

State and Sharia

Mohammad Fadel

One of the most contentious issues in the academic study of Islamic law has been the relationship between the Sharia and the historical polities that Muslims established in diverse times and places. Making this body of inquiry especially difficult to navigate is the fact that scholars' conclusions often depend on unstated and uncritical theories of the "proper" relationship of the state to the law, which may well be disputed among political scientists and legal and political philosophers. Furthermore, because of the heterogeneity of Muslim views on the nature of the Sharia and the nature of the state, as well as on the relationship between the two, a careful scholar must take care to qualify observations in light of the specific sectarian commitments of the work or works being analyzed. Broadly speaking, then, one can speak of different Muslim traditions that articulate competing versions of the normative relationship between the Sharia and the state. The most important sectarian traditions are those of the *ahl al-sunna wal-jamā'a*, the Sunnis; the *shī'at 'Alī*, the Shi'a; and the *shurāt*, known to their detractors as the Kharijis, the secessionists. Within each of these three normative traditions, of course, there are sub-traditions, marking internal disagreements arising out of different interpretations of each community's particular sectarian commitments. The Sunni tradition will be the principal focus of this chapter, something that is justified by the fact that it was the historically dominant tradition among Muslims and has received the bulk of scholarly attention. The chapter will conclude with a brief discussion of future research into this topic.

No account of Muslim thinking on this subject, however, would be complete without due attention to the contributions of the Muslim philosophical tradition (*falsafa*) and, for lack of a better term, the belle-lettrists who often expressed a conception of the law and its relationship to the state from the perspective of the practical statesman rather than the philosopher, theologian, or jurist. Space constraints, however, have made it impossible to devote even cursory attention to their views of the Sharia and the state.

Orientalist Theories of the Sharia and Sunni Constitutional Law

Western scholarship of Islamic law began in earnest with the rise of European colonialism, first in British India and then throughout much of the Islamic world. Hand in hand with European traders and conquering European armies and navies, orientalists worked to produce translations of Islamic law, largely to assist colonial administrators to better govern their Muslim subjects (Hallaq 2009: 376; and

Mohammad Fadel is Associate Professor and Canada Research Chair for the Law and Economics of Islamic Law at the University of Toronto. In addition to an unpublished but widely read doctoral dissertation on Maliki legal process, Fadel has published on a broad range of comparative and Islamic legal subjects, including "Back to the Future: The Paradoxical Revival of Aspirations for an Islamic State" (2009), "Muslim Reformists, Female Citizenship, and the Public Accommodation of Islam in Liberal Democracy" (2012), and "Judicial Institutions, the Legitimacy of Islamic State Law and Democratic Transition in Egypt" (2013).

Chapter 15, below). It was inevitable, given the context in which European studies of Islamic law took place, that parochial conceptions of law, based on these scholars' own experience of the emerging legal systems of an industrializing Europe, would color their impressions of Islamic law. Because the primary motive for studying Islamic law was the instrumental goal of furthering the success of the colonial enterprise, one should not be surprised that unpacking the internal coherence of substantive Islamic law (*fiqh*) was not the most important priority for this generation of scholars.

Parallel with the European expansion into Islamic lands, Max Weber developed his sociological typologies of law, which made links between the formal rationality of legal systems and their capacity to engender the kinds of social changes that had led to capitalist modernity in Europe. Relying on the conclusions of the emerging orientalist studies in Islamic law, particularly that of the Dutch scholar Christiaan Snouck Hurgronje, Weber unsurprisingly concluded that Islamic law was deficient insofar as it lacked, among other things, a sufficient commitment to the formal rationality that Weber believed was a prerequisite for capitalist transformation. This deficiency was in large part a consequence of its status as a religious law that was concerned exclusively with substantive rationality, that is, just outcomes, without regard to abstracting from individual outcomes formally rational rules that were internally consistent and generally applicable. Another consequence of Islamic law being a religious law, according to Weber, was that it was unwilling or unable to adapt in light of changing social circumstances, particularly after "the door of independent legal reasoning" (*ijtihād*) was closed. One particularly pernicious consequence of this failure was the fact that Islamic law became increasingly inapplicable to more and more areas of social life, and, as a result, instead of general rules regulating social life in a reasonably reliable and predictable fashion, Muslim societies were governed by a bewildering array of particular ethical, customary, or practical considerations that were embedded in a system of ad hoc decision-making, thus making capitalist development impossible (Turner 1974: 109, 110, 115, 119). Weber concluded that the Sharia was less a tool of practical governance than an unattainable ideal that had become irrelevant to governance, with the result that Muslim societies, as a practical matter, had become lawless (Turner 1974: 115).

Weber's typology of law and notion of where Islamic law fits into that typology anticipated many of the themes that Western orientalists would subsequently adopt in their study of Islamic law. Thus, Weberian themes such as the difference between religious law and secular law, the tension between legal ideals and reality, legal change versus stagnation, and formally rational law versus substantively rational law represented some of the most important themes guiding Islamic law scholarship from the last quarter of the nineteenth century and much of the twentieth. Indeed, Snouck Hurgronje himself (1957: 261) wrote that,

Fiqh is distinguished from modern and Roman law in that it is a doctrine of duties [*une déontologie*] in the broadest sense of the word, and cannot be divided into religion, morality, and law. It deals only with "external" duties—i.e., those that are susceptible to control by a human authority instituted by God. However, these duties are without exception duties toward God, and are based on the unfathomable will of God Himself. All duties that men can perceive being carried out are dealt with—all the duties of man in whatever circumstances and in their connections with anyone whatsoever.

