Research Handbook on Transparency

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6. Transparency and the Shi'i clerical elite

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ON INSTITUTIONS AND THEIR RELEVANCE

If we are to understand how the value of transparency is understood in Islam, and particularly Shi'i Islam, let us begin with a perhaps obvious but insufficiently internalized observation. Doctrine, be it religious or legal, is hardly interesting on its own. It is susceptible to multiple interpretations and manipulations, particularly over the course of centuries. That doctrine might be deployed to serve one salutary aim or another in any given society—be that aim transparency, anti-corruption, abolition of slavery or care for the poor—seems obvious, almost banal. This is particularly so in the case of Islamic religious doctrine, developed in a world of caliphs, sultans and slave-girls,[1] and its putative use in the modern nation-state, with its very different biases and presuppositions respecting state function and organization, to say nothing of radically different normative premises respecting the nature of human dignity. It suffices to say that at some level of abstraction, classical Islamic doctrine has resources from which to develop an anti-corruption ethic that might include some notion of transparency. And yet to draw on such resources so as to render them relevant in modernity requires such a great amount of concretization through the liberal use of legal imagination that the result is almost as invented as it is derived.

Institutions, by contrast, be they legal or religious, are quite interesting, particularly when they are involved in the pronouncement and elucidation of doctrine. For where an institution is broadly considered authoritative and legitimate, its pronouncements on what the doctrine is must be afforded due weight. And whether one wishes to characterize these authoritative, effectively final, determinations—final, that is, until revisited by that institution or an equally legitimate successor—as doctrinal invention or faithful derivation, surely the reasons that the institution made the determination that it did involve influences that extend beyond the purely doctrinal. This must be particularly so when the historic doctrine does not provide much guidance. After all, institutions, be they religious or legal, have interests, are sensitive to political and social currents and trends, and, most importantly for our purposes, do not desire to slip into obsolescence or irrelevance.

Hence no story of the US Supreme Court's dramatic reversal of its interpretation of the interstate commerce clause during Roosevelt's New Deal is complete by reference to doctrine alone. The President's broad popularity and his threat to remake the Court by "packing" it surely played some role in the Court's reconsiderations.[2] In the religious context, the decision of the Mormon Church to ban polygamy at the end of the nineteenth century after regarding it as a sacred institution for much of its existence seems curious, at least until one is aware of the persecution to which the Church was subjected until it altered its position.[3] The point is not that the doctrinal shifts are implausible. To the contrary, nearly every doctrinal evolution can be and is defended with some level of plausibility, which is precisely what makes the doctrinal question so profoundly banal. It is that the doctrine alone hardly tells the complete story, there are other stories to tell, other factors to consider. It is in the consideration of those factors, and in the telling of those stories, in the Islamic context, as well as the modern Middle Eastern one, that I have made my life's work.

In the Shi'i Islamic context, the primary institutions of note are the two premier clerical institutions of Shi'i learning, based in Najaf, Iraq and Qom, Iran, respectively. For reasons that will become clear, the focus of this chapter will be on Najaf, yet as to both seminaries, certain distinctions with Sunnism can be immediately identified. Where the primary Sunni schools of thought, the *madhabs*, disappeared more than a century ago throughout much of the Middle East,[4] Shi'i Islam maintained a vibrant, active clerical elite, known as *mujtahids*, educated through its institutions and funded and maintained independently of the state, specifically by a tithe imposed upon the laity.[5] The system is something of an informal hierarchy, with "students" rising through the ranks over the course of decades until they reach the highest level, that of *marja' al-taqlid*, or Source of Imitation. This means that they are entitled to make binding rulings on Islamic law that lay folk are supposed to follow.[6] Moreover, while each *marja al-taqlid* is entitled to run his own seminary, and there is no formal higher rank, a single *marja'* is often recognized broadly within either Najaf or Qom, respectively, as being the most learned among all, and thereby acting effectively as *primus inter pares*.[7] In Najaf currently, the position of the most learned is occupied by Grand Ayatollah Ali al-Sistani.[8] Before him Abul Qasim al-Khu'i was deemed most learned, and he was preceded by Muhsen Al-Hakim, who died in 1970.[9] A predecessor to him was Muhammad Husayn Kashif al-Ghita', who was prominent during the period of the Iraqi monarchy.[10] Each of these individuals will play a role in our unfolding, fascinating story. We shall explore precisely how it came to be that a clerical institution whose chief historic function has always been the elucidation of Shi'i Islamic doctrine has managed to find itself

maintaining its contemporary relevance in large part through its repeated demands in various contexts that the state adhere to core conceptions of good governance, very much including transparency.

The next section will lay out in very broad outline how the earliest of modernity's most learned, Kashif al-Ghita', tended to react to the advent of modernity, largely by resisting trends toward codification and centralization of rule-making authority.[11] Eventually, over the course of decades, the Najaf clergy begrudgingly began to accommodate the realities of modern legislation. It restricted its objections to that area of law in which it sought exclusive rule-making authority; namely, the law of personal status.[12] In large part, however, the clergy remained disassociated from the state and uninterested in its modalities of governance. This position has some historic pedigree that precedes the rise of the nation-state in the Middle East, and it is referred to traditionally as "Quietism."[13]

Yet as the third section will explore, Quietism is easier practiced historically than it is in modern nation-states. It is one thing for the clerics to ignore the Ottomans to the extent that they, in turn, ignore the Shi'a, thereby permitting the jurists to lay out rules on all matters from contract to prayer that they might expect the laity to follow, albeit without the coercive power of the state to force compliance.[14] It is quite another when a state begins to assume all sorts of rule-making authority and promulgates state codes that derogate from the juristic rules. At this point, the jurists run the risk of irrelevance because many of their rules slip into obsolescence. They are left offering rules on how to perform absolution in prayer while an impoverished laity in a society rife with economic inequality seeks the solutions to its real problems elsewhere. It is in this context that the conceptions of political Islam among the Shi'i clergy began to arise, advanced in Iraq by Muhammad Baqir al-Sadr in the early years.[15]

As the fourth section shows, political Islam was ruthlessly suppressed in Iraq over the course of decades. By the time of Saddam's fall in 2003, the notion of direct juristic rule was not particularly popular among those clerics who remained in Najaf, including very much Sistani.[16] Nor were prominent exile leaders, among them the juristically trained Muhammad Baqir al-Hakim, seemingly enthusiastic to implement any sort of program of juristic rule.[17] And yet the issue respecting relevance remained. If the jurists were not to control the state and yet wanted to remain relevant in the lives of the laity who looked to them for guidance, what role might they play? In large part, partly through happenstance, this section shows that the answer that has evolved in post-Saddam Iraq has been for the jurists to take an active role in demanding that the state adhere to the principle of public accountability. Transparency was a chief component of this effort, with jurists objecting to procedures and processes that appeared to be

convoluted or unduly complex because the public could not understand them or control them sufficiently to hold the state to account.

