systems combine to operate and control the Muslim polity, with a special emphasis on the possibilities unlocked by legal pluralism. Part III outlines Iraqi commercial law and its shortcomings. Part IV provides a synopsis and critique of *shari'a* commercial rules as set forth by the clerical establishment. Part V discusses how these two systems of rule, each

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37. See *infra* Sec. IV.

38. See *infra* Sec. IV and V.C.



impossible on its own, create the reality of commercial order in Iraq, drawing on specific commercial practices in Iraq's bookselling and textile industries. Part VI offers broader lessons from the exercise.

## I FAILURES OF THE CURRENT PARADIGM

### *A. Traditional Approaches to Understanding the Shari'a*

To understand the crisis in the traditional approach to Islamic law scholarship today and its considerable digression from the manner in which law is generally approached in the American legal academy, I invite the reader, who I assume to be well schooled in the ways of our academy, to consider the following counterfactual. Suppose that within our law schools, in our teaching and in our scholarship, we continued to focus, as the Founders did, primarily on the works of William Blackstone<sup>39</sup> and Sir Edward Coke<sup>40</sup> and their learned near-contemporaries. Suppose that Blackstone's *Commentaries*<sup>41</sup> and Sir Coke's *Reports* and *Institutes*<sup>42</sup> were still our primary pedagogical texts, and the subject of the bulk of our scholarly endeavors. Suppose again that in evaluating, analyzing and discussing legal events since that time, we understood them in light of, and as no more than adjustments to, the pronouncements of the English forbears to our legal tradition. The Sherman Anti-Trust Act<sup>43</sup> would then be viewed as the codification of the *Case of the Monopolies*;<sup>44</sup> *Marbury v. Madison*<sup>45</sup> understood as little more than the constitutionalization of *Dr. Bonham's Case*;<sup>46</sup> and James Kent's *Commentaries*<sup>47</sup> considered the embodiment of the basic principles of corporate law, with all that followed being nothing more than elucidation of the

39. Concerning Blackstone's influence on the Founders, see Albert W. Alschuler, *Rediscovering Blackstone*, 145 U. PA. L. REV. 1, 7-8 (1996).

40. Kevin Ryan, *Lex Et Ratio: Coke, the Rule of Law and Executive Power*, 31 VER. B. J. 9, note 4 ("English common law at the time of the Founders was literally Coke's law.").

41. There seems to be broad consensus that Blackstone's *Commentaries* were very influential in the United States legal community until the beginning of the 20<sup>th</sup> century. Alschuler, *supra* note 39, at 8 (quoting Mary Ann Glendon) ("It would be hard to exaggerate the degree of esteem in which . . . the Commentaries were held.").

42. Again, Coke's influence on the evolution of American law is significant. Ryan, *supra* note 40, at note 4 ("[T]he shape given the law in Coke's *Reports* and *Institutes* became the foundation of legal learning, and the basis upon which the common law developed in England and her colonies, for the next two centuries.").

43. 15 U.S.C. § 1-7 (2007).

44. *Darcy v. Allein (The Case of Monopolies)*, 77 Eng. Rep. 1260 (1603) (declaring an exclusive right to produce any good to be unlawful under the common law).

45. *Marbury v. Madison*, 5 U.S. 137 (1803).

46. 8 Co. Rep. 114 (Court of Common Pleas 1610) (declaring an Act of Parliament to be in violation of "common right and reason" and therefore void).

47. JAMES KENT, COMMENTARIES ON AMERICAN LAW, Lec. 33 (Of Corporations) (1826).

principles of the likes of Kent, Blackstone, and Sir Coke. Suppose, moreover, that professors, judges, lawyers, and students were evaluated based on what they knew about such luminaries. A true doctor of the law would be one who had written a dissertation on the rules concerning succession of the English kings, or the nature of the English charters in the United States, or the proper understanding of the positions of Blackstone and Sir Coke on the *Magna Carta*, or Kent on the Constitution. Those who could only understand the Sherman Act on its own terms would be dismissed as tradesmen, vocational law-mechanics who barely understood the true functions and nature of the law. What might result from an adoption of this unusual, or perhaps, more aptly phrased, traditionalist, paradigm?

Naturally, this is an impossible question to answer with any degree of reliability, but if I might indulge the reader in further speculation, honed through the benefit of the somewhat comparable Muslim experience, I might suggest that a likely consequence would be a significant scholarly devaluing of nearly all legal developments that occurred after the passing of the supposed Golden Era of the luminaries of the law. Citations to modern case law and modern statutes would be limited, supplanted in large part by references to 17<sup>th</sup> century English case law involving situations bearing little resemblance to the issue before the court. Those who might dare to point out the absurdity of drawing reference to dead jurists who lived in markedly different times and social contexts would be dismissed and derided. The works of Kent, or Blackstone, or Sir Coke, would be considered “authoritative” and “true” law, irrespective of what the actual practice or administration of law might be, now or then. To the extent that the learned were asked to opine on a matter of contemporary importance, say the Enron scandal, they would begin their inquiry with the *Commentaries*, and make whatever connection they could to the modern world, however tenuous or perplexing to those unindicted into the scholarly priesthood. If they could not make the requisite connection, the implication would be that they did not really understand “American law.”

There is no need to dwell any further on my rather fanciful hypothetical, which was only intended in any event to provide for the reader a highly generalized framework within which to understand the status of current Islamic law scholarship. The point is, that while there may be considerable intellectual value in understanding Sir Coke in his context, and Ibn Taymiyya in his, the value of *Islamic* legal scholarship in an American law school is suspect, if what one is referring to is the historical construction of an entirely foreign body of law with no necessary application anywhere, and possibly at any time, beyond our ivory towers. Students enrolling in our courses would want to learn about Bin Laden’s *jihād*, and would instead learn of 11<sup>th</sup> century *Shafi’i* legal theories that Bin Laden may never have heard of, and, given some of his statements, probably would not care about even if he had.<sup>48</sup> Journalists would call our offices wanting to un-

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48. It is striking the extent to which Bin Laden is supremely unconcerned with classical theo-

derstand the origins of “profit sharing” within Islamic financial institutions, and we could only recite classical rules which, if taken even remotely seriously, would effectively end modern commerce as we know it.<sup>49</sup> Fellow scholars would wish to engage in comparative work across legal jurisdictions, and we could provide them with little more than centuries-old juristic tomes.

This is not law as we understand it in our academy. This is not even legal history, in many cases the rules bear no resemblance to *medieval* reality, let alone modern. Classical rules of *jihad* presume a preposterous polity wherein the Muslim world, the “House of Islam,” is united and happily led by a single caliph, engaged in eternal hostility against infidels, the “House of War,” and, potentially, illegitimate insurrectionist rebels.<sup>50</sup> Needless to say, this is far from an accurate reflection of any historical period. To take another example, Professor Vogel labors to explain to us the *shari’a* rules on partnerships, and then indicates, correctly, that these rules are so impossible that it is hard to believe that even the medievals lived by them.<sup>51</sup> So what did they do? What, in other words, was the *law* concerning partnerships? Professor Vogel has no idea, and suggests more work needs to be done to investigate.<sup>52</sup> Theory thus not only precedes practice, it supersedes it.

If this is “Islamic law,” then there seems to be precious little reason to pursue it in an American law school, given how little there is that demonstrates this field’s relevance to the actual legal order. Perhaps realizing this, and certainly aware that the world is looking to them to say something important about the *shari’a* in these difficult times, leading scholars make desperate attempts to link their academic knowledge to current realities that are entirely unconvincing, and, indeed, distorting to the very processes they claim to comment upon.

One common way in which this is done is to essentially ignore the exigencies of the modern world, except at the very end of the analysis. The way to find out, according to Professor Abou El Fadl, if democracy is compatible with Islam is to review the juristic texts and provide an answer, leaving the actual reality of the Muslim experience to the side. Professor Abou El Fadl is wise enough to know, and to indicate, that political considerations and social context cannot be ignored when approaching such questions as the possibility of constitutionalism

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ries of *jihad*, famously remarking that those who engaged in the attacks of 9/11 did not follow the *fiqh* as that term is commonly understood (meaning the learned rulings of the classical scholars) but instead followed the learned rulings of the Prophet himself. FEISAL DEVJI, *LANDSCAPES OF THE JIHAD* 13 (2005) (quoting Bin Laden). Bin Laden’s contempt for the notion that the scholars of the classical period are the authoritative voices of what Islamic law is in our times is made apparent in this statement; he is clearly suggesting that the learned classical doctors have in fact departed from the Prophet’s rulings and should be abandoned.

49. Hamoudi, *The Muezzin’s Call*, *supra* note 9, at Sec. II (describing classical rules of finance).

50. MAJID KHADDURI, *WAR AND PEACE IN THE LAW OF ISLAM* 51-53 (1977). See also Sherman A. Jackson, *Jihad and the Modern World* 7 J. ISLAMIC L. & CULTURE 1, 15-18 (2002).

51. VOGEL and HAYES, *supra* note 10, at 132 note 4.

52. *Id.*

or democracy in the Muslim world, yet insists on limiting himself to the doctrinal issues in more than one of his works.<sup>53</sup> Thus, for example, Professor Abou El Fadl says he does not wish to discuss the Arab-Israeli crisis, which after all is precisely such a modern, political consideration, and laments what he considers to be an overemphasis on it among scholars and students in American law schools.<sup>54</sup> Professor Abou El Fadl further indicates that he does not address this subject at all in his classes on Islamic law.<sup>55</sup>

Those of us educated in the post-Realist world, less enchanted with the influence of the opinions of Sir Coke or Ibn Taymiyya, as the case may be, on the outcomes of contemporary legal disputes, find this baffling. How can one discuss *jihad*, constitutionalism, or democracy while avoiding current political realities? Are we truly to believe that the blinding rage that has permeated the Muslim world as a result (whether justifiably or not, I leave the reader to conclude and offer no opinion of any kind) of the Arab-Israeli conflict is less influential in forming modern Muslim notions of modern political order than academic theories of classical jurists who most Muslims have never heard of? Are not these political conditions going to control and shape understandings of Muslim history and Muslim doctrine far more than nuanced interpretations of medieval jurists? As a result, is this entire insulation of “politics” from “law” serving to clarify modern Islam or modern Muslims? Or is it obfuscating that world in misguided deference to our own constructions of juristic theory, which may well have absolutely no salience in the broader Muslim world?

Indeed, in some cases the focus of some excellent scholars on medieval theories is somewhat damaging and distorting to otherwise admirable attempts to describe the modern era. Professor Clark Lombardi has written an excellent book on the jurisprudence of the Egyptian Supreme Constitutional Court concerning Article 2 of the Egyptian Constitution, which requires all laws to be in conformity with *shari'a*.<sup>56</sup> The work suffers, regrettably, from only one basic failing: its unnecessary attempt to link classical era rules and political theories to current attitudes towards the *shari'a*, as if one evolved from the other despite the vast changes that have taken place in Egypt from the medieval period to the modern.

Professor Lombardi indicates that the Court’s theory concerning compatibility with *shari'a* is that legislation must neither contradict “absolutely certain” rulings of the *shari'a*, nor what are referred to as its “universal roots” and “general goals.”<sup>57</sup> This is suspiciously similar to his description, several chapters ear-

53. Khaled Abou El Fadl, *Constitutionalism and the Islamic Sunni Legacy*, 1 UCLA J. ISLAMIC & NEAR E.L. 67 (2001) [hereinafter *Constitutionalism*]; KHALED ABOU EL FADL, ISLAM AND THE CHALLENGE OF DEMOCRACY 4 (2004).

54. Abou El Fadl, *Constitutionalism*, *supra* note 53, at 44.

55. *Id.*

56. LOMBARDI, *supra* note 15, at 125.

57. *Id.* at 180.

lier, of medieval theories of *siyasa shar'iyya*, wherein the jurists seek to control the actions of the political authorities through ensuring that the rules neither violate its “universally applicable” principles and precepts, nor its goals.<sup>58</sup> Thus is a link thereby suggested between the classical theories of the medievals on the one hand, and modern notions of judicial review on the other. Professor Lombardi does not deny and indeed discusses at some length the changes that have taken place in Egypt in the past millennium.<sup>59</sup> However, these changes do not seem to have any significant bearing on the methodological approach to the *shari'a*, which appears to be, from classical to modern, precisely the same, or at least largely similar—identify “certain” rulings, and core goals, and allow to the sovereign control over all else.