More than half a century later scholarly opinion had hardly changed. Writing in the middle of the twentieth century, the British scholar of Islamic law Noel Coulson (1956: 223) expressed much of the same sentiment, saying,

They (i.e., the jurists) produced a comprehensive system of rules governing every aspect of life which expressed the religious ideal. Their fundamental concern was the study and development of "law" for its own sake. Practical considerations were only employed where this could be done without infringement on any theoretical principle.

Joseph Schacht also echoed Weber's criticism of Islamic law as being insufficiently developed, writing in his influential *Introduction to Islamic Law* that although Islamic law is not entirely irrational, "its formal juridical character is little developed; it aims at providing concrete and material norms, and not at imposing formal rules on the play of contending interests" (Schacht 1964: 4). Schacht also asserted, consistent with Weber, that the Sharia "had to resign an ever-increasing sphere to practice and custom," something that was the inevitable outcome of a legal theory that was "from the early 'Abbāsīd period onwards unable to keep pace with the ever-changing demands of society and commerce" (1964: 77). Coulson, too, contrasted Islamic law—which as a divine law "is a rigid and immutable system" and to whose dictates all must succumb regardless of their circumstances—with a legal system grounded in human reasoning "based upon the local circumstances and the particular needs of a given community" (Coulson 1964: 5). Thus, the religious character of Islamic law produced its rigidity, which in turn made it impractical for the governance of a dynamic society, thus producing the "gap" between theory and practice that would culminate, ironically, in the substitution of arbitrary and secular law-making for the ideal system of religious law envisioned by the Muslim jurists.

It is here that we see the intersection between legal theory and the state: because Islamic legal theory created an unattainable ideal, according to these scholars, the historical institutions that actually governed Muslim societies were bereft of a legal system that could be used to further the practical interests of their societies. This institutional failure was deemed to be the result of Islamic legal theory's failure to provide an adequate role for the state in governance, and was therefore understood by these scholars to be largely the failure of Muslim jurists to produce a workable system of constitutional law—the law governing the state itself (Schacht 1964: 27, 54–5). Schacht, for example, wrote that of all the topics discussed by Muslim jurists, the least relevant to social practice was constitutional law, if it existed at all (1964: 36). He attributed the failure to develop a practical system of law to the fact that "the religious law of Islam" developed not in connection with the practices of the emerging Muslim state, but rather in direct "opposition to it" (1964: 27).

Ann Lambton succinctly restates this line of scholarship in her introduction to *State and Government in Medieval Islam*. She writes that because the Sharia is pre-existing and eternal, and because it represents the absolute good, it precedes the community and the state, and thus dispenses with any need for political philosophy, even to "ask[] the question why the state exists." The all-encompassing nature of the Sharia, its divine character, and its claim to govern the state, in turn, preclude the possibility of conceiving the person as a rights-bearing individual. The failure to recognize a separation of religion and state "contributed to, if it was not actually responsible for, the creation of a situation in which power was arbitrary and exercised by the last despot who had usurped it" (1981: xiv–xvi).

Western scholars writing specialized works on Islamic constitutional law came to the conclusion that over the course of time Sunni jurists abandoned any attempt to establish a legitimate constitutional order and simply surrendered to the notion that "might equals right" (Gibb 1955: 19; Kerr 1966: 51). This depressing conclusion is almost exclusively the result of Western focus on Sunni discussions about the selection of the caliph. Sunni doctrine asserts that suitably qualified electors (*ahl al-ḥall wa-l-'aqq*) should select the caliph from among a pool of candidates who meet certain minimal criteria of eligibility, or in the alternative, the incumbent caliph is to select a suitable candidate during his lifetime. Abbasid-era jurists, however, such as the Shafi'i al-Māwardī, had made substantial concessions to the warlords who were exercising effective power in the Abbasid state through the conditional validation of the governorship by seizure (*imārat al-istilā'*); Mamluk-era jurists such as Ibn Jamā'a went even further, effectively legitimating government by usurpation. Sir Hamilton Gibb characterized Ibn Jamā'a's views on government as "a complete divorce of the imāmate from the Sharī'a and the abandonment of the Law in favor of a secular absolutism" (1955: 23).

Kerr, too, focused on the failure of Muslim jurists to articulate an objective set of rules governing the process by which the caliph should be selected, noting (1966: 31) that,

In the election of the caliph by the *ahl al-ḥall wa-l-'aqd* (leaders of the Community), not only do we never have a precise account of who these electors are or how they are to be chosen and on what basis, but there is no means described of authoritatively determining whether or not the election has been correctly carried out.

Islamic constitutional law was also seen to be a failure insofar as it failed to provide meaningful independence for judges (Tyan 1955: 236–9; Tyan 1960: 11–12; Coulson 1966: 131). As a result, orientalist scholars asserted that enforcement of judicial decisions “was entirely at the whim of the *de facto* ruler” (Coulson 1964: 83). Émile Tyan argued that the subordination of the judiciary was the direct result of a normative juridical theory that lodged all powers in an autocratic ruler and conceived of all lesser officials as the personal delegate and representative of the ruler (Tyan 1955: 236). The autocratic powers of the ruler, in combination with the idealistic and thoroughly impractical norms of the Sharia, led to the creation of alternative tribunals, known as *mazālim*, which could dispense an effective form of rough and practical secular justice. For these scholars the *mazālim* courts represented secular law in contrast to the religious law that the qadis administered (Tyan 1960: 445–6; Tyan 1955: 243; Coulson 1964: 129; Schacht 1964: 54–5). Despite their recognition that Muslim jurists themselves discussed *mazālim* tribunals and deemed them to be legitimate, this acceptance of the *mazālim* fora amounted to no more than the further entrenchment and “tolerat[ion] of secular absolutism” (Coulson 1966: 131).