The conclusion offers some reflections on the limitations of these developments. The Najaf clergy is neither positioned nor competent to act as an "independent watchdog" to ensure sufficient levels of transparency in government activities, much less commercial ones, which might help explain why Iraq's state functions continue to be decidedly opaque. In addition, the clerical elite are hardly liberal by any standard, and many supporters of anti-corruption initiatives will find significant differences of opinion with them on any number of topics. Yet none of this derogates from the fact that Najaf is widely popular across Iraq's Shi'i population, appears dedicated to ensuring broader state transparency, and may serve as a useful and helpful partner to ensure this. At the very least, this offers an opportunity for deeper engagement.

QUIETISM AND THE MODERN MIND

As Abbas Amanat has noted in the Iranian context, Shi'i legal thought has had a long history of being disengaged from politics and state affairs.[18] In Amanat's words:

> Before the time of Ayatollah Khomeini, Shi'i legal thought never seriously engaged in the sphere of public law and consequently never articulated a coherent theory of government. Even in the safety of the madrasa, Shi'i law remained largely preoccupied with articulation of civil and private law as practiced in mujtahid-run civil courts. . . . The Shi'i law on which the *mujtahids* relied remained a matter of interpretation and scholastic scrutiny largely within the madrasa environment rather than through the actual practice of the law.[19]

To some extent, this task is rendered easier by core theological tenets of Shi'ism,[20] which vest ultimate authority over the Muslim community in a series of infallible, lineal male descendants of the Prophet Muhammad known as the Imams.[21] The Final Imam, the Mahdi, went into hiding over a millennium ago and remains in hiding to this day during a period known as the Greater Occultation.[22] According to Shi'i eschatological theory, the Mahdi will ultimately emerge and institute just rule among the believers.[23] Hence, to be Quietist and not seek to organize the state under Islamic principles might be defended as merely accepting the Will of God, given that it is God, after all, who has chosen to place the one true heir to Muhammad's mantle in hiding for such a long period.

Yet to ignore public law and to focus exclusively on the scholastic interpretation of private law is only meaningful to the extent that the state is

itself unconcerned with the promulgation of private law. If the state does not create its own rules of contract and tort, marriage and divorce, wills and inheritance, focusing instead only on matters relating to war, crime and taxation—public law, that is—then the juristic role is to some extent preserved in the articulation of private law. Such is probably a fair description of the approach of the Mamluk and Ottoman Empires toward the territory where Iraq currently lies, at least until the initiation of the *tanzimat* reforms in the late Ottoman era.[24] But broad disinterest in the substance of the governing private law is certainly not an accurate characterization of most modern nation-states, Iraq very much included.

Hence, the first reaction of the Najaf clerical elite to state initiated private law rulemaking in Iraq was to resist it. In 1940, the renowned Shi'i jurist Grand Ayatollah Muhammad Hussein Kashif al-Ghita', the most learned of the Najaf clerics of his time, published a lengthy commentary under the title *Tahrir Al-Majalla*,[25] objecting to the Ottoman Civil Code, the *Majalla*, in force in Iraq at the time.[26] As a legal text, the *Majalla* was for its time quite groundbreaking, the first Islamic law codification, deriving its rules from one of the Sunni schools, the Hanafi, while also adopting some of the rules of other schools where the result seemed more consonant with the demands of modernity.[27] Kashif al-Ghita's primary critique was to demonstrate its substantial divergence from Shi'i law (though he pointed out areas of agreement as well) in a detailed, three-volume, article-by-article review of the *Majalla*.[28] In some ways, Kashif al-Ghita's concern was sectarian in nature: the *Majalla* was Sunni in origin, and by acting as the law of a state dominated by a Sunni elite but containing a Shi'i majority population, it was imposing upon the Shi'a a set of rules that were inconsistent with those of Shi'ism. Yet in this, a quest for relevance might well be gleaned. After all, the rules of the Najaf clergy were not merely being ignored (they may have been at earlier times as well),[29] but they were rendered, formally, of no relevance whatsoever by virtue of a state-enacted code that presumed authority where the jurists had earlier claimed it. Plainly, Kashif al-Ghita' is seeking to reverse this disturbing trend, to render Shi'i rules those to which the Shi'a community should turn, and he is doing this in his role as effective head of the clergy responsible for making such rules. He is seeking to make Najaf relevant again as rule maker, at least for the Shi'i community.

Yet we need not dwell here, for the idea that law was going to be taken directly from the manuals of Islamic law developed by jurists, be they Shi'i or Sunni, was not long for the modern world. The *Majalla* was clunky, hardly comprehensive or integrated as a Civil Code should be. It was also replete with rules that simply did not work in modernity, among them, for example, the lack of any sort of a general theory of contract. Instead, it

contained a finite number of nominate contracts, among them sale, lease and agency, with rather detailed rules for each that shed little light on how contracts should be understood and approached in a more universal manner.[30] Hence the *Majalla* disappeared, replaced by the Iraqi Civil Code in 1951,[31] drafted by the premier Arab jurist of the previous century, Abdul Razzaq al-Sanhuri.[32] To the extent that it relied on Islamic law, the Civil Code did so at a much higher level of abstraction than the *Majalla*, not so much incorporating juristic rules as claiming to be consistent with broader juristic trends.[33]

Thus, the Civil Code was a radical departure from prevailing expectations of Islamic law governance. To the extent that the *Majalla* was inconsistent with Shi'ism, then the Civil Code was much more so. Yet it did not provoke the same reaction in Najaf. By the latter half of the twentieth century, some sense of the realities of rule making in the modern nation-state had begun to penetrate Najaf. It simply was not sensible to demand that the rules of the state somehow reflect the juristic rules that were centuries old in origin, no practical way to make such rules work to govern private law affairs in an Arab state in the 1950s.