The only problem is that the Court’s application of its principles is, to say the least, inconsistent. Turning to the first prong of the two part test (the certain rulings of the *shari'a*), the Court declares, for example, the taking of interest on a money loan to be “universally condemned” and an “uncontested divine ruling.”<sup>60</sup> This simply is not true. There is significant classical authority within the Maliki school of thought to suggest that delayed trades of money with gain (as opposed to gold and silver) is permissible.<sup>61</sup> The Court nowhere discusses this, or explains precisely how it came to determine the “universal” nature of the prohibition. Professor Lombardi indicates that the Court has in fact found “very few” rulings that fit within the ban of universal applicability,<sup>62</sup> in which case the determination in this case is all the more surprising. It seems as if a consistent methodology, linked in some meaningful way to the classical era, is elusive.

When we turn to second prong of the test, and the Court’s primary focus, which is to evaluate laws on the basis of the “goals” of the *shari'a*, the hope of finding methodological consistency connected to classical era political theory evaporates.<sup>63</sup> The goals, as articulated by the Court and as set forth most famously by the 12<sup>th</sup> century jurist Abu Hamed al-Ghazali, and repeated by countless others both classical and modern, are the protection of religion, self, reason, honor and property.<sup>64</sup> The Supreme Constitutional Court is not the first entity to cite to these, and Professor Lombardi is not the only person to focus so heavily on these principles. Scholars throughout our law schools repeat these goals, as a

58. *Id.* at 54.

59. *Id.* at 78-118.

60. See *Rector of the Azhar University v. President of the Republic*, Judicial Year No. 1, Case No. 20 (Sup. Const. Ct. 1985) (Egypt), reprinted in W. M. Ballantyne, *Supreme Constitutional Court (Egypt) — Shari'a and Riba*, 1 ARAB L.Q. 100, 102-03 (1985).

61. See Hamoudi, *The Muezzin's Call*, *supra* note 9, at III.D.

62. LOMBARDI, *supra* note 15, at 188.

63. *Id.* at 188-89.

64. *Id.* at 191. In fact, Ghazali’s list is slightly different, including instead life, familiar honor, property, religion and mind. Anver Emon, *Natural Law and Natural Rights in Islam*, 20 J. L. & REL. 351, 368 (2005).

means to demonstrate that the *shari'a* has remained constant in spirit throughout the ages.<sup>65</sup>

The only problem being that this standard is devoid of content,<sup>66</sup> which probably helps to explain its enduring appeal. Certainly, Al Ghazali's ruminations on the subject, which use these goals to defend punishments for adulterers, fornicators, consumers of alcohol, heretics and apostates, hardly seem to be what most modern Muslim scholars, or the Supreme Constitutional Court, have in mind.<sup>67</sup> Ghazali's further indication that no society that truly sought to "serve creation" would forgo punishments for such odious behavior as drunkenness, adultery, fornication and disbelief in God likewise seems supremely unhelpful.<sup>68</sup> No doubt those admirers of Ghazali in our academy will respond with a more nuanced and careful reading of him than I have given, and no doubt Islam's conservative defenders will use the sections I point out above to argue in favor of Islam's inherent hostility to any form of liberalism. Ultimately, the point is that with the goals of the *shari'a* being continually articulated as nothing more than the phrase cited above, virtually any position can be plausibly defended as being in service of the goals.

Professor Lombardi, sympathetic as he is to the Court, desirous as he is to find some sort of connection to classical theory, and reluctant as he is to simply describe the jurisprudential nonsense with which he is faced as being nothing more than outcome driven and results oriented, endeavors mightily to make some sense of this. He divides the goals into two types.<sup>69</sup> First, there are the specific goals, relating to benefits arising from an ambiguous text as opposed to an "absolutely clear" one. Second, there are the general goals, which include the items listed above, as well as others that are as of yet unspecified.<sup>70</sup> The former are used to advance particular social results that the *shari'a* is, in the opinion of the Court, supposed to promote.<sup>71</sup> For example, an ambiguous Qur'anic verse to treat women with "kindness" has been interpreted by the Court to validate legislation requiring the payment of alimony.<sup>72</sup> Other conclusions, to say the least, might be drawn from the ambiguity. As to the latter type of goals, for the rea-

65. See, e.g., Abou El Fadl, *Constitutionalism*, *supra* note 53, at 101, Asifa Qureishi, *Interpreting the Qur'an and the Constitution: Similarities in Text, Tradition and Reason in Islamic and American Jurisprudence*, 28 CARDOZO L. REV. 67, 101-02 (2007); Emon, *supra* note 644, at 367-68.

66. Professor An Naim shares this view of mine, though his own characterization is far kinder than I have allowed. ABDULLAHI AHMED AN NAIM, *ISLAM AND THE SECULAR STATE* 35 (2008) ("the problem . . . is that the so-called basic objectives of the *shari'a* are expressed at such a high level of abstraction that they are neither distinctively Islamic nor sufficiently specific for the purposes of public policy and legislation.").

67. Emon, *supra* note 654, at 368.

68. *Id.*

69. LOMBARDI, *supra* note 15, at 192-96.

70. *Id.*

71. *Id.* at 192-93.

72. *Id.* at 193.

sons discussed above, even the sympathetic Professor Lombardi deems the process of identifying and applying them to be “inescapably subjective.”<sup>73</sup>

I might go one step further. Whatever the bases of the Court’s decisions are, they are not grounded in the meaninglessness of the specific or general goals of the *shari’a*. The Court’s articulation of *shari’a* in our times must be based on something else entirely. Ibn Taymiyya may be the rhetoric, but something else is the cause. If I were to guess from the cases provided, it appears to be a desire of the Court to advance liberal values on the basis of *shari’a* (hence a ruling concerning the requirement of alimony), but not to such an extent as to lose significant credibility among traditionally minded *shari’a* advocates (hence the description of the *riba* prohibition as necessarily encompassing interest on a loan). A thorough explanation is yet to be made.

In some ways, I have been unfair to Professor Lombardi, who does recognize that the Court’s approach can be subjective,<sup>74</sup> who does describe outside influences on decision-making (particularly in the context of the *riba* prohibitions),<sup>75</sup> and who recognizes that the Court is driven by a desire to modernize and moderate the *shari’a* so that it is consistent with international human rights norms.<sup>76</sup> Nevertheless, I cannot help but feel that one might understand more of what the Court is doing, and what it might do in future cases, if in place of attempting to define a coherent methodology (that somehow evolved from medieval classical political theory), more attention were paid to the modern political, social, and economic circumstances that drive the Court to make the decisions that it does respecting the content of the *shari’a* and less to a supposed methodological evolution that seems difficult to identify.

These are only examples, many others abound.

### *B. Islamic Law as the Law of the Muslim Nations*

Professor Abu Odeh’s retort has been along the lines of another extreme. She focuses extensively on the actual provisions of the various Muslim nations to demonstrate, accurately, their considerable distance from the classical *shari’a*.<sup>77</sup> She points out, again accurately, that the law in Muslim nations is based on national legal codes, and that secular legal education and secular, national judiciaries are the norm. She indicates that Muslim societies do not reflect some fantastical worldview wherein the spirit of the medieval world haunts them.<sup>78</sup> She is deeply critical not only of Islamic law scholars, but also of comparatists,

73. *Id.* at 198.

74. *Id.*

75. *Id.* at 165 (pointing out the difficulty in convincing the broader Egyptian public that money interest did not fall within the *riba* prohibition).

76. *Id.* at 7-8. The liberal nature of the Court’s determinations is a consistent theme of the work.

77. Abu Odeh, *supra* note 3, at 791-92.

78. *Id.* at 793-803.

in refusing to acknowledge the legal realities of the modern Muslim world, and the obvious dichotomy between historic, Muslim law and the law of the Muslim world.<sup>79</sup>

Though it might be heresy within Islamic law circles to say so, there is much to commend in Professor Abu Odeh's work. I assign her most commonly discussed article on this subject to my students each year in my Islamic law seminar, as a useful corrective to the fascination with medieval juristic rules, that, I emphasize again, are not and in some significant cases, *have never been*, the basis upon which Muslim societies have organized themselves. Yet, Professor Abu Odeh's provocations appear to prove too much. For if there is no pan-national set of ideas, no *shari'a*, however modern, that plays a significant role in the creation of legal order in and across Muslim societies, then what, precisely is the "law of Muslim nations?" The subject is not worthy of study, one may as well discuss the "law of nations beginning with the letter M." It is only Islam, and Islamic legal ideas, that could possibly link these disparate legal systems as a collective.

Once one ponders the question deeper, further problems emerge. What of the law of the personal status? Abu Odeh neatly sidesteps these questions, emphasizing that the law in the overwhelming majority of Muslim states bears little relation to the *shari'a* except in matters of personal status.<sup>80</sup> Nevertheless, these matters, which encompass the law of the family and inheritance and wills, are hardly trivial and suggest broad reference to binding pan-national legal concepts that transcend the jurisdiction in question. What of Islamic financial institutions and the important regulatory function exercised by their *shari'a* review boards, staffed by non-lawyer clerics and responsible for determining the Islamicity of any proposed transaction in which the institution wishes to engage? What of the communiqués of the Organization of the Islamic Conference, which is comprised of the world's Muslim majority nations? Are not these suggesting a desire on the part of Muslim nations to announce a particularly Muslim international law position on any given issue? What set of principles do pan-national militant *jihadists* follow if not those of the *shari'a*? What sustains the Muslim-wide popularity of movements such as Hamas and Hezbollah save the belief that they are engaging in lawful *jihad*?<sup>81</sup> Can all of this truly be "trace?"

It seems that what is required in order to understand legal order in the Muslim world is a new approach entirely. This approach must neither render the study of Muslim law an entirely incoherent endeavor nor sanctify an academic construct whose relationship to reality is highly suspect. Each of the *shari'a*, as understood by modern Muslims, not academics, and the national law, has a role to play, and it is the interaction between the two where the true nature of law in the Muslim world begins to reveal itself.

79. *Id.* at 808-24.

80. *Id.* at 791-92.

81. All of these examples are discussed in more detail in Section III.



## II LEGAL PLURALISM IN THE MUSLIM EXPERIENCE

### *A. Shari'a and State Legislation*

There are a variety of means through which pan-national *shari'a* binds the various Muslim nations and acts in a pluralistic fashion with national law as the means through which legal order is maintained. The first, and most obvious, is the projection of *shari'a* onto the formal legal order. This can be done in any variety of ways. One is to codify particular *shari'a* provisions, most popularly family law provisions,<sup>82</sup> but other provisions have been codified as well, among them criminal sanctions<sup>83</sup> and prohibitions on money interest.<sup>84</sup> An argument can be made that this is hardly proof of the projection of any pan-national norms, as the law, whatever its origin, is a state code administered by state officials according to state processes that in no way transcend the state.<sup>85</sup> This is true, and as indicated above, the methods often used to codify *shari'a* are so foreign to the structure of Shi'ism that they can hardly be considered "Islamic" in the Shi'i framework. However, the laws that do purport to adopt at least part of the *shari'a* almost always suggest recourse to *shari'a* in interpretation.<sup>86</sup> It is hard to believe that any judge would, in trying to decide what the *shari'a* indicated about a certain matter, consider himself confined to interpretations that arose within his national boundaries, particularly since *shari'a* texts, medieval or modern, make no reference to the Muslim nation states.<sup>87</sup> I do not mean to sug-

82. It is generally agreed that the personal status law, while largely codified, is purported to derive from classical doctrine, though it is inevitably modified, as any "code" taken from such diffuse classical sources would be. BERNARD WEISS, *THE SPIRIT OF ISLAMIC LAW* 188 (2005); Hamoudi, *The Muezzin's Call*, *supra* note 9, at Sec. II.A

83. Anyawanu, *supra* note 32, at 316-17 (respecting parts of Nigeria); Syariah Criminal Offenses (Federal Territories) Act of 1997, No. 559 available at 4 YEARBOOK OF ISLAMIC AND MIDDLE EASTERN LAW 571 (1998) (concerning parts of Malaysia).