Sunni constitutional law was also deficient insofar as it failed to provide for legitimate legislation, all law having come from God via revelation. It being impossible to govern based solely on revealed sources whose texts were frozen in time, Muslim jurists came to recognize the right of the ruler to “make rules and regulations, to clarify and apply the law,” but not in a way that would change it or amend it. This power was known as *siyāsa shar‘iyya* (Lewis 1988: 31). This form of rule-making, however, was not sufficient to remedy the defective nature of Islamic constitutional law. Schacht argued (1964: 53–4) that this doctrine obfuscated the distinction between legislation and administration, and thereby prevented Muslim jurists from addressing the problem legislation posed to their constitutional law squarely. Coulson, on the other hand, believed (1966: 133) that the doctrine gave too much arbitrary power to the ruler, and the jurists, in their typically idealistic stance, legitimated the doctrine in their naïve belief that rulers would be just and only use it for good. In short, Islamic constitutional law was both a cause and an effect of the idealistic, even utopian, nature of the Sharia.

Having concluded that the Sharia dispensed with any need for political theory and that it was essentially utopian, it is not surprising that orientalist scholars writing on Islamic constitutional law, for example Erwin I.J. Rosenthal, W. Montgomery Watt, and Ann Lambton, prioritize “context,” that is, empirical historical reality (or what is claimed to be historical reality), over “text” in their analysis of Muslim political writings. Rosenthal, for example, asserts that the purpose of Sunni constitutional theory was to reconcile the doctrinal demand that spiritual and secular powers be united in the caliph and the empirical reality that others—the sultan or the amir—actually wield temporal power. For Rosenthal, this was accomplished by a reciprocal exchange of recognition between the caliphs and the military elites who held effective power: in exchange for the caliph delegating temporal authority to these *de facto* rulers, the *de facto* rulers in turn would recognize the spiritual authority of the caliph (1958: 22–3). Indeed, Watt was so convinced of the priority of the empirical to the theoretical that he informed the reader in the introduction to his *Islamic Political Thought* that “the concepts implicit in men’s practice are more important than the writings of political theorists,” thus justifying the book’s focus on “practice more than theory” (1968: x). Consistent with that view, he devoted only four pages to Sunni constitutional law; these four pages were essentially a recapitulation of the eleventh-century al-Māwardī’s *al-Aḥkām al-sultāniyya*, as interpreted by Gibb (Watt 1968: 101–4). Lambton’s approach is in essence the same (1981: 87).

Among the newer generation of contributors to Western scholarship on the theory of the caliphate, Patricia Crone has been one of the most creative. She generally agrees with previous scholars regarding the Sharia’s deleterious effect on the political life of the Muslim community (Crone and

Hinds 1986: 109–10), but revitalizes the field by claiming that the Sunni theory, which subordinated the state to the Sharia of the jurists, was a development of classical Islam that represented a radical departure from the views of the early Muslim community, for whom “it was the caliph who was charged with the definition of Islamic law [...]. In short [...] the early caliphate was conceived along the lines familiar from Shi‘ite Islam” (Crone and Hinds 1986: 1). The classical view described by orientalist was therefore a post-Abbasid development.

Crone’s overview of Sunni political thought and of its relationship to the Sharia is at this moment the best and most comprehensive overview of the subject available in English (Crone 2004: chaps. 16, 18). Her reading of the sources is much more nuanced than prior scholarship and pays greater attention to the details of various scholars’ positions, and she usefully draws on the comparative experience of other civilizations in an effort to make sense of some Sunni positions that others have roundly castigated. She makes a persuasive case that al-Ghazālī’s insistence on the importance of the caliphate, as set out in his work *Fadā’ih al-bāṭiniyya* (alternatively, *al-Mustaḥḥir*), is, in contrast to the position taken by his teacher al-Juwaynī in *Ghiyāth al-umam*, best explained by his determination to counter the challenge of Isma‘ili Shi‘ism (2004: 238–41). She also roundly criticizes Gibb’s outrage at al-Māwardī’s attempt to legitimize “governorship by usurpation,” saying that “[h]is reaction is peculiar, for what could be more common in history than the recognition of usurpers? It was by casting the barbarian polities of Europe as subordinate kingdoms (*regna*) within the empire (*imperium*) that Christians such as Isidore of Seville (d. 636) maintained the theoretical unity of the Roman Empire” (2004: 233). Nevertheless, because she hews to the general argument of her predecessors that Sunni religious idealism substantially undermined the possibility of a workable political order, her work should be viewed as the most sophisticated presentation of the classical orientalist view, rather than representing a new approach to the subject.

Revisionist Theories of the Sharia and Sunni Constitutional Law

In the 1980s scholars began to question the validity of certain elements of the orientalist account of the relationship between the Sharia and the actual operation of legal systems in premodern Muslim polities. Its assertion that the idealist nature of the Sharia rendered its use as a tool of governance impracticable was questioned through a series of studies that challenged, inter alia, the assumption that formal legal rules were irrelevant to the historical legal systems in existence in Muslim polities; that Islamic substantive law was, for all essential purposes, immutable; and that a sharp ideological division existed between the qadī courts—which applied the formal rules of Islamic law—and *maẓālim* and other tribunals that the orientalist account had taken to be secular jurisdictions that existed outside the normative framework of Islamic law.

Social historians and anthropologists began undertaking studies that tested how irrelevant formal Islamic law was to organizing social life in Muslim societies. One traditional obstacle to challenging the “irrelevancy” hypothesis was that court records had not been systematically preserved until the Ottoman empire, and as a result there was very little documentary evidence that could shed light on the practices of courts in the Muslim world. Legal anthropologists circumvented this problem through a combination of direct observation of the practices of contemporary courts as well as the practices of other members of the legal class, for example muftis and document writers, combined with close readings of relevant legal texts. Rather than demonstrating a binary opposition between the formal legal system and the cultural system, these studies demonstrated how formal legal norms interacted with cultural norms in order to produce a legal system that was both Islamic and customary (Messick 1986, 1989, 1990, 1993; Rosen 1981, 1989).