Admittedly, some efforts were certainly undertaken to preserve juristic control over *personal status law*, which was comprised of both family law and inheritance. Hence, for example, the prominent jurist Muhammad Bahr al-Ulum issued a critique against the Personal Status Code of 1959 that very much resembled the earlier efforts of Kashif Al-Ghita', albeit in a more ecumenical fashion. Bahr al-Ulum described in article-by-article fashion the manner in which each provision of the Personal Status Code diverged from *either* a Sunni rule *or* a Shi'i one and included a polemic on precisely why this divergence was problematic.[34] This was an effort to strip rule-making authority in the area of personal status away from the state and restore it to the clerical elite, and that effort remains in force to this day.[35] However, beyond personal status, it is fair to say that Najaf has long consigned itself to the reality that the rules its clerics derive are of fleeting relevance in ordering private relations as between individuals in the areas of contract, tort and property.[36]

And therein lay the danger for Najaf during the latter half of the twentieth century. If an institution is defined by its authority to issue a set of rules, and if that set of rules slowly slips into obsolescence, then the institution itself runs the risk of obsolescence. To be sure, the jurists did retain authority respecting rules of worship and ritual, but these were hardly sufficient to retain the loyalty of the laity. The Shi'a were, by the middle of the previous century, marginalized and economically disadvantaged, a majority population in a state that was dominated politically and militarily by Sunni Arabs.[37] It is hardly enough to repeat centuries old rules of worship

to such a population and expect their interest. Certainly such a message cannot be compared in its appeal to the premier ideological movement that found favor throughout much of Iraq's Shi'a dominated south at that time, that of communism, with its message of massive redistributions of wealth and the revolutionary institution of economic justice.[38]

At the very least, the Quietist approach, which involved ignoring the state to the full extent possible and leading the believers to live a virtuous life within the constraints of the profane world, no longer seemed tenable.[39] While jurists from Kashif al-Ghita' to Bahr al-Ulum plainly did involve themselves in political affairs as we have seen, the broad general tendency among Shi'i scholars was to avoid doing so, and to treat the state as an epiphenomenon predating the return of the Mahdi from which the believer is properly alienated.[40] Such an approach might work decently when the effective rules of organization are, or at least are supposed to be, based on the rules of Islamic law as derived by a given, authoritative clerical institution. Yet if an Ottoman empire ceases to exist, and if an Iraqi state begins to impose rules that bear no resemblance to the Islamic law of the jurists, and if the result is broad social and economic dislocation and dissatisfaction, then Quietism hardly seems adequate. To ignore the state is to ignore modern realities and seek refuge in centuries old texts that offer no comfort to the laity. One embraces such an approach only at the risk of obsolescence. Political Islam in the Shi'i context began to arise as a consequence of this.[41]

THE RISE AND FALL OF JURISTIC RULE

The rise of political Islam in Iraq is most closely connected to the person of Muhammad Baqir al-Sadr, a Najaf-trained scion of one of Iraq's most revered clerical families.[42] As Mallat shows in a scintillating work, Sadr's major objective was to rescue the juristic academies from near certain irrelevance, particularly in light of the rising appeal of communism among Iraq's Shi'a population.[43] In one of his most well-known, early works, *Our Economics*,[44] Sadr attempts to demonstrate how an Islamic economic system might work, emphasizing themes of social justice and the role of an Islamic leader to ensure its proper functioning.[45] Given the accessibility of the language, written in clear, modern Arabic without resort to the arcane linguistic formalisms that render much juristic discourse nearly unintelligible, Sadr's audience was those Shi'a who might otherwise look to Marxism rather than Islam as containing the solution to their worldly problems.[46]

Of course, if *Islam* was the solution, then it might logically follow that there must be a prominent political role in the state for the jurist who

pronounces it. After all, political advocacy on the part of the jurists had led to little substantive change. The broad trend over the decades of Iraq's existence was very much in the direction of progressive state secularization and juristic marginalization notwithstanding the efforts of jurists like Kashif al-Ghita' and Bahr al-Ulum. Sadr's ideas were thus absorbed and taken to their logical extreme by another Iranian born Najaf cleric, Ayatollah Ruhollah Khomeini. As Khomeini reasoned it, God wished the state to be Islamic, and the jurist to rule it.[47] Only the jurist could ensure the full and proper implementation of *shari'a*.[48] A sole jurist need not handle all of the tasks associated with this effort himself, but the jurist must supervise the state to ensure that its tasks were handled in accordance with Islamic precepts.[49] Sadr in his later work took some of these ideas from Khomeini's writings to develop a more concrete set of proposals respecting Islamic governance, many of which found their way into Iran's current constitution.[50]

Certainly juristic control was one way to ensure juristic relevance. Yet at least for Iraq, the idea was not to last. The Ba'ath ruthlessly suppressed any notion of political Islam, executing Sadr and his sister, Bint al-Huda, who had been responsible for the spread of Sadr's ideas among Iraq's female Shi'i population.[51] Islamists all either fled Iraq, or were promptly killed by the regime.[52] The only jurists left alive were Quietists, most notably the senior Grand Ayatollah Abul Qasim al-Khu'i.[53] The only political organization that could exist was the Ba'ath, for whom the broad mass of religious Shi'a felt no small amount of antipathy, as a brutally suppressed uprising in 1991 demonstrated.[54] Iraq thereafter entered a two-decade period of prolonged totalitarian stasis.