84. Law for Usury (Interest) Free Banking (amended 1987), available at <http://www.irtp.com/laws/the%20law%20for%20usury%20free%20banking/index.asp> (last visited April 26, 2008) (law of Iran respecting money interest).

85. See, e.g., Weiss, *supra* note 82, at 188.

86. This can be done through the enactment of a code and an indication that where the code is silent, *shari'a* shall prevail. See, e.g., Egyptian Personal Status Code art. 3 (as amended, 2000), available at <http://www.egypt.gov.eg/arabic/laws/personal/introduction.asp> (last visited April 26, 2008) (*in Arabic*) (indicating resort to Hanafi Islamic Law when the code provides no specific textual provision); Iraq Personal Status Code, Law No. 188 of 1959, art. 1(2) (reference to general *shari'a*, without specifying any particular school of thought). However, at other times, the code provides almost no specificity beyond an indication that *shari'a* shall apply with respect to the law of the family. See, e.g., 9 Modern Legal Systems Cyclopedia §1.4(A) (Malaysia); The Muslim Personal Law (Shari'at) Application Act of 1937, (India) available at <http://www.indiacode.nic.in/fullact1.asp?tfnm=193726> (last visited April 26, 2008).

87. While medieval jurists would naturally make no mention of the modern nation states that did not exist in their era, modern *shari'a* recitations are largely the same. See generally, e.g.,

gest strict uniformity in *shari'a* interpretation across all Muslim nations, but I do mean to emphasize that interpretive methods and approaches can transcend the several Muslim jurisdictions.

It could be argued, however, that in the vast majority of cases where the *shari'a* is supposed to act as a “gap filler,” outside of family law at least, its influence is exceedingly slight, and in practice rarely serves as the basis for decision. This might be the case with respect to Sanhuri’s Civil Code, for example.<sup>88</sup> It might also be true of numerous other laws throughout the Muslim world, where the law seems so foreign to the *shari'a* that one has a difficult time imagining how *shari'a* might ever be relevant, except at the margins.<sup>89</sup> Certainly, in my own experiences with Arab judiciaries, I have not seen very much reference to the *shari'a* beyond the family law when interpreting national codes.

However, there are other examples of pluralism where that presumption seems entirely inappropriate. It is becoming increasingly popular for nations to adopt a constitutional provision that requires that all legislation be in conformity with the *shari'a*, or at least its universal tenets or principles.<sup>90</sup> I have already mentioned that Professor Lombardi has done extensive work on this subject in the context of Egypt. While I have been somewhat critical of Lombardi’s approach, his work makes clear that the Supreme Constitutional Court refers to a variety of concepts and ideas in determining what the *shari'a* is, none of which is in any way linked to the nation-state.<sup>91</sup> Of course, the Egyptian Supreme Constitutional Court may very well be distinctive in the manner that it applies the *shari'a*; to ignore national particularity is to obscure the nature of the national judicial process. At the same time, however, to exalt the national code as the sole determinant of legal outcome, when in fact the Court is drawing on a pan-national set of concepts and ideas that other national courts with similar provisions may draw upon, is no less distorting.

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MUHAMMAD ABU ZAHRA, *MAUSU'AT AL-FIQH AL-ISLAMI* [THE ENCYCLOPEDIA OF ISLAMIC RULES] (1967). See also Baudouin Dupret, *What Is Islamic Law: A Praxiological Approach and an Egyptian Case Study* 24 THEORY, CULTURE & SOCIETY 79, 91 (2007) (quoting an Egyptian court adopting a rule taken from Abu Zahra). This piece by Professor Dupret is in fact extraordinary in its efforts to define the *shari'a* through lived experience rather than decontextualized reference to medieval text.

88. See, e.g., IRAQ CIV. CODE No. 40, *supra* note 24 (1951); EGYPTIAN CIV. CODE No. 131, art. 1 (1948).

89. A complete list would be extensive indeed. Suffice it to say, that it is not unusual for even the most secular seeming of laws, for example the commercial law of highly developed Bahrain, to contain in it a provision permitting recourse to *shari'a*. See Bahrain Trade Law No. 7 art. 2 (1987).

90. Egypt amended its constitution in 1980 with this result. LOMBARDI, *supra* note 155, at 133-34 (requiring conformity with principles of *shari'a*). Both Iraq and Afghanistan included a similar provision in their respective constitutions. IRAQ CONST. art. 2 (2005) (requiring conformity with universal tenets); AFGHAN. CONST. art. 3 (2004) (requiring conformity with the provisions of the sacred religion of Islam).

91. *Id.* at 159-256

### B. Transnational Shari'a Projection

Another manner in which the *shari'a* acts with secular state and international regulatory structures is through the creation of international networks and institutions whose regulation is subject to state or international legal control, but is also self-governed by jurists setting forth modern conceptions of *shari'a*. In these instances it is senseless to talk of "supremacy," as each is of central importance. The premier example of this is Islamic finance. Quite clearly, what is and is not acceptable in the context of an Islamic financial institution is determined by non-state religious authorities just as much as state regulatory agencies.<sup>92</sup>

These religious authorities make determinations as to which forms of conventional finance structure are permissible, and which fall within entirely modern conceptions of traditional Islamic prohibitions.<sup>93</sup> A variety of organizations, institutions, and networks continually develop these regulations as the practice matures, from the *shari'a* review board of each Islamic financial institution (or, in the case of global institutions like HSBC, the review board responsible for the Islamic banking division), to more global institutions like the Islamic Fiqh Academy of the Organization of the Islamic Conference (OIC).<sup>94</sup> The rulings and determinations of these organizations are largely binding in the Islamic Finance community. An excellent recent example of this can be found in the concern over the supposedly equity based Islamic bond known as the *sukuk*,<sup>95</sup> which arose when Muhammad Taqi Usmani, a cleric with no current position of official authority in any nation, criticized its use as being fundamentally un-Islamic in some instances.<sup>96</sup> The entire practice has been, in the words of one reporter, "thrown for a loop" by Usmani's criticism, even though the bonds have absolutely no direct effect on any state regulatory body anywhere.<sup>97</sup> As this example illustrates, clerics and pan-national Islamic law exert significant control over the practice of Islamic finance.

State regulation plays an important role in Islamic finance as well, and regional discrepancies can exist.<sup>98</sup> Some states even have independent regulatory

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92. VOGEL and HAYES, *supra* note 10, at 47-49.

93. *Id.*

94. *Id.* See also Website of HSBC Islamic Banking Division, available at <http://www.hsbcamanah.com/1/2/hsbc-amanah/> (last visited March 1, 2008).

95. The *sukuk* are supposed to be instruments that earn a return based on the profits arising from the underlying venture they are financing. However, most *sukuk* in the market effectively fix their returns by offering any excess profits over a specified percentage to the venture as a reward, and make up for any shortfalls from the same specified percentage through non-recourse interest free loans to be repaid from any future profits exceeding the specified percentage. The result is, in economic terms, a fixed interest bond. See generally Mufti Taqi Usmani, *Sukuk and Their Contemporary Applications* (ruling on file with author).

96. *Id.* (objecting to the repurchase conditions as well as the non-recourse interest-free loans that are common in *sukuk*).

97. Sebastian Abbot, *Islamic Bonds Hit By Scholar*, WASH. TIMES, Jan. 14, 2008.

98. IBRAHIM WARDE, ISLAMIC FINANCE IN THE GLOBAL ECONOMY 112-31 (2000).

structures to govern Islamic finance institutions,<sup>99</sup> and certainly every institution I can think of would claim to be in full compliance with all applicable national laws and regulations. But being in full compliance with state regulations is clearly not enough, compliance with broader Muslim expectations is also fundamentally important, as the *sukuk* example shows.

Pan-national *jihad* is another example of the manner in which international law and *shari'a* have been combined in a pluralistic fashion to create a modern Muslim law of war that is in many ways distinct from the traditional paradigm. On the one hand, it is clearly the case that many modern *jihadist* movements, and certainly the most popular, derive their legitimacy not only from the Muslim law, but also from thoroughly modern (though of course controversial) conceptions of national liberation. Hamas and Hezbollah are the most obvious examples of these movements.<sup>100</sup> These Islamist organizations often refer to their struggles not as *jihad*, but instead use the more modern term *muqawama*, or resistance.<sup>101</sup> Thus, both nationalist liberation ideology and Islamist militancy are in play.

Moreover, the Organization of the Islamic Conference, comprised of the Muslim nations of the world, has announced a position, which may be fairly called the "Islamic" position, which specifically exempts the activities of the Lebanese and Palestinian resistance movements from any definition of terrorism.<sup>102</sup> The OIC suggests that under international law, there is an exception for terrorism when legitimate struggles against colonialism, alien domination and foreign aggression are involved.<sup>103</sup> Much of the rest of the world is unwilling to accommodate such an exception, resulting in an impasse at the United Nations towards the adoption of a single standard.<sup>104</sup> Thus, we see how modern notions of *shari'a*, as pan-national Muslim law, have resulted in the articulation of an Islamic position on terrorism that is so at variance with the position of most of the rest of the world that the United Nations cannot agree on an appropriate position.<sup>105</sup> The notion that this international legal position of the Muslim nations is not a form of Muslim law, or, if it is, it is not terribly important, seems impossible to sustain.

This is not to say that international law may be ignored. As noted above, the OIC explicitly indicates that its position is derived from international law, even though most of the rest of the world disagrees. In any event, the tension is

99. *Id.* at 123-28 (describing Malaysia).

100. Hamoudi, *The Muezzin's Call*, *supra* note 9, at Sec. VI.

101. *Id.*

102. Kuala Lumpur Declaration on International Terrorism, OIC, arts.10-12 (hereinafter "Kuala Lumpur Declaration") (April 1-3, 2002).

103. *Id.* at art. 8.

104. See *Ad Hoc Committee Negotiating Comprehensive Anti-Terrorism Convention Opens Headquarters Session*, U.S. FED. NEWS (Feb. 5, 2007) (describing OIC position and indicating that this important issue remains outstanding).

105. *Id.*

clear. The Muslim nations wish to abide by two sets of principles; the first, a modern notion of *jihad* that is the vehicle for Islamic and nationalist resistance to Zionism, colonialism and imperial aggression (all of which are treated as a single epiphenomenon), and the second, the rules of international law as set forth in the UN Charter. Both are relevant to the international order in the Muslim world, neither is supreme over the other, and it is the combination of the two that therefore best defines the pan-national Muslim order.

### C. Informal Ordering and the *Shari'a*

A third way in which the *shari'a* and national law can combine to create legal order in the modern Muslim nation-state is in situations where the projection of the *shari'a* is less formal and official. This is of particular importance in matters of commerce, where actors can readily “opt out” of the formal legal system, or at least parts of it, in order to settle their own disputes in their own manner. Enforcement of any determination using a dispute resolution mechanism unrecognized by the state might be “voluntary” in the sense of not necessarily being state-enforced, but surely hardly a matter of choice should the commercial actor wish to remain within the system.

An excellent example of this is the diamond industry, as Lisa Bernstein has shown in a justifiably acclaimed article, where the administration, regulation, and enforcement of rules is entirely internal and self-governing.<sup>106</sup> Unlike Professor Bernstein’s diamond sellers, however, who have “systematically rejected” state law,<sup>107</sup> Shi’i Iraq’s merchants and traders rely on a blend of both state law and *shari'a*, as articulated by the Shi’i clerical establishment in Najaf, in order to establish commercial order. This is because neither system contains sufficient levels of both functionality and legitimacy on its own.

As will be shown in the next two sections, each system provides a unique set of characteristics. The state law quite often provides more clarity than religious law.<sup>108</sup> Its rules tend to be more developed and comprehensive, and it is better organized and appears more modern than religious law.<sup>109</sup> Under the religious system, the rules of commerce are piecemeal, disjointed, and difficult to understand, much less follow.<sup>110</sup> Many of the more detailed rules could not possibly be of relevance to the vast majority of modern commercial actors.<sup>111</sup> Some

106. Lisa Bernstein, *Opting Out of the Legal System: Extralegal Contractual Relations In the Diamond Industry*, 21 J. LEG. STUD. 115 (1992).