Social historians also began to make use of fatwas—after successfully challenging the notion that these represented purely theoretical or academic exercises—to demonstrate the relevance

of formal Islamic law as a tool for the effective governance of pre-Ottoman Islamic societies (Powers 1998, 2002, 2003, 2006a, 2006b; Masud et al. 2006; Shatzmiller 1995, 2001, 2007). Meanwhile, since the 1990s there has been an explosion in studies exploiting Ottoman court records for the economic and social history of the Ottoman empire, in addition to numerous monographs on its legal culture (Gerber 1994, 1999; Imber 1997). Timur Kuran has to date published a ten-volume collection of judicial records from seventeenth-century Istanbul, with summaries of the decisions in modern Turkish and English (2010–). Numerous historical studies of endowments (*awqāf*) over the same period have also undermined the orientalist position that Islamic law had little relevance to social practice (Ghazaleh 2011). The cumulative weight of these studies has significantly weakened the case that Islamic law was largely a theoretical enterprise that had little relevance to social practice or the practice of courts.

Legal anthropologists and social and economic historians were not the only scholars compromising the orientalist conception of the relationship of the Sharia to society; scholars in legal theory were also challenging the stereotyped notion that Islamic legal theory was too idealistic and rigid to permit principled adaptation to changing circumstances (see Chapter 5, above). They were crucial in paving the way for a more nuanced appreciation of *uṣūl al-fiqh* and its commitment to rational and logical coherence, with the result that our appreciation of Sunni *uṣūl* has now far transcended the “four-source” theory (Quran, Sunna, *ijmāʿ*, and *qiyās*) commonly attributed to al-Shāfiʿī.

The renewed interest in Sunni *uṣūl al-fiqh* was accompanied by the same in post-formative (that is, post-fourth-century AH) developments in Sunni substantive law (*furūʿ al-fiqh*). Once it was demonstrated that Islamic law was not impermeable to legal change, scholars began documenting the actual history of Sunni substantive law. Several specializing in post-formative fiqh demonstrated that substantial diachronic changes took place in Islamic substantive law, and that fiqh became more systematic and abstract—in contrast to the claims of Weber and orientalism—throughout the post-formative period. To offer only a few examples: through a close analysis of Hanafi legal categories, John Makdisi showed (1985–86) that post-formative Hanafi law displayed many of the features of formal rationality and systematization that Weber believed were lacking in Islamic law. With respect to diachronic change, Baber Johansen demonstrated (1988) that Hanafi jurists from the Mamluk and Ottoman periods knowingly and openly adopted positions in matters of taxation contrary to those of the early Hanafi masters, demonstrating that even within the parameters of *taqlīd* there were important venues for substantial and legitimate doctrinal change. Others were able to show that *taqlīd* did not represent a lesser form of Islamic law, but rather a shift from individual to corporate authority (Jackson 1996a: xxx–xxxii), indeed, it placed the law on firmer social footing by making the law more predictable, even code-like, as evidenced by the authoritative accounts of the various madhhab doctrines that Mamluk-era jurists produced, such as *Mukhtaṣar Khalīl* (Fadel 1996). Finally, it was demonstrated how substantive law evolved through the interaction of legal doctrine, social practice, and the practice of *iftāʾ* (giving legal opinions) (Hallaq 1994; Hallaq 2001: 195–208; Fadel 1997: 57–61, 66–7, 69–71).

By demonstrating that Sunni Islamic legal theory and substantive law were neither as rigid nor as idealistic as had been claimed, this line of scholarship effectively challenged some of the most basic tenets of orientalism regarding the relationship of the Sharia, Muslim society, and the state. Sunni constitutional law, however, has yet to receive the same degree of attention from revisionist scholars. Indeed, even a scholar with the stature of Wael Hallaq has failed to revisit orientalist assumptions regarding Sunni constitutional law, omitting the topic entirely from his *Sharīʿa: Theory, Practice and Transformations* (Fadel 2011: 115). Nevertheless, scholarship has begun to make strides in proposing new ways to understand Islamic constitutional law and the legitimacy of the state from the perspective of Islamic law.

The first scholar to provide a new account of Islamic constitutional law was Sherman Jackson in his study of the Maliki Shihāb al-Dīn al-Qarāfi (d. 684/1285). Relying on al-Qarāfi’s treatise on constitutional law, *al-Iḥkām fī tamyiz al-fatāwā ‘an al-aḥkām wa-taṣarruḥāt al-qāḍī wa-l-imām*, Jackson identified al-Qarāfi’s functionalist analysis of Prophetic precedents as laying the foundation for a constitutional approach to the interpretation of Islamic law (Jackson 1993). According to

Jackson, al-Qarāfi states that proper understanding of Prophetic precedent first requires determination of the capacity in which the Prophet Muḥammad was acting at the time: either as the Apostle of God, as mufti, as judge, or as head of state. When the Prophet acted as an apostle, he was conveying God's revelation to humanity. When he was acting as a mufti, he was communicating the meaning of revelation to humanity in the form of rules that were applicable to the end of time—the legal effect of such rules was either to create immutable duties or obligations, or to authorize certain kinds of human actions, in each case on condition that the relevant legal conditions had been satisfied. When the Prophet was acting in the manner of a judge, the effect was that individuals could not exercise the right in question unless and until a judge authorized them to exercise that right. Finally, when he acted in his capacity of head of state, that meant that the legal norm in question did not represent a general rule of law, but rather the decision of the community's temporal ruler, with the consequence that successive rulers of the Muslim community were free to follow the Prophetic precedent, modify it, or ignore it altogether, in each case based on their contemporaneous assessment of the community's welfare.