TRANSPARENCY AND JURISTIC RELEVANCE

When the Saddam regime finally fell in 2003, at the instigation of the United States, it was immediately apparent that Iraq's Shi'a laity continued to regard its juristic authorities and institutions with a great deal of respect.[55] This is hardly a surprise. The primary political trends that had proved popular among the Shi'a prior to the instigation of totalitarian Ba'ath rule were communism and political Islam,[56] and the former was no longer of particularly great popularity anywhere. Hence when the son of Grand Ayatollah Muhsen al-Hakim, Muhammad Baqir al-Hakim, returned to Iraq from two decades exile in Iran, he was greeted by tens of thousands of wildly cheering spectators in Najaf.[57] It seemed relatively apparent that Islamism was going to be the dominant political voice of the Shi'a.

At the same time, it was equally apparent that any political theory that resembled "Guardianship of the Jurist" was impossible for a number of reasons. There was the American administration of Iraq and the near certainty that any such proposal would meet with broad American rejection.[58] There was the fact that Iraq was a pluralistic state, and it was hard to believe that its Sunni and Kurdish populations had any interest in being under the "guardianship" of any Shi'i juristic academy. There was the fact that the model had been employed in Iran, and that Iraq had fought a long nine-year war in Iran during which hundreds of thousands of Iraqis had lost their lives.[59] And, finally, there was the fact that Iraq's leading juristic authority, Sistani, had no interest in acting as the nation's chief executive authority.[60]

Yet what must a juristic academy do to remain relevant if it does not seek to control the state? There continued to be some level of agitation to grant the jurists exclusive rule-making authority over personal status matters through repeal of the Personal Status Code.[61] However, early efforts to do this were blocked by the United States, and later efforts met with such controversy that it has never been implemented by legislation, despite a constitutional provision calling for such legislation.[62] Other efforts, including the placing of jurists or their deputies on the Federal Supreme Court so as to permit them to invalidate legislation deemed to be contrary to the "settled rulings" of Islam have likewise, at least to date, stalled due to vigorous controversy.[63]

The solution, in the end, was not so much devised as developed in reaction to events as they unfolded. Whatever Sistani's initial vision of the role of the juristic academies may have been, and it appears that it may have involved a prominent role in the state,[64] it ultimately evolved into one that focuses largely, *albeit certainly not exclusively*,[65] on matters of public accountability, of which transparency is, in this vision, an essential element. And this all began with the question of the timing of elections nearly immediately after Saddam's fall.

Aware of the patent appeal of Shi'i Islamism and concerned about the possible result of any election held too early in light of that appeal, the United States sought to defer elections for some time.[66] The United States also sought in the meantime to devise a constitution-making method that did not rely on direct elections to select the members of any constituent assembly.[67] The problem for the United States was that Grand Ayatollah Sistani was no less suspicious of the United States than the United States was of Shi'i Islamism, and of course both sides were well aware that electoral realities were on Sistani's side. Add to this the fact that despite its relative isolation, Iraq was hardly immune from the democratic ethos that permeates our global political culture, and that Islamist groups

had long accommodated themselves to, and indeed even embraced, democratic politics, and the path for Najaf lay clear.[68] Sistani demanded elections at the earliest available opportunity,[69] and he continued to demand them until the United States finally relented in large part, permitting the body that was to write the constitution to be elected.[70]

More interesting for our purposes, however, is the means by which the demand was phrased. From the start, the idea was not that democratic elections were a vital component of Islamic law standing alone. As a Grand Ayatollah who spent decades studying Shi'i methodological, doctrinal and historical traditions, Sistani was no doubt well aware of the suspect plausibility of such a claim. Rather, the idea was that elections ensured the core value of *public accountability*, which then ensured the preservation of Islamic law. Hence, for example, Sistani's earliest recorded message respecting elections reads as follows:

> These [occupation] authorities do not have the authority to appoint the members of the constitution writing council. There is no guarantee that this council will produce a constitution that responds to the paramount interests of the Iraqi people and expresses its national identity of which Islam and its noble social values are basic components. . . . There must be general elections in which each eligible Iraqi can choose his representative in a constituent assembly for writing the constitution.[71]

The first sentence sets forth the illegitimacy of relying on the United States to select the members of the council, and the second sentence explains why; namely, that it does not ensure that the council will be accountable to the Iraqi people. Democratic elections, the third sentence in the excerpt above, are merely the *instrument* to achieve public accountability.

Equally interesting is the rather distant connection of the subject to Sistani's core area of competence as the most learned of the Najaf high jurists. Islamic law is in some sense *subsidiary* to public accountability in Sistani's rendition. The state must reflect the will of its people, and elections are a means to do this. Further to this, the people, being desirous of Islamic law and other "noble social values," will ensure that Islam's role will not be reduced in the state. The path seems a rather tortuous one for a jurist to ensure the realization of Islamic law. If Sistani were truly seeking to ensure that certain precepts of Islam be guaranteed by the state, he could merely outline those precepts (a ban on alcohol, for example, or on money interest on a loan) and work with political allies to ensure their implementation. The overriding value quite self-evidently is not the enactment of law that shows some deference to *shari'a*, but the creation of a state that is accountable to the public.

As to why Sistani chose to make his first confrontation with the United States revolve around the question of elections rather than anything

more directly related to Islam or *shari'a*—core competencies of a Najaf jurist—one can only speculate.[72] It is possible that Sistani was genuinely concerned that the United States would somehow engage in a broad attempt to radically secularize Iraqi society, and that elections were the most viable way to prevent this. Alternatively, he may have believed that the Shi'a were in a precarious position in the absence of elections given their numerical majority and yet their traditional, political marginalization. If so, then clearly solidifying majoritarian control of state apparatus took precedence over all else.