107. *Id.* at 115.

108. *See infra* Sec. III.

109. *Id.*

110. *See infra* Sec. IV.

111. *See, e.g.,* ALI SISTANI, MINHAJ AL-SALIHEEN, available at <http://www.sistani.org/local.php?modules=nav&nid=2&bid=24> (last visited April 26, 2008) (*in Arabic*) [hereinafter MINHAJ] §§219-31 (dealing with trades of items that few commercial actors would ever seek to trade). In referring to contemporary juristic rules, I focus on the work of Grand Ayatol-

rules seem taken from another era, such as the rule requiring that a person may not enter into a contract until he or she has reached the age of *bulugh* (puberty).<sup>112</sup> In this confusion, the default practice is to defer to the Civil Code to set the form, structure, and general rules of commerce.

On the other hand, among Shi'i merchants, particularly those in the textile and book industries, the Civil Code leaves areas of concern for the pious, particularly where it permits activities, such as the taking of money interest,<sup>113</sup> which the *shari'a* as developed by the clerical establishment unambiguously prohibits.<sup>114</sup> Though commercial actors could technically avail themselves of Iraqi courts to enforce payment of owed interest, they would prefer cheaper and easier to obtain forms of relief, none of which are available in the case of money interest because of the broad hostility of the devout population to such an open flouting of the *shari'a* rules. As a result, artifices explicitly sanctioned by the clerical establishment are preferred.

In addition, the *shari'a* often provides flexibility where the national civil code does not. For example, within Shi'ism, there is no requirement of possession or title documentation to obtain a lien.<sup>115</sup> In such instances, even if judicial enforcement is impossible, the *shari'a* is preferred because its lack of comprehensiveness can in important respects provide actors room to operate and informally enforce practices that are more convenient than those that state law permits.

Commercial actors in Iraq, particularly Shi'i merchants in the textile and book industries, thus employ a blend of the two systems, following national law as a general matter with important exceptions. This ensures some clarity to the regulation of commercial order (provided by national law) as well as legitimacy (provided by the religious law), flexibility (often provided by the religious law), and ease of enforcement (provided by both systems working together).

### III

#### THE IRAQ CIVIL CODE AND COMMERCIAL ORDERING

It is not my purpose to attempt to recite in any level of comprehensiveness or detail the provisions of Sanhuri's magnificent Civil Code. One author has done so recently to admirable effect,<sup>116</sup> and thus the effort would not only be tangential to the focus of this article, but also redundant. However, five observa-

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lah Sistani, who is the most prominent and popular of the *mujtahids* in Iraq, and possibly the world, today. See Linda Walbridge, *Introduction: Shi'ism and Authority* in *THE MOST LEARNED OF THE SHI'A: THE INSTITUTION OF MARJA' TAQLID 11* (Linda Walbridge, ed.) (2001) (arguing that Sistani is the most popular of the world's *mujtahids*).

112. *Id.* at §62.

113. IRAQ CIV. CODE, *supra* note 24, at art. 692.

114. MINHAJ, *supra* note 111, at §§1011-1013.

115. See *infra* Sec. IV for more detail with regards to this matter.

116. See generally Stigall, *supra* note 25.

tions, relevant to the carrying out of commerce in the textile and book industries in Iraq, are worthy of delineation.

### A. The Code and Modernity

First, the Civil Code is modern. Perhaps the best manifestation of this is in its creation of a general theory of obligation and of contract, in contradistinction to the classical Islamic law<sup>117</sup> and to contemporary Shi'i juristic rules.<sup>118</sup> The *shari'a* under these systems does not recognize any general contract theory, but rather discusses contract in the context of various nominate forms, such as sales, leases, agencies and partnerships.<sup>119</sup> This is also reflected in the first attempted codification of Sunni Islamic law, the Ottoman era *Majella*.<sup>120</sup> Sanhuri, relying to some extent on his own tendentious readings of the classical texts and his gleaning of "principles" from them, changed this and adopted a largely Roman and civilian approach to obligation.<sup>121</sup> As a result, Articles 73 to 505<sup>122</sup> of the Civil Code provide rules on obligations generally, and Articles 73 to 183 deal with contracts specifically, including contract requirements and forms, capacity, the vitiation of the agreement for fraud, duress and mistake, void and voidable contracts, interpretation, enforcement, and the like.<sup>123</sup> Similar rules concern not only contracts but other forms of obligation as well, most obviously, obligations arising out of tort.<sup>124</sup>

More than anything else, this creation of general rules and a general theory of contract and obligation sets Sanhuri's code apart from its predecessors by providing a clear set of rules under which contracting parties are expected to conduct themselves. In addition, a general theory of contract permits significantly more flexibility in the structuring of transactions, as it enables the parties themselves to decide how they wish to organize their mutual obligations to each other, rather than requiring adherence to any one of a series of rigid nominate

117. Hamoudi, *The Muezzin's Call*, *supra* note 9, at Sec II.B. *See also infra* notes 118-121.

118. *See generally* MINHAJ, *supra* note 111, at vol. 2 (dividing what would normally be considered "contracts" into separate sections, each dealing with different nominate forms, among them sales, leases, types of partnerships, loans and the like, with only the briefest of descriptions for contracts generally).

119. *Id.*

120. *See, e.g.*, MAJELLA, art. 103 (defining contracts in the most highly general terms); arts 167-403 (sales); arts. 404-611 (lease/hire); arts. 612-700 (suretyship); arts. 701-761 (pledges).

121. LOMBARDI, *supra* note 155, at 98; Hill, *supra* note 18, at 68-70.

122. IRAQ CIV. CODE, *supra* note 24, at arts. 444 to 505, all of which related to evidence of obligation, were later replaced with the Evidence Law.

123. *See generally, id.*, at arts. 73-183.

124. A theory of obligations subsumes both contract and tort (as well as other matters). However, in keeping with the focus of this Article, and so as not to confuse the common law reader with the civil law notion of the nature of "obligation," I emphasize the theory of contract contained in the Civil Code.

forms.<sup>125</sup> Such uniformity, flexibility and clarity facilitates modern commercial transactions considerably.<sup>126</sup>

Moreover, Sanhuri's code recognizes the concept of juridical personhood for companies,<sup>127</sup> which, when combined with the limited liability principles set forth in the Company Law, results in a thoroughly modern set of rules concerning ownership and liability.<sup>128</sup> It grants persons over the age of eighteen the ability to enter into contract.<sup>129</sup> Consistent with the general theory of contract, it permits the creation of contracts over anything that does not conflict with law or public morals.<sup>130</sup> It emphasizes that in the interpretation of the contract, a primary focus be on the intent of the contracting parties, not the form of the transaction, or the lexical structure.<sup>131</sup> All of these are central to most modern, developed notions of contract.

### *B. Comprehensive Nature of the Civil Code*

A second observation is that the Code is comprehensive. Much like any civilian code, it deals with a broad panoply of matters, including not only general theories of obligation, but also specific rules governing types of contracts and

125. This certainly is the view of a premier commentator on the Iraqi Civil Code, Professor Abdul Majeed Al Hakim. Professor Hakim suggests that the notion that the will of the parties should control the nature and structure of the transaction is built on modern, philosophical bases concerning the normative importance of individual freedom, the same bases that undergird the current emphasis on human rights. DR. ABDUL MAJEED AL-HAKIM, PROFESSOR ABDUL BAQI BAKRI AND ASSISTANT PROFESSOR MUHAMMAD TAHA BASHIR, AL WAJIZ FI NADHARIYAT AL-ILSTIZAM FI'L QANUN AL-MADANI AL-IRAQI [NUTSHELL ON THE THEORY OF OBLIGATION IN THE IRAQ CIVIL CODE] 20 (1980). However, one need not embrace entirely Professor Hakim's seemingly Spencerian notions of the importance individual economic freedom to recognize that central to modern commercial systems is the idea that parties may, with limited exceptions, structure any transaction they please in any manner that they see fit.

126. For his part, Dean Sanhuri compared the importance of a general theory of obligation in the Civil Code to the importance of a spinal cord in a human body. ABDUL RAZZAQ AL-SANHURI, 1 AL-WASIT FI SHARH AL-QANUN AL-MADANI AL-JADEED [A COMMENTARY ON THE NEW CIVIL CODE] 126 (Beirut 3d. ed. 2000). There is some scholarly literature that suggests that the classical insistence on nominate forms did not in any way render it primitive or undeveloped. *See, e.g., Contracts in Islamic Law: The Principles of Commutative Justice and Liberty*, 13 J. ISL. STUD. 257 (2002) (arguing that the classical system enabled the realization of commutative justice and liberality). This may well be the case, and it is not nor has it ever been my project to cast an unfair and anachronistically contemptuous light on Muslim classical law. However, it is fair to say that in the contemporary world, given broad contemporary understandings of the nature of contract, commercial actors would find it nearly impossible to navigate in a world in which their various agreements would have to be fit into one of several rigid, nominate forms, with specific rules attaching as to each form.

127. IRAQ CIV. CODE, *supra* note 24, at arts. 47-60.

128. *See* IRAQ COMPANY LAW, arts. 6-8, available at <http://www.br-iraq.com/PDF/LawonCompanyNo21of2004/English/LAWNo21.pdf> (last visited April 26, 2008).

129. *Id.* at art. 106.

130. *See id.* at art. 75.

131. *Id.* at art. 155



torts, as well as rules concerning property, conflicts of law over property and persons, insurance, and mortgages and other forms of security.<sup>132</sup> With the exception of a specific exemption for matters of personal status (such as marriage, divorce, and inheritance), which are governed by a Personal Status Code and whose derivation from *shari'a* appears much more direct, the Iraq Civil Code is, like almost any Civil Code, the primary source of the rules of private law and seems no less comprehensive in its scope.<sup>133</sup>

### C. The Code and Islamicity

Third, the Civil Code takes some cognizance of Islam and the *shari'a*. It is far from the purposes of this Article to join in the seemingly interminable debate as to whether or not Sanhuri's Civil Code is truly Islamic. This is particularly because, as noted above, the answer is clearly that it is not, as far as the Shi'a are concerned, and the focus of this article is on Shi'i practice. Nevertheless, it would be a mistake not to point out that the Code's provisions do to some extent root themselves in an Islamic context. For example, the definitions of juristic persons include clearly Islamic entities such as the *waqf*, perhaps best translated (reductively) as a Muslim trust.<sup>134</sup> The *shari'a* is given a limited role as a "gap filler" as we have noted above.<sup>135</sup> A property right known as the *tasarruf*, derived from classical Sunni law with no obvious analog in Roman law and concerning the right of private parties to develop the lands of the 'amir, or sultan, (the 'amiri lands) is specifically recognized with its own unique rules and limitations.<sup>136</sup> The term "'amiri land" remains in the Civil Code despite the obvious fact that there is no 'amir and thus effectively the term refers to state property. The rules concerning loans deal not only with money, but also with items weighable or measurable by volume,<sup>137</sup> categories developed by Shi'i jurists<sup>138</sup> and Sunni jurists of the Hanafi and Hanbali schools.<sup>139</sup> Thus, even if the Civil Code is not "Islamic," it must fairly be said that its respect for, and occasional adoption of, Islamic rules and Islamic terminology is a matter scarcely in doubt.

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132. See generally IRAQ CIV. CODE, *supra* note 24.

133. See generally QANUN AL AHWAL AL-SHAKSIYA RAQM 188 LI SANAT 1959 WA TA'DEELATIHI [Law 188/1959 of Personal Status, Together with Its Amendments] (7<sup>th</sup> ed. 2000) [hereinafter "Personal Status Law"]; see also Hamoudi, *Revolution*, *supra* note 21, at 544-45.

134. IRAQ CIV. CODE, *supra* note 24, at art. 47(e).

135. *Id.* at art. 1(1).

136. *Id.* at arts. 1169-1248.

137. *Id.* at art. 690.