According to Jackson, the political relevance of al-Qarāfi's taxonomy lies in his assertion that each of Muḥammad's four functions was inherited by various members of the Muslim community. Thus, Quran reciters and hadith transmitters inherited the apostolic function of communicating revelation. Muftis inherited the Prophet's function as authorized interpreter of the textual proofs (*adilla*) contained in God's revelation, but with the crucial difference that, unlike the Prophet, they were not infallible, and so their interpretations of God's revelation bound only those who followed them but not those who followed the views of different muftis. Judges inherited his function of resolving conclusively disputes among people in accord with judicial evidence (*hijāʾ*), such as eyewitness testimony, oaths, denials, etc. And caliphs inherited from the Prophet his role as temporal head of the community with the authority to make binding decisions for the good of the community (*al-siyāsa al-ʿamma*).

In this way, various public offices in the state were given different roles within the constitutional order of a caliphate: judges' decisions were final so long as they followed legitimate rules of law as articulated by muftis; because of the regime of *taqlīd*, the four madhhabs enjoyed quasi-constitutional status and existed side by side, supplying the rules by which courts would resolve disputes; and rulers, whether called caliphs, amirs, sultans, or kings, enjoyed the power to direct the community's public affairs, engage in giving legal opinions (that is, act as a mufti), and resolve legal disputes (that is, act as a judge), without, however, interfering in the autonomy of the law-making process, or the integrity of the law's application. The result of al-Qarāfi's theory, paradoxically perhaps, was simultaneously to elevate the theoretical powers of the caliph (and by extension other rulers) by recognizing him as a member of the legal class and the judiciary, while effectively neutralizing those powers by subjecting his exercise of those powers to the same standards that applied to ordinary members of the legal class and the judiciary.

As a practical matter, then, this meant that if rulers chose to exercise either the power of interpreting the law or of resolving disputes, they would have to rely on the established opinions of the legal schools. According to Jackson, the upshot of all this was to place substantial limits on the power of the government through the tool of the law. Another important feature of al-Qarāfi's argument was that it placed limits on the reach of the law itself, and, accordingly, helped to check the risk that any one particular school of law could dominate the state and impose its norms on society, including on Muslims holding contrary views—something that particularly concerned al-Qarāfi due to the Shafi'i school's close relationship to the Ayyubid and Mamluk rulers of his day (Jackson 1996a).

Other scholars of the Mamluk era have also challenged one aspect of the orientalist narrative that asserts that Muslim rulers effectively created their own, essentially arbitrary system of positive law to govern medieval Muslim societies. This alternative system of law, known as *siyāsa*, was said to exist outside the formal normative constraints of the Sharia, and was administered largely through the "secular" tribunals of, for example, *maẓālim* or *jarā'im*, in contrast to the "religious" tribunals of the qadis. I myself have challenged this account of *siyāsa*, relying on the medieval Hanbali scholars Ibn Taymiyya and Ibn Qayyim al-Jawziyya, as well as on Ibn Farḥūn (d. 799/1396), the Maliki author of *Tabṣirat al-hukkām*, and al-Tarābulūsī (d. 844/1440), the Hanafi author of *Mu'īn*

al-ḥukkām (Fadel 1995: 61–75, 79–105, 185–98). Both Ibn Farḥūn and al-Ṭarābulusī incorporated *siyāsa* directly into the ordinary law that judges were expected (or could be expected) to administer; moreover, roughly one-third of each of these works was dedicated to the question of *siyāsa*. Given the normalization of *siyāsa* at the hands of jurists in the Mamluk period, I argued that it was impossible to dismiss *siyāsa* as an Islamically illegitimate mode of law.

Yossef Rapoport has also criticized the continuing prevalence of the orientalist description of Islamic law and the (Mamluk) state, which he describes as “depressing narratives of decay and corruption” (2012: 71), despite the fact that Islamic law scholarship since the 1980s has refined much of the Schachtian (and ultimately Weberian) model of Islamic legal history (2012: 73). According to Rapoport, instead of a growing gulf between the jurisdictions of the qadi courts and the *mazālim* and other tribunals established by the rulers, the Mamluk period witnessed an ever-greater integration between the two systems. This began when al-Zāhir Baybars (r. 1260–77) introduced the system of the four chief judges—one from each of the different schools of law—with the specific goal of taking advantage of particular elements of each school’s doctrine in order to promote greater flexibility, predictability, and practicality in the legal system (2012: 77–9). Historical evidence from the period, Rapoport notes, contradicts the notion that *mazālim* courts were arbitrary or were indifferent to Sharia norms (2012: 80–1). And while *mazālim* courts originally specialized in remedying administrative abuses, in the later Mamluk period their jurisdiction expanded into both family law disputes and commercial disputes, largely to close what the rulers deemed were loopholes in the formalistic system of fiqh (2012: 84). Indeed, by the end of the Mamluk sultanate, the rulers had become so involved in the administration of justice—justice rendered in the name of the Sharia in contrast to the formal rules of fiqh—that they began to claim the right to interpret the substantive rules of the Sharia themselves, without regard to the views of the jurists (2012: 97). Instead of seeing this conflict, then, as a conflict between “religious” and “secular” authority, it is better viewed as competing conceptions of Islamic authority and Islamic justice writ large, between the formalistic champions of fiqh on the one hand and a more common-sense oriented conception of Islamic justice on the other (2012: 86–92).