In any event, whatever the reason, what is clear is that the intervention worked. Sistani's demand was found on flyers throughout Iraq, and Sistani was widely revered among the Shi'a as Iraq's democrat, speaking electoral truth to American might. He drew thousands of protestors to his cause on a daily basis.[73] That Sistani ultimately stared down the Americans, and forced elections, is a well-recited piece of Shi'a lore on the Iraqi street. This is to say nothing of the reporters and politicians around the world who began to discuss Sistani with such frequency and vigor that he became among the most well-known figures in post-Saddam Iraq despite refusing to meet with the media at all.[74] One irrationally exuberant commentator even recommended a Nobel Prize for the Grand Ayatollah.[75] Najaf had found a way to remain relevant in political affairs, and indeed globally beloved, without taking over the state or indeed saying very much of anything respecting the relationship of law to Islam. Unsurprisingly, success bred repetition, resulting in Najaf's repeated interventions on matters relating to public accountability and anti-corruption over the span of years.[76]

Of course, public accountability is not synonymous with transparency, but it is apparent that Najaf's later interventions were directed at ensuring transparency precisely for the purpose of enhancing public accountability. Hence, for example, desperate to retain influence in the constitution-making process, the United States proposed the selection of at least an interim legislature to propose an interim constitution through a rather complex caucus system. The system would involve some level of grass-roots support for the interim body but was opaque enough to enable the United States and its Iraqi allies to manipulate to some extent.[77] Again, the plan was rejected by Sistani, and again, the problem was one of accountability. The caucus system did not "guarantee the formation of an assembly that truly represents the Iraqi people. It must be changed to another process that would so guarantee, that is, to elections."[78] America's proconsul in Iraq at the time, L. Paul Bremer, begrudgingly abandoned his caucus plan.[79]

In this case, the fear could not have been a radical secularization process, since the interim legislature was not to draft the constitution, but rather to

act as Iraq's sovereign until full elections were held to elect a constituent assembly.[80] Nor could it have been the lack of any sort of local input in the creation of the assembly, as the caucuses, whatever their flaws, would surely need to reflect grass-roots opinion to some extent. Rather, the only sensible objection, one made elsewhere by outside experts,[81] was that the caucus system was plainly complex, difficult to understand and administer, and capable of manipulation. It was, to use a single term, *opaque*, and opacity would not ensure sufficient public accountability.

Years later, after the United States departed Iraq and as Iraq's democracy began to mature, there was yet another Najaf intervention, again into electoral matters, and again respecting the value of transparency. This was in the rather ferocious debate that surrounded the 2009 Elections Law, pursuant to which Iraq's second parliamentary elections under its current 2005 Constitution would ultimately be held.[82] While the debates surrounding that piece of legislation were multifarious, one important area of concern was whether or not the election would be held pursuant to an "open" or "closed" list system.[83] Under a "closed" list system, a candidate selects a slate containing a predetermined list of candidates (which may or may not be known to the voter), and, excluding technicalities not relevant for these purposes, the list gets the proportion of seats that reflects its proportion of the vote.[84] Hence, in a 50-person legislature, a slate receiving 50 percent of the vote gets 25 seats, and those seats are allocated to those who appear at the top of the predetermined list, whether or not the voters would have preferred other candidates.[85] Under an "open" list, by contrast, the voter selects the candidate and the list, thereby permitting the list to be reordered as the electorate wished it.[86]

While the matter of open and closed lists need not necessarily be linked to the ideals that the value of transparency seeks to vindicate, in Iraq in 2009 they were very closely associated. The broad concern with the closed list was a lack of public accountability, which in turn arose because of wide public suspicion that candidate lists were not being ordered based on the competence of the individuals in the party but through a series of corrupt, backroom deals that might include bribery or influence peddling.[87] The feeling widely among Iraq's electorate was that absent an ability on the part of the electorate to reorder the list, such backroom deals would continue. The legislature, with its already inflated salaries,[88] would be reduced to being no more than a source of patronage for the dominant parties through a series of arrangements that would never be exposed to public light.[89]

Yet the problem was that to change the system to one of "open-list" elections, one needed a law, and those who would be voting on it had the most to lose from the change. Accordingly, while there were few legislators who expressed support for closed-list elections, proposals kept appearing

with closed-list provisions. It was here where Najaf played an important function. From Sistani's office as well as from lower-level Najaf jurists and those offering sermons during Friday prayers, the demand for open-list elections was consistent and unwavering. The matter was framed specifically as one of transparency—to prevent the parties from striking deals with particular candidates—as well as public accountability, to ensure that the representatives were answerable to the will of the people.[90] In this context, far from any concerns respecting American designs on constitutional practice, Najaf continued to act as a voice in favor of transparent state activity over more closeted preferences among particular elites, and with success. The Elections Law ultimately included an open list provision.[91]

By contrast, Sistani does not seem to involve himself very much in matters that actually relate more directly to Islamic law. He does not, for example, have much to say about the Civil Code's provisions permitting the taking of interest or the lack of legislation concerning women's dress. The rules for such matters of course might be found in his juristic compendia,[92] but their relationship to the law of the state is not something on which he seems particularly concerned. To the contrary, the jurists of Najaf, when asked of such things, repeat the mantra that they have no role in politics or lawmaking with such frequency that it can grow tiresome.[93] The juristic academies are, in this respect, thoroughly Quietist, uninterested in advancing Islamic causes or crusades they know to be controversial. And yet, in their sporadic interventions into state affairs, on matters that relate to transparency at times, and to related values such as anticorruption and good governance at others, the jurists have found a way to remain relevant among their followers, and indeed garner significant positive international attention.

CONCLUSION

I believe that I am describing a promising evolution. It began with a juristic resistance to the very idea of modernity, and shifted to a theory of juristic rule that proved to be a disaster in the one state that attempted it. Eventually, it ended with a set of ideas that both manage to embrace traditional notions of Quietism as to religious affairs while engaging in forms of political intervention, including the vindication of transparency in different times and places, that should be understood as uncontroversial and indeed salutary. Yet lest this fortunate turn of events be exaggerated, it is important to set out important limitations on the thesis.

First, the Najaf seminaries are not equipped to act as independent watchdogs over the state in any sustained and meaningful way. Market

transparency, to take the simplest example, would lie well beyond their competence, which might help explain why Iraq remains one of the most corrupt nations on earth despite the Najaf undertakings. Najaf's interventions are sporadic and limited, focused on particular activities that have a higher profile; they certainly do not obviate the need for Iraq to take much needed wide-scale reforms to ensure greater transparency. Najaf clerics, that is, might well help deter any Minister of Oil from attempting to award a well-known oil field through a bidding process that is less than completely open and transparent. However, it will do little to ensure that companies listed on the Baghdad Stock Exchange are sharing accurate financial information with the general public, or that bribes aren't being paid to state officials to procure favor at lower levels.