138. MINHAJ, *supra* note 111, vol. 2, at §217.

139. VOGEL & HAYES, *supra* note 10, at 75.

*D. Necessary Revisions to the Code*

Fourth, the Civil Code is in desperate need of revision. While it is comprehensive and modern, a number of provisions require some level of updating, now that more than half a century has passed since its enactment, and the world has become considerably more globalized and commercially interdependent. Unfortunately, particularly given Iraq's isolation over the past thirty five years, this has not been done. The most obvious area in which some level of reform is vitally necessary, as Mark Sundahl points out in a recent article, concerns the taking of security on loans.<sup>140</sup> The Civil Code effectively requires, for all objects to be secured other than real property, that the lienholder take possession of the object itself.<sup>141</sup> This has been relaxed somewhat by the Trade Law, which permits the taking of security if title documents pass to the lienholder, or if the lienholder assumes some sort of apparent possession.<sup>142</sup> These provisions are helpful, but not in cases (such as, for example, the taking of security as against a current book or carpet inventory) where title documents do not exist. Moreover, precisely what constitutes apparent possession is unclear. In an age where the obtaining of security has become, for better or for worse, progressively easier, Iraq is quite literally stuck in the 1950's.

Other anachronisms remain. The Civil Code does not address issues concerning foreign companies or persons very thoroughly. They are mentioned in the conflicts section<sup>143</sup> and in the determination of the domicile of persons,<sup>144</sup> for example, but the provisions are limited and vague. Many of them deal with less prominent issues such as marriage to foreigners,<sup>145</sup> inheritance from foreigners,<sup>146</sup> or the devising of property under a foreign will.<sup>147</sup> The rules on choice of law, extremely important for modern commerce, are particularly confusing. One Article provides a series of rules as to which law must apply to "contractual obligations," but then adds "unless the parties otherwise agree or circumstances make clear that another law must be applied."<sup>148</sup> What circumstances? In case of a conflict between the parties' choice and these undefined "circumstances," which controls? No guidance is given. Another Article indicates that the "form" of the contract is subject to the law where the contract was

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140. See Mark Sundahl, *Iraq, Secured Transactions and the Promise of Islamic Law*, 40 VAND. J. TRANSNAT'L L. 1301 (2008).

141. IRAQ CIV. CODE, *supra* note 24, at art. 1322(1).

142. *Qanun Al Tijara, Raqm 30 li sanat 1984* [Trade Law, No. 30/1984], art. 187.

143. See IRAQ CIV. CODE, *supra* note 24, at arts 14-23.

144. *Id.* at arts. 34-60.

145. *Id.* at art. 19.

146. *Id.* at art. 22.

147. *Id.* at art. 23.

148. *Id.* at art. 25(1).

put into effect (*tammāt fih*).<sup>149</sup> This latter Article seems entirely pointless, and potentially could undermine any choice of law provision in a contract.

A choice of forum or the concept of large international arbitrations is mostly unrecognized in the Code,<sup>150</sup> and foreign judgments cannot be enforced unless applicable Iraqi law grants them the power to adjudicate the matter.<sup>151</sup> The world of multinational corporations, contracts spanning jurisdictions, alternative dispute mediation, and recognition of foreign arbitral awards is largely foreign to this Civil Code, drafted long before these developments had become significant.

### *E. The Civil Code and the Shari'a*

Finally, the Civil Code contains one central provision that is deeply problematic from a *shari'a* perspective. This is Article 692, which permits the taking of interest on a loan.<sup>152</sup> Sanhuri describes at great length how the taking of interest on loans can be reconciled with classical Sunni thought,<sup>153</sup> but the effort has failed to convince the world's Islamic movements, even as they have adopted other modern ideas that depart substantially from classical conceptions, among them Sanhuri's general theory of obligation.<sup>154</sup>

Interest on loans remains a central target of Muslim protest, less because of its classical origins, given how much of classical contract law is ignored, and more because the founders of the Islamic economics movement, who were also the founders of Islamic political protest, saw in the taking of interest a moral lesson that distinguished their own polities from those of the West.<sup>155</sup> Leaders such as the Shi'i Muhammad Baqir al-Sadr and the Sunni Sayyid Qutb, tapping into a theme of anti-colonial, regional liberation fervor that lasts to this day, castigated Muslim societies for acceding to Western notions of finance in permitting interest.<sup>156</sup> They called for nothing short of an economic and political revolution in these societies, to bring them back to their proper, Islamic roots.

149. *Id.* at art. 26.

150. The section of the Civil Code dealing with international conflicts of forum neither contains a choice of forum clause, nor the possibility of international arbitration. *Id.* at arts. 15-16. It indicates that Iraqi courts must decide all disputes in connection with contracts concluded or performed in Iraq. *Id.* at art. 15(c). In this vein, it should be noted that Iraq is not a party to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, commonly known as the New York Convention. See Status 1958 - Convention on the Recognition and Enforcement of Foreign Arbitral Awards, available at [http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/NYConvention\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html) (last visited April 26, 2008).

151. See IRAQ CIV. CODE, *supra* note 24, at art. 16.

152. *Id.* at art. 692.

153. Abdul Razzaq al-Sanhuri, 3 MASADIR AL HAQQ FIL FIQH AL-ISLAMI at 234-36, 240-43.

154. Hamoudi, *The Muezzin's Call*, *supra* note 9, at Sec. III.D.

155. *Id.* at Sec. IV

Interest, they argued, was cruel and rapacious; it permitted the rich to increase their wealth on the backs of the poor. Moneyed classes will lend to defenseless borrowers, and guarantee for themselves a return with no risk at all, a sure form of oppression.<sup>157</sup> In the place of such exploitative debt, the fundamentalists argued, Islam calls for the creation of institutions and instruments that are based on social justice, mutuality, and sharing. The shameless lender who offers one dirham and demands two later is destructive of social harmony and the Islamic brotherhood, as he makes an enemy of his borrower.<sup>158</sup> Instead, capital and labor should partner together to earn profits, an idea that Sadr takes so seriously that he calls for a ban on all hired labor, at least with respect to raw natural wealth, notwithstanding Muhammad's *hadith* clearly in favor of hired labor generally.<sup>159</sup> Sadr is unconcerned with the *hadith*, alternatively describing it as illegitimately derived, or if legitimate, taken out of its proper context.<sup>160</sup> It is apparent that Sadr's interest lies not in adherence to foundational text in any formal sense but rather in the creation of a new Muslim order that is uniquely Islamic, thoroughly just, and contradistinct and separate from that of the broader global community.<sup>161</sup>

#### IV

#### JURISTIC RULES OF COMMERCE

As with the discussions of the Civil Code in the previous section, it is not my purpose to provide any sort of detailed summary of all of the rules of commercial transactions provided by the Najaf *mujtahids* generally, and by Grand Ayatollah Sistani in particular, on whom I focus because of his broad influence.<sup>162</sup> Rather, some observations on the rules of commerce, particularly relevant to the nature of commerce in Shi'i Iraq, are in order.

##### *A. Relationship to Civil Code*

The first and most obvious observation is that the religious rules lie in tension with the state law, neither in direct conflict nor in absolute harmony. As with all Grand Ayatollahs,<sup>163</sup> the subject matter of Sistani's master work, the *ri-*

156. *Id.*

157. *Id.*

158. SAYYID QUTB, AL-ADALAH AL-ITJIMA'IYYAH FIL ISLAM [SOCIAL JUSTICE IN ISLAM] 102-03 (15<sup>th</sup> prtg. 2002).

159. *Id.* at 103.

160. *Id.*

161. To be clear, I do not introduce these economic notions to demonstrate their accuracy, but rather to show the type of expectations that modern Muslims have with respect to Islamic finance.

162. See generally MINHAJ, *supra* note 111.

163. See generally, e.g., GRAND AYATOLLAH ABU'L QASIM AL KHU'I, MINHAJ AL-SALIHEEN (1992) (*risala* of Grand Ayatollah Khu'i, the predecessor of Grand Ayatollah Sistani).

*sala 'amaliya*, makes clear that its purpose is to guide the believer on how to live her life in accordance with God's Will.<sup>164</sup> As a result, matters of public law, over which the believer has no direct control, are left unmentioned,<sup>165</sup> and matters of worship, over which the believer has entire control, are discussed in great detail.<sup>166</sup> In neither case does this create much of a problem. It is in the area in between, the realm of private law, where the tension occurs.

In setting forth rules of private law, whether they be tort rules such as those concerning usurpation,<sup>167</sup> property rules such as treatment of abandoned property or fallow land,<sup>168</sup> contract rules concerning sales or prohibited forms of gain,<sup>169</sup> or personal status rules concerning marriage, divorce and inheritance,<sup>170</sup> the state, and its different sets of rules, is simply not mentioned. No guidance is given as to how to negotiate between the state law and religious rules.

This causes some confusion. If various rules of property are to be based on the religious rules, for example, what does one do to reflect changes of ownership? If to procure a security interest over property, possession is not necessary even if preferred as a matter of precaution,<sup>171</sup> then how does one register a security interest, in light of the fact that the religious institutions neither have nor seek to have any sort of separate administrative capacity to effect such registrations? As discussed in Section V, Sistani's reluctance to say anything on these subjects leads to a great deal of ambiguity, which in turn provides much ground for flexibility.

### B. Lack of Comprehensiveness

The religious rules seem more designed to develop particular matters of interest to the jurists with sufficient levels of certainty than to provide a comprehensive guide to how commerce should be conducted. Thus, for example, where the Civil Code would contain an entire set of rules relating to the interpretation

164. See generally MINHAJ, *supra* note 111.

165. This is not to say that Grand Ayatollah Sistani has no interest in Iraqi public law, a subject worthy of an article on its own. Clearly the Grand Ayatollah has involved himself in Iraqi constitutional and election processes on more than one occasion, though it is equally clear that he has no interest in juristic rule. See Hamoudi, *Money Laundering*, *supra* note 23, at note 67. However, irrespective of his occasional forays into public law, the Grand Ayatollah has provided no set of rules under which the state must operate, no theory to describe the nature of the interaction, and no guidance as to when deference to the state is necessary or appropriate. This is certainly not the case with respect to private law matters, as the text makes clear.

166. *Id.*

167. MINHAJ, *supra* note 111, vol. 2 at §§806-89.

168. *Id.*, vol. 2 at §§762-805; §§890-918.

169. See, e.g., *id.*, vol. 2 at §§51-61 (concerning rules of sales); §§217-35 (concerning prohibited forms of gain).

170. See, e.g., *id.*, vol. 3 at §§30-56 (concerning marriage); §§473-562 (concerning divorce); §§988-1074 (concerning inheritance).

171. *Id.*, vol. 2 at §1031.

of contract,<sup>172</sup> the religious rules have no comparable sections. There are broad, interpretive references suggesting that if one party, for example, handed over a particular item to another with the intention of providing it as security, then a mortgage is thereby secured.<sup>173</sup> But as to how to interpret the words of a contract generally, what role custom and usage should have, whether parole evidence may be admitted for purposes of interpretation, none of these issues, so fundamental to modern contract theory, are described with any level of precision.

Also absent are any notions of juridical personhood for companies, making it unclear whether a person may Islamically form a company, and if so, whether that company may enter into an agreement. There are no rules on limited liability even if such companies were to exist. There is no section concerning potential conflicts of rules, meaning that the status of agreements with non-Shi'is in particular is uncertain. Arbitration, mediation, or other forms of dispute resolution are not thoroughly discussed. Simply stated, it would be impossible to use the religious rules as a system of commercial governance absent considerable elaboration from another source of authority.

Finally, quite often it is difficult to know precisely what the consequences are if a party simply acts in contravention of the religious rules. Returning once again to placing a security interest on property, the rules provide ample guidance on how security is to be treated if the property is pledged twice with the consent of both parties.<sup>174</sup> However, what is omitted is what is to be done if the pledgor provides the property twice *without* the consent of both parties; that is if he fraudulently fails to inform one or both parties that there is another pledge on the property. Because there is no registration mechanism in the religious system through which interests can be recorded, the UCC Article 9 rules on priority<sup>175</sup> might be hard to replicate, but surely something else is required if this law is to work. The reasons for this particular omission seem clear enough; the religious rules have limited, even if supremely effective in many cases, means of enforcement. That is, the mere indication of a prohibition is, at least within the context of finite and largely closed merchant communities, probably sufficient to prevent any party from violation. A bookseller seeking to borrow money and offer his inventory on lien is most likely going to be unable to seek financing beyond other merchants, and they will be able to ascertain relatively quickly whether or not another one of them has already procured a security interest. However, the lack of a broader enforcement mechanism does limit the potential scope of these rules.