Kristen Stilt’s work (2012) on the *muḥtasib* of Mamluk Cairo casts further light on the practical relationship that existed in the Mamluk state between formal legal doctrine and the institutions of the state. In Stilt’s analysis of this official—often described as the market inspector—he was simultaneously a bearer of the legal tradition, insofar as he oriented his policies in reliance on formal doctrinal manuals reflecting the values of the fiqh tradition, and a representative of the state’s institutional power, insofar as he also carried out the ruler’s policies and directives, particularly in the economic realm. Her study of the *muḥtasib*’s activities from this period, as reflected in historical chronicles and legal sources, repudiate the notion that rulers were divorced from the generally religious culture in which the Sharia was elaborated; a good portion of the rulers’ directives to *muḥtasibs* was directly related to religious policies that the ruler himself took a direct interest in, whether with respect to the proper conduct of ritual prayers or regulation of sexual propriety among the general populace. Through an analysis of 35 case studies across a range of topics, Stilt at minimum raises substantial questions regarding the notion that normative fiqh, along with its conception of public offices such as that of the *muḥtasib*, was irrelevant to the functioning of the medieval legal system.

Shī‘at ‘Alī (the ‘Alids)

In contrast to the Sunnis, the partisans of ‘Alī b. Abī Ṭālib, the Prophet’s first cousin and son-in-law, who are popularly known as the Shi‘a, were united—despite their divisions into numerous sub-sects—in the conception that God had designated Imams who were responsible for the spiritual and political guidance of the Muslim community following the Prophet’s death. These Imams, moreover, were generally understood to be descendants of Muḥammad through the union of ‘Alī and Fāṭima, the

Prophet's daughter. The three most important branches of the Shi'a are the Zaydis, the Imamis (also known as the Ithna 'Asharis or Twelvers), and the Isma'ilis.

As a general matter, the Shi'a did not produce a body of cognizable constitutional law, at least not in the sense developed by Sunni jurists such as al-Māwardī. A brief historical review of Shi'i views on the state is given below; for Western scholarship on Shi'i classical thought on the state, see further Sachedina 1988; Madelung 1980; Gleave 2009; Calder 1987; Eliash 1969.

The Zaydis take their name from Zayd b. 'Alī (d. 122/740), a great-grandson of 'Alī b. Abī Tālib, who led an unsuccessful revolt against the Umayyad caliphate in Kufa. In contradistinction to the two other large Shi'i groups, the Zaydis did not restrict the Imamate to a particular line of the Prophet's descendants, but instead held that any male member of the Prophet's descendants was a legitimate candidate, provided he satisfied its conditions, which were learning and political power. The legitimate Imam must, they believed, be more than a scholar; he must also manifest his learning through capturing (or founding) a state. While it was an obligation upon Muslims to attach themselves to the legitimate Imam when he appeared and claimed his rightful position, there was no requirement that an Imam exist at all times. Accordingly, while the Imamate was obligatory as a moral ideal, the empirical absence of a legitimate Imam did not imperil the spiritual state of the community; the community could endure in the absence of an Imam through its adherence to the Sharia. Zaydis were able to establish small states on the margins of the Islamic world, one along the shores of the Caspian Sea that existed from 864–1120, and the other in Yemen, which lasted more than a millennium, from 897–1962, albeit with the qualification that distinctive Zaydi ideas gradually receded in favor of Sunni theories of legitimacy as the Zaydi state in the Yemen became more firmly institutionalized and subject to principles of dynastic succession (Crone 2004: 99–109).

The Imamiyya, or the Twelvers, is the most numerous of the Shi'i communities, representing approximately ten percent of Muslims worldwide. The Twelvers are distinguished from the Zaydis by several doctrines, beginning with who was eligible to be the Imam, but more significantly, regarding the role of the Imam in the life of the community. To sum up the differences, first, the Imams descended only from a particular line within the Prophet Muḥammad's family, and instead of earning their position by virtue of learning, political sagacity, courage on the battlefield, and calling men to the establishment of a legitimate political order, they were known by an express designation (*wiṣāya* or *naṣṣ*) from father to son, the sole exceptions being the first Imam, 'Alī b. Abī Tālib, whom the Prophet Muḥammad himself had designated as Imam, and the third Imam, al-Ḥusayn b. 'Alī b. Abī Tālib, whom his brother, the second Imam, al-Ḥasan b. 'Alī b. Abī Tālib, designated as his successor. Thereafter, all Imams had to be a son of the living Imam, until the period known as the occultation (*ghayba*) began, with the disappearance of the twelfth Imam. Second, the Imams not only enjoyed a special line of descent, they also had access to knowledge that was otherwise inaccessible to ordinary human beings, and with respect to their religious instruction, they were infallible (*ma'ṣūm*). As a result, recognition of the true Imam was crucial to a person's salvation, even if he was otherwise a Muslim. For this reason—unlike many of the Zaydis—the Imamis uniformly rejected the legitimacy of not only the Umayyad and Abbasid caliphates, but also the early caliphates of Abū Bakr, 'Umar, and 'Uthmān, recognizing only the caliphate of 'Alī as having been legitimate, a stance that earned them the designation of *rawāfiḍ*, "the rejecters." Third, because of the essentially apolitical role of the Imam in Twelver thought, the disappearance of the Imam was resolved by empowering religious scholars to speak on his behalf through the medium of their legal expertise; but because Twelver theology maintained the belief that the only legitimate government was the government of the Imam, non-Imami government could never have any legitimacy—the most that could be achieved was to live justly as a faithful community in accordance with the Imam's teachings as elaborated by the jurists (Crone 2004: 110–24).

Unlike the Zaydiyya, located away from the center of the Islamic world, the Imamiyya was largely an urban religious movement, concentrated first in the holy cities of the Hijaz, the garrison towns of Iraq, Baghdad, and Qum in Iran. With the exception of the Twelver Buyid interregnum, 945–1045, in

Iraq and western Iran, the Twelvers had always been subjects of Sunni rulers. Even during the period when the Buyids were in effective control of the Abbasid caliphate, there was no attempt to overthrow it in favor of a state founded on Twelver Shi'i principles. The reasons for this are clear: Twelver doctrine had evolved to adopt a position of absolute political quietism that was the distinct opposite of the Zaydis. Only government by the Imam could be legitimate, and the possibility of legitimate rule had come to an end, at least until the twelfth Imam returned from his occultation to restore justice by reuniting the political and spiritual (Crone 2004: 120–2).