The second qualification is that there are obvious dangers to relying too heavily on juristic authorities to act as the sole authoritative voice to force states to engage in good governance measures, whether those be related to transparency or otherwise. Even as we might celebrate Sistani's insistence that opaque caucuses be replaced with transparent elections and open-list elections be instituted to remove opportunities for secret deal-making, we can also lament his commitment to a form of untrammeled majoritarianism.[94] Najaf may well profess that it is uninterested in intervening in matters of state law, but its political allies have not always felt the same, having been involved over the course of years in seeking to roll back the Personal Status Code. That Najaf has been a positive force with respect to some matters should not blind us to the possibility that it will be less helpful in others.

Yet none of this should preclude the possibility of a deeper and broader engagement with Najaf on issues relating to anticorruption, good governance, and, of course, transparency. The reality is that Iraq's state watchdog institutions, from the Bureau of Supreme Audit to the Integrity Commission, have not despite the best of intentions proved equal to the task of reducing appalling levels of corruption in Iraq.[95] All too many politicians appear too self-interested to undertake significant reform. The sole institution that seems both authoritative and legitimate enough to do very much happens to be a religious one, which happens to be struggling to find a manner to remain relevant and seemingly found a niche on these matters of good governance in general, and transparency in particular. This should be celebrated. Things could have ended much, much worse.

NOTES

1. The corpus of the legal rules that comprise the *shari'a* were developed in the Sunni tradition in the eighth through the tenth centuries. CLARK LOMBARDI, STATE LAW AS

ISLAMIC LAW IN MODERN EGYPT: THE INCORPORATION OF THE *SHARI'A* INTO EGYPTIAN CONSTITUTIONAL LAW 14 (2006). While Shi'ism's major centers of learning continue to develop rules from original sources, it is fair to point out that the bulk of the doctrine similarly dates largely from the same time period as well. The extent of the similarity of the Shi'i rules to their contemporaneous Sunni counterparts is of some debate. *Compare* JOSEPH SCHACHT, ORIGINS OF MUHAMMADAN JURISPRUDENCE 260 (1950) (arguing substantial similarity of Shi'i rules to classical Sunni rules) *with* NOEL COULSON, SUCCESSION IN THE MUSLIM FAMILY 3 (1972) (describing Schacht's view as a "gross underestimation.")

2. *See* BARRY FRIEDMAN, THE WILL OF THE PEOPLE 3–4 (2009).
3. An excellent account of this process is described in Mary K. Campbell, *Mr Peay's Horses: The Federal Response to Mormon Polygamy 1854–1887*, 13 YALE J. L. & FEM. 29, 36–51 (2001).
4. NOAH FELDMAN, THE FALL AND RISE OF THE ISLAMIC STATE 83–85 (2008).
5. Haider Ala Hamoudi, *You Say You Want a Revolution: Interpretive Communities and the Origins of Islamic Finance* 48 VA. J. INT. L. 249, 267–68 (2008).
6. Ibid.
7. Linda S. Walbridge, *Introduction: Shi'ism and Authority*, in THE MOST LEARNED OF THE SHI'A: THE INSTITUTION OF *MARJA' TAQLID* 4 (Walbridge ed. 2001).
8. ANDREW ARATO, CONSTITUTION MAKING UNDER OCCUPATION: THE POLITICS OF IMPOSED REVOLUTION IN IRAQ 107 (2009).
9. Devin J. Stewart, *The Portrayal of an Academic Rivalry: Najaf and Qum in the Writings and Speeches of Khomeini 1964–78, in* THE MOST LEARNED OF THE SHI'A: THE INSTITUTION OF *MARJA' TAQLID* 222–23 (Walbridge ed. 2001).
10. Hamid Mavani, *Analysis of Khomeini's Proofs for* al-Wilaya al-Mutlaqa *(Comprehensive Authority) of the Jurist* in THE MOST LEARNED OF THE SHI'A: THE INSTITUTION OF *MARJA' TAQLID* 198 (Walbridge ed. 2001).
11. *See* notes 25–29 infra and accompanying text.
12. *See* notes 34–35 infra and accompanying text.
13. Haider Ala Hamoudi, *Between Realism and Resistance: Shi'i Islam and the Contemporary Liberal State*, 11 J. ISL. L. & CUL. 107 (2009).
14. Respecting the tendency of the Mamluks and the Ottomans to ignore Iraq until relatively late in the Ottoman reign, see YITZHAK NAKASH, THE SHI'IS OF IRAQ 22–23 (2nd. ed. 2003).
15. CHIBLI MALLAT, THE RENEWAL OF ISLAMIC LAW 142.
16. PATRICK COCKBURN, MUQTADA: MUQTADA AL-SADR, THE SHI'A REVIVAL AND THE STRUGGLE FOR IRAQ 140 (2008).
17. ALI ALLAWI, THE OCCUPATION OF IRAQ: WINNING THE WAR, LOSING THE PEACE 111 (2007).
18. ABBAS AMANAT, APOCALYPTIC ISLAM AND IRANIAN SHI'ISM (2009), 180–81.
19. Ibid.
20. The description herein is of "Twelver Shi'ism", which is the type that dominates in contemporary Iraq. Haider Ala Hamoudi, *Baghdad Booksellers, Basra Carpet Merchants and the Law of God and Man: Legal Pluralism and the Contemporary Muslim Experience*, 1 BERK. J. M.E. & ISL. L. 83, 87 n. 21 (2008).
21. ALLAMAH SAYYID MUHAMMAD HUSAYN TABATABA'I, SHI'ITE ISLAM 190–211 (Seyyed Hossein Nasr trans.1975) (describing the lives of each of the Imams).
22. Ibid. at 211.
23. Ibid. at 211–12.
24. Nakash, supra note 14 at 22–23.
25. *See* MUHAMMAD HUSSEIN KASHIF AL-GHITA', TAHRIR AL MAJALLA (1940), *available at* http://www.kashefalghtaa.com/site/gallery.php?picid=70.
26. Dan E. Stigall, *Iraq Civil Law: Its Sources, Substance and Sundering*, 9 J. TRANS. L. & POL. 1, 8–9 (2006).
27. Ibid. at 8. For an example of a situation in which a rule from a school other than the

Hanafi was purportedly used in the *Majalla*, see OUSSSAMA ARABI, STUDIES IN MODERN ISLAMIC LAW AND JURISPRUDENCE 59–60 (2001). For a criticism of this use, see 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. 423, 446 (2008).