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172. IRAQ CIV. CODE, *supra* note 24, at arts. 155-67.

173. MINHAI, *supra* note 111, vol. 3 at §1028. *See also* §1004 (same rules concerning loans).

174. *Id.* *supra* note 111, vol. 2 at §1043. Basically, they then have equal rights as pledgees.

175. *See* WILLIAM D. WARREN & STEVEN D. WALT, SECURED TRANSACTIONS IN PERSONAL PROPERTY 118-19 (7<sup>th</sup> ed. 2007).

### C. Vestiges

While the rules as to how to interpret a contract are by and large absent, one can learn in almost mind numbing detail the manner in which animals may be sold, live or butchered, in pieces or whole, at a slaughterhouse or retail, the consequences of the illness of the animal and so forth.<sup>176</sup> Even more detailed (and more irrelevant) rules surround the purchase of fruits and vegetables off of trees or while still growing.<sup>177</sup> Trades of items such as wheat and barley for each other are examined in detail, as are loans of similar items, while rules concerning currency exchanges, far more important to modern commerce than anything dealing with wheat or barley, are dealt with summarily.<sup>178</sup>

The rules find it necessary to prohibit loans of alcohol, or pork, as if two Muslims pious enough to consult Ayatollah Sistani's rules to determine Islamicity would ever think to make a loan in the form of a pig.<sup>179</sup> While other examples abound, these should demonstrate the considerable irrelevancy of great portions of the rules of the religious authorities to modern commercial actors.

### D. Anachronisms

Some of the religious rules seem impossible to take seriously in modern times. The most glaring example concerns capacity. As with numerous other areas of Islamic law, capacity is determined at the onset of what is known as *bulugh*, understood to be nine lunar years of age for a girl, and fifteen for a boy unless the signs of puberty, such as pubic hair and wet dreams, appear before then.<sup>180</sup> It is very difficult to believe that commercial actors in the contemporary era, no matter how pious, are going to permit questions of capacity to hinge on such matters as wet dreams and pubic hair. It is even harder to believe that ten year old girls will be considered competent in most merchant societies to transact business on their own. Certainly nothing in my experience in Iraq led me to conclude that anyone thought that a child this young was capable of making sound business decisions.

Thus, inasmuch as such matters are concerned, an alternative source of rules is often preferred.

176. MINHAJ, *supra* note 111, vol. 2 at §§299-303.

177. *Id.* at §§272-98. These rules arise from a classical prohibition concerning speculation known as *gharar* that remains relevant in Islamic finance.

178. MINHAJ, *supra* note 111, vol. 2 at §§272-98. Only the last two rules of trades with gain deal with paper money, *id.* at §§234-35, while a plethora of rules surround if and under what circumstances wheat may be traded for dates, or barley for wheat, or beef for chicken, or sheep for goat, and the like. *Id.* at §217-31. Unsurprisingly, at least in my experience observing Iraqi commerce, such in-kind trading was exceedingly rare, and commercial actors relied as much on currency there as they would anywhere else in purchases and sales.

179. *Id.* at §1007.

180. Ali Sistani, Q&A, definition of bulugh, available at <http://www.sistani.org/local.php?modules=nav&nid=5&cid=424> (*in Arabic*) (last visited April 26, 2008).

### *E. Commerce and Charity*

Consistent with the underlying principles of “Islamic economics” espoused by revolutionaries such as Sadr and Qutb, the religious rules constantly make reference to the need to provide brotherly succor and aid, and to imply a form of economic order that is based as much on mutual cooperation and support as on the pursuit of individual self-interest.<sup>181</sup> For example, the first rule in the section on loans states that *taking* loans is disfavored, though not prohibited, except in cases of need.<sup>182</sup> The less the need the stronger the disfavor, and the more the need the weaker the disfavor, until the disfavor disappears entirely.<sup>183</sup> The next rule indicates that the *granting* of a loan is strongly favored as a charitable act, and then cites statements of the Prophet Muhammad as well as Ja’far al-Sadiq, the sixth of twelve Infallible Shi’i Imams,<sup>184</sup> that indicate that believers who give loans to fellow believers in need will have angels praying on their behalf and will have their own needs removed in the current world and in the Hereafter.<sup>185</sup> Another quoted statement of Ja’far al-Sadiq compares favorably the support of a believer to the support of a brother.<sup>186</sup> These “rules” are provided before any specific guidance is given on the manner in which loans may be given or received, the form they must take, and the structural principles underlying them. Unsurprisingly, however, as the discussion on loans continues, it becomes amply clear that interest in any form or variety, whether it be the payment of additional money, the procurement of a service or the enjoying of the usufruct of a possessory lien, is prohibited in the context of a loan.<sup>187</sup> If, after all, a loan to a fellow believer is equivalent to a loan to a brother, and loans are limited to those in need, then it is hard to imagine activity more odious and distasteful than for a person to offer \$100 to his own brother in desperate need, on condition that \$150 be returned later.

### *F. Formalisms and the Religious Law*

Finally, the religious law relies on a great deal of formalism, particularly in matters of commerce. Thus, keeping with the example of the previous section,

181. See *supra* Section III.E for more detailed information concerning “Islamic economics.”

182. MINHAJ, *supra* note 111, vol. 2 at §1002. The *shari’a* generally classifies any particular action into five categories: required, favored, neutral, disfavored and prohibited. SHERMAN JACKSON, *ISLAMIC LAW AND THE STATE: THE CONSTITUTIONAL JURISPRUDENCE OF SHIHAB AL-DIN AL-QARAFI* 117 (1996).

183. MINHAJ, *supra* note 111, vol. 2 at §1002.

184. The Imamate within Shi’ism was the institution holding exclusive authority over Islamic doctrine following Muhammad’s death. In Twelver Shi’ism, the dominant form of Shi’ism in Iraq, there are twelve Infallible Imams, with the twelfth under Shi’i eschatology having gone into hiding, to return near the end of times. Hamoudi, *Revolution*, *supra* note 21, at 264-66.

185. MINHAJ, *supra* note 111, vol. 2 at §1003.

186. *Id.*

187. *Id.* at §§1011-13.



while the granting of a loan cannot be accompanied by any form of gain whatsoever, there is a separate issue if the loan is conditioned on a separate sale. That is, clearly the lender, as a condition of his loan of 100 bushels of wheat, cannot demand the repayment of 105 bushels in a year's time. Can he, however, loan 105 bushels, on condition that five of these bushels are sold back to him immediately for some relatively low amount, thus effectively lending 100 bushels immediately for a repayment of the full loan of 105 bushels in a year's time? Sistani dismisses this ruse as being within the types of gains that are prohibited.<sup>188</sup> But what if instead a separate property, not the bushels themselves, are sold by the borrower for less than its market value, or what if 100 bushels of wheat are lent to the borrower, on condition that he buy five more bushels for the price of ten, payment and delivery to be made in one year? Sistani is more hesitant, and indicates that these do not fall within the gain stipulations,<sup>189</sup> presumably because they involve sales separate from the loan. He does suggest that prudence cautions avoidance of such artifice, clearly designed to thwart the purpose of the prohibition on gain, but in language that implies that such matters are disfavored, not prohibited.<sup>190</sup> It is hard to see why this type of trade is treated differently than a loan, except in the barest formalist sense—one involves a loan and a benefit derived thereof and the other a loan and a separate sale.

By contrast, once the world of debt and loan is left behind, and the transaction in question becomes a "sale," the rules on trades with gain become much more permissive. The sale of an item measurable by weight or volume for a larger amount of the same item in the future is still prohibited, as a form of impermissible gain akin to a loan with an increase.<sup>191</sup> As for trades of different items measurable by weight or volume, the rules are complex, confusing, and, as Section IV.C shows, largely irrelevant.<sup>192</sup> Almost nobody in the modern world effects trades of goats for sheep, or wheat for barley; cash is the universal medium of exchange. This is fortunate, because the rules respecting commercial paper and money, neither of which are measurable by weight or volume, are surprisingly permissive, permitting the "sale" of one currency for the "purchase" of a higher amount of a different currency in the future, so long as the currencies are not the same.<sup>193</sup> This practice is not disfavored in any way.<sup>194</sup> That is, assuming an exchange rate of 1500 Iraqi dinars to the dollar, a trade of 100,000 Iraqi di-

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188. *Id.* at §1014.

189. *Id.*

190. *See id.* Sistani's words are "*fa la yatrak al ihtiyat al ijtinab minhu*," or "prudence does not relinquish the avoidance of such things." *id.* When Sistani wishes to prohibit something, the terms are either "*yuhram*" ("it is prohibited"), or "*alahwat luzuman alijtinab anhu*" ("the more prudent course necessarily is its avoidance") *id.* at §992 (emphasis mine). Without the term "necessarily," the clear implication is permissible, though disfavored, conduct.

191. *Id.* at 217.

192. *See supra* note 178 and references cited therein.

193. MINHAJ, *supra* note 111, vol. 2 at §234.

194. *Id.*

nars for 150,000 dinars to be paid in the future would be prohibited, but a trade of \$100 for 100,000ID to be paid in the future is entirely acceptable.<sup>195</sup> Other than forcing both sides to assume a currency risk, it is hard to see precisely what this achieves that money interest does not. Certainly it seems to thwart all of the high minded language cited earlier of the benefits of charitable loan giving and the absolute prohibition of benefits associated with loans. On the other hand, as discussed in the next section, such formalistic exemptions are embraced by commercial actors who are then able to engage in debt based transactions without serious restriction.

## V

### IRAQI MERCHANTS AND THE HYBRIDITY OF THE COMMERCIAL EXPERIENCE

In nearly two years in Iraq, from the summer of 2003 to the summer of 2005, through the intercession and persistent questioning of friends and relatives, I was given ample opportunity to inquire into and observe Shi'i merchant practices<sup>196</sup> in two primary retail industries, textiles and books, in Baghdad and to a lesser extent Basra. I do not claim that the means of financing within these industries is necessarily representative of broader areas of commerce, either within Iraq or beyond it. I provide no statistics (because I am virtually certain none exist) respecting the size of these industries, either in absolute terms or relative to other areas of domestic Iraqi commerce, or even of their nature. Given the circumstances prevailing in Iraq, a study that seeks to make any sort of statistical claim respecting the importance or scope of the practices I describe herein, or other Islamic forms of commerce, cannot seriously be attempted at this time. I would assume that industries of a similar nature in Iraq (for example, sellers of foodstuffs), would act similarly to those I describe herein, but I have nothing but supposition and the barest anecdotal evidence to support such a claim.

As a result, rather than make broad or highly generalized claims, it is my intent to describe one particular area of practice with which I have become familiar to shed light on the manner in which the devout might approach questions of Islam and law. Precisely how any industry in any country seeks to navigate between *shari'a* and law will depend on any number of factors, the uniqueness of any given, individual Muslim practice is undeniable. However, that many do so navigate, and neither live in a world of medieval jurists nor of entirely privat-

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195. *Id.*

196. In neither location were the merchant classes, at least at the time I observed them, composed exclusively of Shi'is and quite clearly some of the commercial practices described did transcend sect. Nevertheless, because the scope of the Article concerns Shi'i law, I focus exclusively on the nature and form of dealings within the Shi'i merchant class. Indeed, as Iraq's sectarian divide widens, limited focus of this sort may prove to be increasingly relevant to any description of Iraqi contemporary commercial practice.

ized religion, is equally undeniable. This article thus provides but one example of the contemporary Muslim experience.

#### A. General Commercial Practice

In the first place, it is important to note that the nature of this practice involves a finite number of retail merchants operating stores and shops in a confined area where each knows the other, and his<sup>197</sup> family, quite well. All of the merchants are either sole proprietors or family owned storefronts, with possibly a small number of laborers hired to perform any variety of routine tasks. The proximity and relationships alter the nature, though not the extent, of the competition between the merchants. Agreements on paper are common, though the merchants often seek the presence of two witnesses<sup>198</sup> as well, and rely almost as much on the witnesses as on the terms of the paper in subsequent disputes. Transactions are overwhelmingly done in cash, and delivery made on the spot. Payment is almost never made prior to inspection of goods, and may be done considerably afterwards.