The quietist stance of the Twelvers remained undisturbed until the Safavids conquered Iran at the beginning of the sixteenth century and imposed Twelver doctrines on its populace. Instead of recognizing the legitimacy of the Safavid state, however, even in a qualified sense, Twelver scholars themselves claimed to be representatives of the Hidden Imam, and as a result, worldly rulers—to the extent they could gain any legitimacy at all—could do so only by agreeing to act as instruments of the Twelver religious class (Lambton 1981: 276–7). Twelver doctrine, then, has never come to recognize a legitimate political space outside the scope of the Imam's authority, or in his absence, the authority of the religious scholars who speak on his behalf, a position that laid the foundation for Ayatollah Khomeini's twentieth-century doctrine of “the rule of the [most eminent] jurist” (*wilāyat al-faqīh*) and the establishment of the Islamic Republic of Iran (Crone 2004: 122).

This conventional apolitical account of Twelver Shi'ism has been challenged by Said Arjomand, who argues that the concept of the *ghayba* actually functioned as a catalyst for the political activism of Twelver theologians with secular political authorities. The fact that the twelfth Imam was in hiding meant that, in practical terms, no living person could claim his authority (Arjomand 1988: 45) and as a result, political legitimacy came to depend on traditional, pre-Islamic norms of patrimonial monarchy, encapsulated in the slogan that the ruler was the shadow of God on earth (1988: 95–9). The non-Imamic ruler, who is otherwise deemed to be a usurper, could become a just ruler by using his powers to further the goals of the Hidden Imam, *ṣāhib al-amr* (1988: 63–4). To accomplish the Hidden Imam's ends, scholars had to become more world-affirming and actively involved in the affairs of secular government, a process that began with the rise of rationalist Twelver theology at the hands of theologians like al-Sharīf al-Murtaḍā, who were even willing to serve the Abbasid caliphate in Baghdad (1988: 59–63).

From Arjomand's perspective, the Safavid takeover of Iran was not therefore the point at which Twelver Shi'ism became politically active; instead, it introduced a rejuvenated form of messianic Shi'ism that represented an important challenge to orthodox Twelver Shi'ism (1988: 102). Safavid religious policy walked a fine line between its commitment to rationalist Twelver orthodoxy, as evidenced, for example, by Shah Tahmāsp's (r. 1524–76) designation of 'Alī al-Karakī al-'Āmilī (d. 940/1534) as *nā'ib al-imām* (1988: 133–4), and its inability to extricate itself fully from its roots as a messianic Shi'i movement (1988: 179–80). Indeed, orthodox Twelver Shi'ism, with its rationalist commitment to political activism, does not eventually triumph until the nineteenth century, when it finally defeats both Shi'i millenarianism and the Akhbari school of thought (1988: 14).

The Isma'iliyya broke away from the Twelvers/Imamiyya largely as a reaction to the latter's quietist politics. Unlike the Twelvers, who deferred the messianic age to an indefinite future and prohibited any attempts to hasten its advent, Isma'ilism was largely a millenarian movement that consciously sought to hasten its advent. In addition to its millenarianism, Isma'ili doctrine always included an important antinomian element that understood the messianic age to coincide with the abrogation of religious law. One branch of the Isma'ili movement successfully established its own powerful, universal state, the Fatimid caliphate. The Fatimid state originated in 909 in North Africa, but after they successfully conquered Egypt, their newly built capital of Cairo became the center of the movement. The Fatimids, however, were never able to replace the Abbasids, and the messianic origins of the state were quickly replaced by the same bureaucratic logic that governed the Abbasid caliphate and those of its Sunni Turkic and Iranian allies. As a result, the religious movement again separated from the political, and eventually, the Sunni Salāh al-Dīn al-Ayyūbī put an end to the Fatimid

caliphate in 1171 (Crone 2004: 197–218). The religious movement continued to survive, however, and pockets of Isma'ili communities still exist in Syria, Yemen, Iran, on the Indian subcontinent, and among the Indian diaspora in East Africa and North America.

The *Shurāt* or the Kharijīs (the “Secessionists”)

The *shurāt*, those who “sold themselves to God,” was the appellation preferred by Muslims whose answer to the problem of just governance was to insist on the immutability of the form of government that prevailed in the early Muslim community in Medina, as it existed until the waning days of the third caliph, 'Uthmān b. 'Affān. To their detractors, they were simply *khawārij*, secessionists, who obstinately refused obedience to any realistic form of government in favor of small, anarchic groups prone to periodic fits of violence. The origins of this group lies in the first civil war, when the fourth of the so-called rightly guided caliphs, 'Alī b. Abī Tālib, fought against Mu'āwiya b. Abī Sufyān. Each commanded a large body of the early Muslim community; the point of contention was the murder of the caliph 'Uthmān. 'Alī had been declared the next caliph, but Mu'āwiya, a long-serving governor of Syria, refused to recognize 'Alī's legitimacy on the grounds that the very people who had killed 'Uthmān were the ones who then selected 'Alī for the caliphate, and that, in any event, 'Alī refused to hand over the killers to Mu'āwiya, 'Uthmān's cousin and legal next of kin, for justice. The two parties met in battle at Siffin, and instead of finishing off Mu'āwiya's army, 'Alī agreed to submit the dispute to arbitration.