28. *See generally* KASHIF AL-GHITA', supra note 25. *See also* MALLAT, supra note 15 at 49 (describing the efforts of Kashif al-Ghita' and locating them as part of a revival of Shi'i juristic efforts to address practical modern problems).
29. Nakash, for example, maintains that Iraqi tribes in the latter part of Ottoman rule tended to apply their own tribal laws, resorting to juristic rules only in cases of marriage and divorce. NAKASH, supra note 14 at 46–47.
30. Stigall, supra note 26 at 8.
31. The Civil Code, No. 40 of 1951, *available at* http://www.iraq-ild.org/LoadLawBook.aspx?SC=120120013721926. A highly imperfect and somewhat outdated translation is available at http://gjpi.org/library/primary/statutes/.
32. ENID HILL, AL-SANHURI AND ISLAMIC LAW 68–70 (1987).
33. CLARK LOMBARDI, STATE LAW AS ISLAMIC LAW IN MODERN EGYPT: THE INCORPORATION OF THE *SHARI'A* INTO EGYPTIAN CONSTITUTIONAL LAW 92–99 (2006) (describing Sanhuri's technique as "comparative neo-*taqlid*").
34. MUHAMMAD BAHR AL-'ULUM, ADWA' 'ALA QANUN AL-AHWAL AL-SHAKHSIYA [Shedding Light on the Personal Status Law] (1963). An account of this work is offered in English in Kristen Stilt, *Islamic Law and the Making and Remaking of the Iraqi Legal System*, 36 Geo. Wash. Int'l L. Rev. 695, 751–52 (2004).
35. Even when Iraq remained under American occupation, for example, the Iraqi "Governing Council", the council of Iraqi advisers handpicked by the United States to assist it during the transitional period, issued a resolution, resolution 137, that ordered the repeal of the 1959 Personal Status Code, and its replacement with uncodified *shari'a*. IRAQ GOV. COUN. RES. 137, dated Dec. 29, 2003, *available at* http://www.al-ghad.org/B148021177/C627240556/E195612751/index.html. This effort ultimately fizzled with the United States refusing to sign the resolution into operative law, and the Governing Council repealing it with much controversy. LARRY DIAMOND, SQUANDERED VICTORY: THE AMERICAN OCCUPATION AND THE BUNGLED EFFORT TO BRING DEMOCRACY TO IRAQ 172 (2005). Shi'i Islamist representation increased substantially after an election and the replacement of the Iraq Governing Council with a sovereign Iraqi state and a sovereign Transitional National Assembly acting as its legislature. ALLAWI, supra note 17 at 292–93. That assembly then drafted Iraq's permanent constitution, which in Article 41 calls for Iraqis to have the freedom to live by their own rules of personal status, based on their "religions, sects, beliefs and choices" as organized by law. Such an organizing law has not yet been passed, though a draft personal status law for the Shi'a was sent to the legislature for its review in the spring of 2014. Haider Ala Hamoudi, *Understanding the Problems in Iraq's Shi'i Draft Personal Status Law*, JURIST, March 31, 2013, http://jurist.org/forum/2014/03/haider-hamoudi-personal-status.php.
36. *See* Haider Ala Hamoudi, *The Death of Islamic Law*, 38 GA. J. INT. & COMP. L. 293, 316 (2010) (describing views of Shi'i Grand Ayatollah Bashir Al-Najafi).
37. MARION FAROUK-SLUGLETT AND PETER SLUGLETT, IRAQ SINCE 1958: FROM REVOLUTION TO DICTATORSHIP 190–92 (3rd ed. 2003).
38. Ibid. at 193.
39. Hamoudi, supra note 13 at 108.
40. Ibid.
41. MALLAT, supra note 15 at 36–37.
42. COCKBURN, supra note 16 at 27.
43. MALLAT, supra note 15 at 36–37.
44. MUHAMMAD BAQIR AL-SADR, OUR ECONOMICS (1997, trans World Organization for Islamic Services).
45. Hamoudi, supra note 5 at 277–84.
46. Ibid. at 271.