Disputes tend to be relatively rare. Mediation is by far the most common form of dispute resolution, with the mediation being either through the parties' respective clans, or, if the dispute is serious or technical enough, through one of the more experienced merchants in the bazaar to whom disputes are often referred. It is not uncommon for the mediator to effectively become an arbitrator of sorts, and rule against a particularly recalcitrant party. Compliance with the ruling is almost inevitable, because the failure to comply with the ruling of a more experienced merchant following a quasi-hearing would lead to some form of ostracization. The second most common means of resolution and enforcement of disputes are extralegal; generally speaking, physical threats of one kind or another. Assaults on persons or premises are thus disturbingly common. These tend to occur less when the question is the interpretation of a contract (such as whether or not goods are conforming) and more when the question concerns the unwillingness or inability of one party to satisfy his obligations. Though of course one blends into the other, as for example the troubled merchant who insists the goods he received are nonconforming and refuses to pay for them. Religious scholars are involved at least theoretically if, for example, a party wishes to compel the sale of an item over which he has obtained security. Courts are almost never involved.

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197. The use of the masculine gender in this context is deliberate; I saw no female merchants during my tours of these *souqs*, though female customers abounded.

198. There is some Islamic pedigree to this, in that the *Qur'an* exhorts the believers to have two witnesses to any transaction involving a future obligation, or *dayn*. *Qur'an* 2:282. But generally speaking the juristic rules do not emphasize such a requirement and merchants are more likely to point out the logistical convenience of such a process rather than any sort of religious obligation associated with it.

*B. Structures of Commerce, Administrative Compliance, and the National Law*

As a general matter, all merchants seem to broadly observe the national law's requirements on title, registration and the like. Every merchant certainly could produce a document of title to his own storefront when I asked, for example, and, if his storefront was jointly owned with others (usually family members), he could readily produce a document reflecting the company's name and the nature of the partnership. In addition, contracts were in such cases often between the company, as a juridical person, and other parties, despite the fact that the religious rules provided no indication that company personhood was acceptable.

The form purchase and sale agreements are generally drafted by lawyers, not jurists, as are documents evidencing receipt of payment. There does not seem to be any sort of belief on behalf of the merchant class that the religious laws do not contain a general theory of contract; more than once I was told I was entirely wrong about this, though none could ever point me to any set of provisions in juristic texts that could plausibly be called a general theory.

Moreover, it is worth noting that while no merchant ever claims to follow state law in contravention of the *shari'a*, there clearly is, among this merchant class, a sense of legitimacy bestowed upon the national law as representing the collective will of the nation to which they owe political fealty. The best example of this lay perhaps in their responses to the Company Law, and the 2004 Amendments thereto.

Generally speaking, as noted above, the vast majority of sole proprietorships do not register their respective companies, and when I asked why, invariably the reply I received was that a "company" could not consist of one person, for there would be no person with whom he could keep "company." They further indicated that the law reflects this, and only permits more than one person to form a company. Thus, if two brothers own a storefront together, they might register a company, invariably in the form of a "joint liability company," similar to a general partnership in terms of financial obligations of the joint owners, to demonstrate their relative interests in the place.<sup>199</sup> For a single person, however, this is unnecessary: clearly he owns his own business entirely.

This is an accurate reflection of the 1997 Company Law,<sup>200</sup> drafted, it should be emphasized, in Ba'ath Iraq, at a time when the Shi'a were under severe persecution.<sup>201</sup> It is not an accurate reflection, however, of the law after March of 2004, as amended by the Coalition Provisional Authority ("CPA"), the American-run agency responsible for administering Iraq after the fall of Saddam Hussein and before the transition of power from the United States back to a sov-

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199. See IRAQ COMPANY LAW, *supra* note 128, at art. 6(3).

200. *Id.* at arts. 5, 6.

201. See LARRY DIAMOND, SQUANDERED VICTORY 5-6 (2005) (describing the persecution of Shi'a).

foreign Iraqi government.<sup>202</sup> The CPA Amendments grant far more expansive rights to individuals to form companies and expand greatly the ability of companies of all types to seek limited liability.<sup>203</sup> When I pointed this out to the merchants, I was met with firm objection. Merchants insist by and large that the law has not really changed, or that the change is illegitimate, or that it will be promptly reversed. Moreover, it is, they insisted, clearly against the spirit of the Civil Code as well as the Company Law, suggesting legitimacy to those laws lacking with respect to the CPA's revisions. Thus, while the merchant class has thus incorporated a Saddam-era law into the nature of their dealings, they do not recognize a CPA amendment thereto, even one that might work to any individual merchant's benefit by permitting him to seek the legal protection of limited liability.<sup>204</sup>

### C. Finance and the Shari'a

However, it is equally clear that when the national law permits something that the *shari'a* unambiguously prohibits, the textile and book merchants I observed tended to shun the provisions of the national law. This is particularly the case in the area of finance, where, as noted above, the prohibition of interest has been viewed as the centerpiece of an Islamic form of economics that is meant to be more humane and less voracious than the American form supposedly is. Merchants were as quick as any other class of devout Shi'a to mouth the platitudes of the Islamic economic order, emphasizing that they gave loans without interest for the sole purpose of "gains without limit" in the Hereafter, that where the West considered the ultimate purpose of life to be the soulless accumulation of material goods, they believed the purpose was to serve the Almighty God, and that where in the West one devoured a weaker brother and defended this as "survival of the fittest," in Islam he was supported in times of need, and weaned back to health. Islam believed in the brotherhood, the West believed in nothing but the individual accumulation of wealth. I do not recall meeting a merchant who did not begin a conversation with a speech somewhat along these lines.

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202. Hamoudi, *Money Laundering*, *supra* note 23, at 526.

203. CPA Order Number 64, *Amendment to the Company Law No. 21 of 1997 with Annex A* (March 3, 2004) available at [http://www.cpa-iraq.org/regulations/20040305\\_CPAORD64\\_Amendment\\_to\\_the\\_Company\\_Law\\_No.\\_21\\_of\\_1997\\_with\\_Annex\\_A.pdf](http://www.cpa-iraq.org/regulations/20040305_CPAORD64_Amendment_to_the_Company_Law_No._21_of_1997_with_Annex_A.pdf) (last visited April 13, 2008)

204. Of course, given some of the mob-like extralegal means to which merchants often resorted to exact payment of debt, discussed in this section, the limited liability principle would undoubtedly be of very little consolation to any merchant seeking to avoid payment obligations. Moreover, there may well be sound economic reasons why, in the context of such a closed commercial community where relationships of trust are fundamental to the nature of the business relationship, the principle of limited liability would not serve the community well. Others more schooled in economics than I are more competent to address this. Nevertheless, the question of the legitimacy of the CPA orders is central to understanding the reaction to the amendments to the Company Law.

Once I permitted the rhetoric to end, however, and without disputing or interrupting it (for that would only bring on more digression), the reality seemed somewhat different. In the first place, when asked what charitable interest-free loans they had given in the past year, few could produce very much by way of documentary evidence of any, though some had indicated that a first cousin had been lent \$1000, or a second cousin's husband \$500, which speak more to the nature of close, extended family relations in Iraq relative to the United States than anything having to do with broader commercial relationships. Nobody seemed to loan money much beyond the family.

On further discussion, it seemed that the more common form of financing was not a loan. The religious rules, not to mention the rhetorical comparison of Western economics and its loans to the more generous Islamic model, made that impossible. Rather, financing was done through a "sale" of one currency for another, which, as was noted above, is entirely acceptable under Sistani's rules because it is a trade of one item for another, neither of which is weighable or measurable by volume.<sup>205</sup> Thus are unsecured "sales" of current Iraqi dinars for future US dollars,<sup>206</sup> both extremely common forms of currency in Iraq in the present day, quite common, at exchange rates that reflect interest rates that are quite exorbitant, 33% per annum.<sup>207</sup>

These specific types of loans were rarely made from one merchant to another. Part of the reason may have been the entirely exploitative nature of the interest rate, but part may also have been the reluctance of a bookseller or a carpet merchant to want to deal with currency speculation and repayment risks, given that this is hardly the business he knows or understands. The job is therefore left to moneylenders. These individuals are far more likely to resort to violence to ensure repayment than use the other forms of dispute resolution described above. As I left Iraq, I was told by some merchants that gangs linked to Moqtada Sadr's Mahdi Army, the militia unit supposedly bringing Islamic rule to regions under its control,<sup>208</sup> had taken over the money lending practice in Ba-

205. MINHAJ, *supra* note 111, vol. 2 at §234.

206. In addition, the direction of the sale, from dinar to dollar, places most of the currency risk on the borrower, if one assumes that the dinar is more likely to collapse relative to the dollar than vice versa.

207. The dinar to dollar exchange rate is 1500 to 1. For repayment of loans in one year's time, it is generally made 1000 to 1, or an increase of 33%.

208. Concerning the Mahdi Army's sporadic efforts to institute supposedly Islamic rule, see DIAMOND, *supra* note 201, at 211-12 (describing an incident involving Sadr's Shar'ia courts). The Mahdi Army has, however, suffered a considerable loss of legitimacy from the fact that so many of its members are engaged in mafia like gang activities that are rather far removed from Iraqis' conception of what Islam is supposed to represent. See, e.g., Sabrina Tavernise, *Relations Sour Between Shi'ites and Mahdi Army*, NEW YORK TIMES, Oct. 11, 2007 at A1 (reporting a story where a divorced woman was killed by a Mahdi Army gang based on a baseless accusation that she was a prostitute, with her home then rented out by the gang that killed her).

sra. Given the tactics of the Mahdi Army,<sup>209</sup> I could not safely verify this information.

Given this, merchants tended to avoid moneylenders if they had the means, and instead relied on secured loans, which merchants were more willing to offer. The ease of obtaining security comes from a reliance largely on religious law to the derogation of the national law, as the latter precludes the use of nonpossessory liens unless a document of registered title passes to the lienholder or some other vague form of apparent possession is made,<sup>210</sup> an impossible task for something like a book inventory. The religious law, by contrast, recommends but does not require possession by a lienholder, and because it neither recognizes explicitly the state law, nor does it have its own administrative infrastructure through which registrations may be made, there is no mention of documents of registered title.<sup>211</sup> The religious rules do, however, suggest a communiqué (*bayan*) if there is any fear that the borrower will disclaim the presence of any lien, and as a result, the communiqués are often issued, with two merchant witnesses, which all but makes apparent and public to anyone within the *souq* that a lien has been placed on a particular movable property. Given that nobody beyond the *souq* will take a nonpossessory lien that a court will never enforce, there is no particular need for broader notice, and short of absconding with the property and relocating to another city, it is difficult to see what a borrower could do with the property that would be of detriment to the lienholder, other than selling it to repay the debt, which he is permitted to do under the religious rules with the permission of the lienholder.<sup>212</sup> Thus, even though the religious rules are extraordinarily poor at determining broader issues of registration and perfection, this is hardly an issue in this particular context.

From my anecdotal experience, loans undertaken under such a secured mechanism carry “interest” at roughly half of the interest rate of that of the moneylenders (that is repayment in a year’s time at a rate of 1250 Iraqi dinars to the dollar), and were therefore preferred by merchants. In addition, while fellow merchants could and often did resort to the same tactics as moneylenders, the potential to resolve disputes through clan intervention, or reference to a senior merchant, were more likely than in the moneylender situation.

The religious rules also permit enforcement of a security interest through reference to a cleric who could enforce a sale, and merchants insisted that this was an available option, though none could point out an example in recent memory where this was done. Rather, as a general matter, given the insular nature of the *souq*, if the merchant could not pay, he surrendered the pledged inventory. A merchant who had no free inventory might offer a car as security, or

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209. For the reasons set forth *supra* note 208, I avoided any contact of any kind with the Mahdi Army, which did limit my observations to a considerable extent.