In protest of his decision to cease hostilities, a group of 'Alī's supporters departed from his camp, thereby earning the name of the “secessionists.” Their opposition was based on their slogan “God is the only judge!” (*lā ḥukm illā li-llāh*), and they accused 'Alī of impiety by abandoning God's command to fight Mu'āwiya and his followers and submitting the dispute to an arbitrator for resolution. The insistence on the right, and in some early versions, the obligation, of Muslims to act to depose an unjust ruler, became the hallmark of their doctrine. The fact that they would rebel against unjust rulers even when they had no hope of prevailing was the motive behind their self-appellation of *shurāt*: they “sold” themselves to God through their ready willingness to lay down their lives in sacrifice against ungodly authority.

Like other Muslims, they largely agreed in principle on the obligation to have an Imam (although one group of the *shurāt*, the Najdiyya, are reported to have rejected the obligatory character of the Imamate [Crone 1998]); however, their doctrine of the Imamate was so radically egalitarian that it all but obliterated any difference between the Imam and the ordinary Muslim. From this perspective they can be viewed as the radical opposite of the Imamis and the Isma'ilis, whose conception of the Imamate posited radical difference between the Imam and the rest of humanity. For the *shurāt* the Imam could be any free Muslim, without regard to ethnicity or tribal descent. The only qualification was that he must be the most meritorious of the community, and that after he was elevated to the Imamate he continued in office only for so long as his conduct was consistent with the law and he remained virtuous. Once he fell short of this standard, the community was to ask him to repent, and if he did not, he was to be replaced. For the most radical of the early *shurāt* there was no possibility of living in a moral community unless that community was led by its most virtuous man.

Accordingly, Muslims who had not repudiated the Umayyads (and later the Abbasids) were necessarily apostates, and could be legitimately fought. Later *shurāt*, however, modified this doctrine, and came to accept the permissibility of living under an unjust ruler as long as one accepted, as a doctrinal matter, the moral obligation to establish a just Imamate. Under this more moderate platform, a stable doctrinal sect, known as the Ibadiyya, was able to establish itself, and they were able to set up relatively long-lived polities in Oman and North Africa (Crone 2004: 54–64). Muslims who follow *shurāt* teachings today represent less than one percent of the global Muslim community (Crone 2004: 20).

Future Research

Much progress has been made in studying the relationship of Islamic substantive law, as a set of formal doctrines, with the historical practices of various premodern Muslim polities. Given the richness of the archival sources, the most progress has been made in the Ottoman period, but knowledge of the pre-Ottoman Muslim states has also benefited. More progress, however, remains to be done. Islamic law scholarship focusing on the post-formative era, roughly the fifth to the tenth century AH, must make greater use of the formal doctrinal sources produced by that era. Long dismissed as an era of stagnation, we now know that much of the intellectual labor in formulating and adapting the law was taking place in commentaries, specialized treatises, and fatwas. While the work is labor intensive, it is likely to shed light on numerous questions that are of interest equally to legal historians as well as social historians. In this regard, it is crucial that legal scholars work closely with historians of the periods in question. It may be the case that many legal texts that seem unintelligible, or perhaps insignificant, become more intelligible, or gain in significance, when read in the proper historical context. At the same time, historians without a proper understanding of legal doctrines run the risk of misinterpreting their sources if they lack a solid understanding of legal terminology. It is not an exaggeration to say that the future progress of the field will depend on the ability of scholars from different disciplines—law, political history, social history and, ideally, economic history—to work together through legal and historical records in order to fashion a richer history of the legal world that predominated in the post-formative era.

For the classical and early periods, however, our sources are necessarily more limited. Our doctrinal resources are fewer, and so too the historical resources. Nevertheless, we have not exhausted our reading of even the early doctrinal sources. I will speak with regard to one important question that arises out of Sunni constitutional law: the notion that the ruler is a representative (*nā'ib*) or agent (*wakīl*) of the community. While Crone obviously recognizes that this view exists (Crone 2004: 240, 277, 298), she laments the failure of Sunni Muslims to take the “short step [...] [of] forming independent councils authorized to signal when the rules had been breached, to strike out illegal decisions, and to block their execution” (Crone 2004: 277). It may be, however, that we have failed to notice the existence of some forms of institutionalized means of supervising the legality of the government, even if they were rudimentary from the perspective of a modern state. Take the *mazālim* tribunal, for example. Although the orientalist view was that it existed to make up for the inefficacy of the qadi's court, one of its most basic functions was *radd al-ghuṣūb*, the restoration of property that a government official had misappropriated. Far from being an extra-legal procedure, the efficacy of this remedy depended on recognition of the complainant's property rights as set forth in the fiqh literature, and of the fact that the actions of a government agent, no matter how powerful, could not alter the law's view of who held the legal entitlement.

The notion that the ruler is an agent of the community or its representative stands in sharp contrast to the notion of the ruler as a divine agent, and one would expect to see traces of this doctrine in the fiqh literature, particularly with respect to how jurists evaluate the conduct of the ruler and other public officials. While general works such as al-Māwardī's *al-Aḥkām al-sultāniyya* might not delve into these details, ordinary works of positive law routinely discuss issues involving the potential liability of the ruler and his agents when they violate the law; tracing the history of doctrines regulating the ruler's personal liability for wrongdoing, or those of his agents, might be a fruitful line of inquiry for determining the origin and the history of the concept of the imam as the community's representative. Finally, works of positive law, in particular in the post-formative and Ottoman eras, are replete with discussions regarding on what conditions a ruler's command is to be obeyed, and the nature of deference such commands ought to receive, but usually these discussions arise in connection with particular cases, rather than in the form of an abstract, philosophical discussion of the limits of the ruler's authority to legislate. Careful reading of these rules will certainly cast important light on the normative relationship between the authority of the ruler and his agents, and that of the law as interpreted and administered by the scholars.

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