47. Ayatollah Ruhollah Khomeini, *Program for the Establishment of an Islamic Government, in* ISLAM AND REVOLUTION: WRITINGS AND DECLARATIONS OF IMAM KHOMEINI 1941–80 137 (Algar trans. 1981) [hereinafter "Khomeini"].
48. Ibid. at 73.
49. Ibid. at 137–38.
50. MALLAT, supra note 15 at 69–70.
51. Ibid. at 18.
52. FAROUK-SLUGLETT AND SLUGLETT, supra note 37 at 200.
53. COCKBURN, supra note 16 at 50–52.
54. Sluglett estimates that the Iraqi army killed as many as 300,000 people to suppress the 1991 uprising, using tanks bearing the genocidal slogan "[n]o Shi'is [will survive] after today." FAROUK-SLUGLETT AND SLUGLETT, supra note 37 at 289.
55. *See* ALLAWI, supra note 17 at 111.
56. FAROUK-SLUGLETT AND SLUGLETT, supra note 37 at 194–98.
57. ALLAWI, supra note 17 at 111.
58. Ibid.
59. FAROUK-SLUGLETT AND SLUGLETT, supra note 37 at 270–71.
60. Even Allawi, wont to emphasize Sistani's intrusions into politics and his desire to infuse politics with some level of religiosity, acknowledges this much. ALLAWI, supra note 17 at 210.
61. See note 35 supra.
62. Iraq Const., Art. 41.
63. Article 2 of the Iraq Constitution prohibits the enactment of any legislation that contradicts the "settled rulings of Islam." Article 92 indicates that the Federal Supreme Court will include, in addition to judges, "experts in Islamic jurisprudence and legal jurists," but also states that the number of such experts and jurists, as well as the means of decision-making on the Court and all other matters associated therewith, will be put forth in a law enacted by a two-thirds majority. Such a law has not passed, leaving the already existing Federal Supreme Court, authorized pursuant to the interim constitution, as a semi-permanent caretaker institution. That Court is staffed entirely by state judges, not jurists or religious experts. Haider Ala Hamoudi, *Ornamental Repugnancy: Identitarian Islam and the Iraqi Constitution*, 7 U. ST. THOM. L. J. 692, 700–2 (2010).
64. *See, e.g.*, ALLAWI, supra note 17 at 209–10.
65. The qualification should not be understated. I do not argue that the *only* interventions that the juristic classes undertake are those that relate to the realization of the values of public accountability and transparency. Plainly, jurists have involved themselves in other matters, such as, for example, the content of religious materials in primary school curricula. Steven Lee Myers, *Iraqi Cleric Avoids Using His Power to Sway Voters*, N.Y. TIMES, Mar. 3, 2010, at A4. I do, however, maintain that much of their effort has been along these lines, far more than any effort to ensure state enforcement of particular rules of *shari'a*, even those that are well nigh universally agreed upon as *shari'a* rules by the Sunnis and Shi'a alike. I might also note that where Najaf's interventions into matters involving transparency and public accountability have generally met with broad levels of success, many of its other interventions have not achieved the same result. Most famously, Sistani's call for restraint after the bombing of the Askari shrine was widely ignored, with the result being a spike in sectarian violence in the bombing's immediate aftermath. ALLAWI, supra note 17 at 444.
66. ANDREW ARATO, CONSTITUTION MAKING UNDER OCCUPATION: THE POLITICS OF IMPOSED REVOLUTION IN IRAQ 124–25 (2009).
67. Ibid. at 100–2.
68. Haider Ala Hamoudi, *Identitarian Violence and Identitarian Politics: Elections and Governance in Iraq*, 51 HARV. J. INT. L. (ONLINE) 82, 85 (2010).
69. Ibid.
70. ARATO, supra note 65 at 130–31.
71. This translation is reproduced ibid. at 99.

72. The decision by Sistani to take this fundamentally political stand is doubly ironic because of his explicit rejection of Khomeini's notion that a jurist required political training in order to attain his position. ALLAWI, supra note 17 at 210.
73. *See* ARATO, supra note 65 at 107.
74. Ibid. at 106.
75. See, e.g., Thomas L. Friedman, *A Nobel for Sistani*, N.Y. TIMES, Mar. 20, 2005.
76. *See, e.g.*, Hamoudi, supra note 62 at 703 (describing such interventions).
77. ARATO, supra note 65 at 114–15.
78. Ibid. at 115 (*quoting* Sistani).
79. Ibid. at 130. Bremer seems to have convinced himself that Sistani at some point had agreed to this plan and, in his words, "moved the goalposts," by rejecting it later. L. PAUL BREMER, MY YEAR IN IRAQ: THE STRUGGLE TO BUILD A FUTURE OF HOPE 234 (2006). Yet it is almost unimaginable that any plan that contained an opaque caucus system had ever been presented to Sistani and approved by him, given his consistent rejection of that means of selecting legislators. *See* ARATO, supra note 65 at 130 (reaching same conclusion respecting Sistani's consistency).
80. ARATO, supra note 65 at 114.
81. Ibid. at 116–17.
82. The law was ultimately enacted as Law of Elections, No. 26 of 2009, amending Law of Elections, No. 16 of 2005.
83. Hamoudi, supra note 67 at 88.
84. Ibid.
85. Ibid.
86. Ibid.
87. This was a prominent point made by parliamentarians during sessions debating the Law of Elections, as well as in Friday sermons, on television news programs, and in the newspapers. As one who was present in Iraq at the time, working closely with Iraq's legislature, the Council of Representatives, it was nearly impossible to hear complaints about the closed-list system without references to individuals whose place on the list was due to factors other than their public appeal.
88. The salaries of Iraqi members of parliament in 2009 were approximately $26,000 *a month*, in a nation whose per capita income was $300 a month. AFP, *Iraqi MP Expenses Scandal Triggers Religious Outrage*, Nov. 6, 2009, *available at* http://www.france24.com/en/node/4919336.
89. This feeling, it should be noted, has long existed in the Arab world irrespective of the method by which elections are held. Hence, for example, one of the most arresting scenes in Alaa Alaswany's best selling novel *The Yacoubian Building* involves a rich merchant obtaining a position in parliament almost entirely through a graft arrangement with the ruling party. ALAA ALASWANY, THE YACOUBIAN BUILDING (2005).
90. Hamoudi, supra note 67 at 88.
91. Art. 3(1), Law of Elections, No. 26 of 2009.
92. For money interest on a loan, see Rule 2292, Transactions, Rules Regarding Debt or Loan, *available at* http://www.sistani.org/index.php?p=251364&id=48&pid=2336 ("To pay interest is haram [forbidden], the same way as charging interest."). Respecting women's dress, see http://www.sistani.org/index.php?p=616687&id=1208 (obligation to cover hair and body from a man not her husband or a close relative).
93. Haider Ala Hamoudi, *Navigating the Najaf Mantra with the Four Grand Ayatollahs*, DAILY STAR (LEB.), Nov. 5, 2009.
94. ARATO, supra note 65 at 105 (largely blaming the United States for the failures in negotiations in the interim process but also acknowledging that Sistani "shows no sign whatsoever of being aware of any constitution-making approaches that could unite constitutionalism and democracy and the rights of a majority with the needs of minorities").
95. Iraq is ranked 175th out of 182 on the Transparency International Corruption Perception Index. http://cpi.transparency.org/cpi2011/results/.