210. See *supra* notes 141 and 142 and accompanying text for further explanation.

211. MINHAJ, *supra* note 111, vol. 2 at §1031.

212. *Id.* at §1047.

in more desperate circumstances, seek a loan from a moneylender. This type of desperation was relatively rare for most merchants, who could rely on family support, or a secured loan, in times of trouble. Still, it was common enough to permit some to make a reasonably lucrative living out of money lending.

Thus, as this Section shows, once the myths of either some fantastical notion of “pure” Islamic law or entire adherence to national law are discarded as inadequate, a much more complete picture of commercial order emerges. This picture, in the context of Iraqi merchant practice, shows how commerce, on the basis of notions of legitimacy and functionality, carves its own form of order from two separate bodies of law. It relies on the secular for basic form and structure, where the religious law is silent, and it turns to the religious rules when their form and rhetoric demand adherence, though it relies on the formalisms of the *shari'a* to prevent such adherence from fettering commercial practice. Likewise, religious rules are employed when the national law simply cannot accommodate modern commercial practice, such as in the case of security, where the religious rules and their reluctance to involve state concepts provide remarkable flexibility. Thus, what emerges, ultimately, is neither Islamic economics, nor the academic construction of classical juristic text, nor the manifestation of the rules of a national code, but rather actual commercial practice, held together through varied adherence to separate legal systems.

## CONCLUSION

### MUSLIM PLURALISM AND RAYS OF HOPE IN LEGAL SCHOLARSHIP

It would be a mistake to suggest that all of our scholarship in the legal academies is caught in deep denial of the reality of the legal order in the Muslim world. Scholars arise continually who challenge these paradigms, if more implicitly than I have. Russell Powell has written a fascinating piece on the development of women’s rights in Pakistan, contrasting this with comparable changes in Catholic canon law, to show how and on what basis religious doctrine has evolved in the two traditions.<sup>213</sup> Playing an important role is the fact that religious doctrine remains purportedly the basis of Pakistani family law at least, whereas civil law traditions in the Catholic world have largely jettisoned canon law, thereby demonstrating one manner in which religious rules may be shaped by their concretization in a particular time and place.<sup>214</sup> Mark Cammack has long written illuminating pieces of how Islamic law principles operate in conjunction with other forces and influences within the broader legal culture of the one country that is the subject of so much of his scholarship, Indonesia.<sup>215</sup> While

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213. See Russell Powell, *Catharine McKinnon May Not Be Enough: Legal Change and Religion In Catholic and Sunni Jurisprudence*, 8 GEO. J. GENDER & L. 1 (2007).

214. *Id.* at 31-40.

215. See, e.g., Mark Cammack, *Islam, Nationalism and the State in Suharto’s Indonesia*, 17



much of Bernard Freamon's work on slavery focuses on the classical era, he not only provides juristic rules, but also shows which rules were actually *law*, in that they had some effect on the actual practices of a particular era, and which rules bore no resemblance to classical practice<sup>216</sup> thereby making them, at least in the context of the time and place which Professor Freamon is describing, hardly a form of law as we understand the concept. Moreover, the subject of pluralism and Islam has received considerable attention abroad, and a wonderful book was published precisely on the subject of legal pluralism in the Arab world, with a number of separately written pieces on the intersection of law and religion, and the adoption of a pluralist model to explain them, from both sociological and legal perspectives.<sup>217</sup>

One particular area in which the work concerning the relationship of religious rules to state rules has been the most promising is in the area of legal theory. Mohammad Fadel, who has done groundbreaking work in Islamic political philosophy and its relationship to Rawlsian liberal theory,<sup>218</sup> tries to address the question of how to navigate the divide between the different but in some ways overlapping systems of *shari'a* and state law. Fadel first indicates that there should not be a problem with a state prohibiting activities permitted but not required by the *shari'a*, because these do not raise any particular questions of conscience for a committed Muslim.<sup>219</sup> For example, rather than determine whether the *shari'a* in fact implicitly prohibits polygamy (the liberal position) or permits polygamy but discourages it (the conservative position), with a purpose to enacting the "correct" interpretation, Fadel suggests that the state may pass any law that it wants on the basis of public reason without necessarily deciding the interpretive issue because it is not requiring either group to sin through violating their own notions of *shari'a*.<sup>220</sup> This is because there is no general claim that Islam *requires* polygamy, and thus a prohibition is not requiring a Muslim to choose between the state and her religious obligation.<sup>221</sup>

Thorny problems do disappear when this is taken as a starting point. In many, if not most, cases, compliance with both religious and legal standards is at least technically possible. That is, while the state law may set the age of mar-

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WIS. INT'L L.J. 27 (1999); Mark Cammack, *Indonesia's 1989 Religious Judicature Act, Islamicization of Indonesia or Indonesiazation of Islam?*, 63 INDONESIA 143 (1997); Mark Cammack, *Legislating Social Change in an Islamic Society: Indonesia's Marriage Law*, 44 AM. J. COMP. L. 45 (1996).

216. Freamon, *supra* note 12, at 53-57 (describing the horrific nature of Muslim slave practice).

217. See generally LEGAL PLURALISM, *supra* note 8.

218. See, e.g., Mohammad Fadel, *The True, The Good and The Reasonable: The Theological and Ethical Roots of Public Reason in Islamic Law*, 21 CAN. J. L. & JUR. 5 (2008).

219. Mohammad Fadel, *Public Reason as a Strategy for Principled Reconciliation: The Case of Islamic Law and International Human Rights Law*, 8 CHI. J. INT'L L. 1, 4, 11 (2008).

220. *Id.* at 11.

221. *Id.*

riage at eighteen and require the consent of the marrying parties,<sup>222</sup> and the religious rules suggest that a father or paternal grandfather may contract a child in marriage,<sup>223</sup> the believing family neither sins, nor commits a crime, by waiting until a child is eighteen to secure a marriage for him or her, with their consent. The religious rules do not, that is, *require* marriage at a younger age or without consent, they merely *permit* it. I am not in a position to provide any evidence as to the extent to which both state law and religious rules are followed by the pious in this regard. However, through years of living in Iraq, I can say with relative confidence that there is nothing at all unusual, and indeed among the urban and pious I knew it was a universal practice, for marriages to be contracted after the age of 18, and with the consent of all parties, and their parents, involved. Similarly, while as noted above, the state law may *permit* the taking of interest on a loan, and the religious rules *prohibit* it, nothing prevents the pious Muslim from following the religious rules and complying with the law, given that nothing in the law *requires* the taking of interest. This is precisely what happens in commercial practice in Shi'i Iraq, as we have seen. This is not to suggest that some problems do not remain, or that Fadel does not seek to address them, clearly he does<sup>224</sup>, but that a significant number of problems concerning the reconciliation of *shari'a* to state law can be eliminated entirely if the state were able to enact legislation on the basis of public reason that neither prohibited a required practice, nor required a prohibited one.

Professor Abdullahi An Naim, who has made a central part of his current work the necessary relationship of *shari'a* to state law, offers a slightly different approach. An Naim makes clear that he firmly believes that state law cannot be based on the *shari'a*, as the *shari'a* is itself inherently uncertain and unknowable, given the diversity of viewpoints that are contained within it.<sup>225</sup> To particularize his position through the lens of contemporary Shi'ism, Grand Ayatollah Sistani is not the only *mujtahid* whom Shi'i laypersons may select as a source of rules for Shi'ism; there are three other prominent Grand Ayatollahs in Najaf currently.<sup>226</sup> To enact any one of their derivations of *shari'a* as the law seems fundamentally contrary to the nature of the institution of the *marja'iyya*, where each scholar has his own seminary and uses his own interpretive methods to reach conclusions, with the institution as a whole, rather than any particular jurist, thereby preserving God's Will. Under such a system, it is the diversity of the *shari'a* and not its uniformity that justifies its sanctity. In the words of Muhammad Baqir al-Sadr, "legitimate interpretive effort [*ijtihad*] is the field on which [juris- tic] disagreements lay."<sup>227</sup> Indeed, the destruction of the *marja'iyya* in Iran is

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222. Personal Status Law, *supra* note 133, at art. 7(1).

223. MINHAJ, *supra* note 111, vol. 3 at §§57, 60.

224. Fadel, *supra* note 219, at 18-19.

225. AN NAIM, *supra* note 66, at 13-14.

226. Hamoudi, *Revolution*, *supra* note 21, at note 94.

227. MUHAMMAD BAQIR AL-SADR, AL FATAWA AL WADIHA 21 (1977).

precisely the result of juristic rule, with dissenting jurists being silenced by the force of the state.<sup>228</sup>

An Naim therefore boldly calls for a reevaluation of the *shari'a* away from current Islamist considerations of it as a system of law and more towards a system of moral rules of voluntary compliance.<sup>229</sup> State law in the nations with Muslim majorities would then be based on what he terms "civic reason," accessible to citizens of all religions.<sup>230</sup> An Naim accepts that a society's consensus on legal and illegal behavior, on the basis of civic reason, will reflect Muslim sensibilities, but believes that so long as the reasons proffered in the public sphere are not based on God's Will but civic reason, this is not only uncontentious, but in fact consistent with the rights of citizens to their own self-determination.<sup>231</sup>

It is not my purpose to discuss each of these two eminent and admirable scholars in any level of detail, but it should be clear from the above descriptions that both Fadel and An Naim necessarily assume the *dual* identity of a Muslim citizen, Muslim as to her own conception of *shari'a*, citizen as to the state. To the lasting benefit of their readers, both devote significant intellectual energy and consideration to the circumstances under which these might conflict and also to manners of resolution. Their thoughts are careful, nuanced, and quite relevant to the commercial practices described in this paper, demonstrating how Islamic legal theories do retain significant relevance in the modern legal order of Muslim societies, so long as they are willing to depart from the academic construct of "Islamic law" to discuss real world issues and circumstances.

With the exception of particular CPA revisions to the Company Law, whose manner of enactment was sufficiently unique and troublesome to merit fair criticism, the Iraqi commercial actors never really disputed the legality of the national law. None would take interest or pay interest; all considered this prohibition (notwithstanding the nature of their alternative practices) to be fundamental to a better world order, but the idea that there was something illegitimate or unacceptable about the law *per se*, merely because it was not drafted by jurists, did not occur to them. They complied with law in any number of ways. Even when they chose an alternative path, as in the systems respecting the procurement of a security interest, there was nothing illegal about it, and the actors themselves were well aware that they could not seek redress for their interests in

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228. James Woolsey, *WW IV: Who We Are Fighting and Why*, 4 RICH. J. GLOBAL L. & BUS. 1, 7 (2004).

229. An Naim, *supra* note 66, at 28-30. To be clear, An Naim in calling for the separation of "shari'a" from "law" is referring to law in the limited sense of "state law." My references in this article to pan-national Islamic law, or the Islamic "law" of commerce, are obviously not intended to be taken as laws of the state but rather rules of social order to be considered in contradistinction to the state law. This discrepancy in terminology brings our respective positions rather close together, notwithstanding my repeated references to shari'a as a form of "law".

230. *Id.* at 92-97.

231. *Id.* at 28-29.

the *courts*. The only purely extralegal (and illegal) actions had to do with the resort to violence at times to enforce payment obligations in particular. This had much less to do with the conflict of religious norms to legal norms,<sup>232</sup> and more to the disturbingly high levels of *de facto* permissible violence generally in Iraq for any number of reasons.

My understanding of Iraq, and its legal system, has thus been enhanced by these thoughtful reflections, as my understanding of the legal order of other Muslim societies, past and present, has been enhanced through reading the likes of Cammack, Powell and Freamon. If only these hybrid approaches were understood as the truest and most accurate representation of "Islamic law," our crisis would pass. But instead the hybridizers, as I might call them, are the outliers, law-mechanics whose true knowledge of the *shari'a* is supposedly limited by our failure to understand the pure and unassailable logic of the academic construct, even if its logic is no more foreign to us than it would be to most modern Muslims. Nearly half a century after Professor Llwellyn parted from our world, surely our academy should know that the life of the law is never so pure, nor so logical.

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232. I never asked, but I would be shocked if any cleric sanctioned such conduct to repay debt. Certainly the religious rules nowhere sanction such conduct.