Classical Approaches and Contemporary Challenges Evaluating Islamic Conceptions of the Rule of Law

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1. Introduction

Since Islam's inception as a religious society, Islamic jurists, and political theorists have long wrestled with the issues of governance and the rule of law. Despite popular misconception, classical Islamic scholars articulated a robust theory of the rule of law based upon the devolution of legal authority and legal diversity while preserving social harmony. Yet in placing a premium upon religiosity and social harmony, classical jurists were less preoccupied with detailing the limits of ruler-based authority. In the contemporary period, and in particular, with the emergence of the nation-state as the sole source of legitimate legal authority, demands for re-instituting Islamic law as a rule of law system are complicated by a number of institutional and political challenges. First, a reconciliation of a diverse Islamic legal authority lies in the hands of nation-states whose intolerance for legal pluralism may prove fatal to the survivability of the classic Islamic

penchant for humility. Second, while modernist movements have emerged to chart a course of reconciling classical Islamic law with the nation-state, the so-called Islamists among them have only demonstrated themselves to be self-selective in their adoption of classical jurisprudence, and therefore no different than other modern political actors acquiring and retaining their political authority. Finally, without a charted course to recreate the classic Islamic dynamic of separating political authority, these attempts are likely to remain crippled without a more robust Islamic juridical response to excess state authority.

2. Afghanistan: A Rule of Law Case Study

It is almost axiomatic to conclude that improving rule of law in other countries has been and remains crucial to a host of Western foreign policy goals. Perhaps nowhere has this been more evident than in the case of Afghanistan, where the United States and other countries have poured in such efforts since just shortly after the U.S.-led invasion of the country in 2002. It is estimated that efforts to improve the rule of law within Afghanistan have cost the United States alone over a billion dollars over the past decade and yet only had marginal success.[1] Therefore, one of the challenges as to Afghanistan (as with a host of other countries) is a fuller understanding how to effectuate adherence to the rule of law. At a minimum, we must recognize that to alter the rule of law composition of a place often means eviscerating realities on the ground in place of another approach to the rule of law. The operative assertion for replacing one paradigmatic approach to the rule of law for another rests on the assumption that the latter takes account of novel realities on the ground or that a novel systemic approach to an existing approach is preferable. Consequently, any attempt to augment, supervene, or in any way, change an existing legal system requires both in-depth assessments as to the realities on the ground as well as trepidation in seeking or altering such change. Thus, from the vantage point of change, we must further examine our understanding of what an adherence to the rule of law entails. According to a popular international development handbook, there are five elements that comprise the rule of law: (i) order and security, (ii) legitimacy, (iii) checks and balances, (iv) fairness and (v) effective application.[2] Without delving into the particulars of each element, it raises important questions about the precise contours

1. See Special Inspector General for Afghanistan Reconstruction, "Rule of Law in Afghanistan: U.S. Agencies Lack a Strategy and Cannot Fully Determine the Effectiveness of Programs Costing More Than $1 Billion", (July 2015), available at https://www.sigar.mil/pdf/audits/SIGAR-15-68-AR.pdf.

2. See U.S. Agency for International Development, "Guide to Rule of Law Country Analysis", 1-2, (2010), available at http://pdf.usaid.gov/pdf_docs/Pnadt593.pdf.

of what an endemic legal regime looks like, whether in Afghanistan or elsewhere.

In the case of Afghanistan, along with a multitude of other countries, their legal system has historically drawn upon the Islamic legal system along with various forms of customary law.[3] Islam, as a political social order and faith, began to make inroads into the territory of current-day Afghanistan as far back as 652 CE, only two decades after the Prophet Muhammad died.[4] Consequently, with more than fourteen centuries of application, the natural focus of this analysis is an examination of the Islamic legal system and how it functions as a rule of law based legal system. To conduct this endeavor with sufficient depth and justice requires a careful understanding of how rule of law understood within classical Islamic law and perhaps more importantly, if and how those classical understandings are applied to contemporary Muslim-majority nation-states. In addition, there is also a required recognition that introducing a discourse about classical Islamic law as a rule of law based system has the potential for upending the contemporary Western based understanding of the rule of law,[5] and therefore, immediately regarded as suspect. That "suspicion" is predicated upon the degree to which Islamic law is regarded as alien, retrograde or part of the "other." Some Western observers have regarded Islamic law or shari'a-based law, at best, as antiquated, or worst, as an ideology for conquest.[6] Endless arrays of popular books and activists have distorted Islamic law beyond recognition. The underlying assumption by such observers has always been that Islam as a culture and not only a religious creed was primitive, simplistic, retrograde, and locked within medieval splendor out of which it could not disentangle itself.[7] But when examined in its totality, Islamic law amounts to a

3. See Hamid Khan, Special Report: "Islamic Law, Customary Law, and Afghan Informal Justice", U.S. Institute of Peace at 1 (March 2015), available at https://www.usip.org/sites/default/files/SR363-Islamic-Law-CustomaryLaw-and-Afghan-Informal-Justice.pdf

4. See Nancy Hatch Dupree, *A Historical Guide to Afghanistan* 492 (1970).

5. Or, in other words, an understanding of the rule of law that is nation-state-centric, and therefore, a rule of law approach which flows from this political understanding including but not limited to an emphasis on the institutional attributes believed necessary to actuate the rule of law, such as comprehensive laws, well-functioning courts, and trained law enforcement agencies. See Guide to Rule of Law Country Analysis at 2. Instead, consistent with longstanding scholarship on this issue, this analysis will conform to what most scholars have focused their attention on the ends that the rule of law is intended to serve within society such as upholding law and order, or providing predictable and efficient judgments. See Rachel Kleinfeld, Competing Definitions of the Rule of Law: Implications for Practitioners (Carnegie Endowment for Int'l Peace, Democracy and Rule of Law Project, Carnegie Paper No. 55, Jan. 2005), available at http://carnegieendowment.org/files/CP55.Belton.FINAL.pdf.

6. See Hamid Khan, *Practitioner's Guide to Islamic Law*, International Network to Promote the Rule of Law, August 2014, 11, available at http://inprol.org/sites/default/files/islamic_law_guide_revised_compressed.pdf

7. Shlomo Avineri, *The Return to Islam, in Global Studies: The Middle East*, 167–170 (ed. William Spencer:

fourteen-century legal colossus, consisting of a hermeneutical, conceptual, theoretical, practical, educational, and institutional system aimed at ever-continuing attempt to discover God's will. In other words, Islamic law represents, despite contemporary derision by some, a robust, formidable legal system to be considered with the utmost seriousness.

3. Classical Islamic Law as a Rule of Law System

A preliminary, yet essential, matter is an inquiry as to the degree to which Islamic law can serve as a basis for a rule of law system. This inquiry usually takes the form of asking whether such a system serves as a mode of regulating a polity that involves both (1) the law and (2) a legal culture in which the law and the institutions of governance are distinguishable and yet aligned in an ongoing enterprise of regulation and management.[8] Or put differently, whether Islamic law possesses (1) a fairly clear conception and structure of law and legal derivation must specifically prescribe such a system and (2) the prescription must be sociologically so pervasive and epistemologically so compelling it is culturally embedded and normative and psychologically second nature.[9] In order to address these elements sufficiently, we must consider the elements of this religiously-based legal system not only coincided with the Prophet Muhammad's ministry but also by the establishment of the unique Muslim polity during the Prophet's lifetime.

a) The Qur'an as a Lawgiving Book

The Qur'an (which literally means "The Recital" or "The Recitation"), in contrast to the New Testament and the Hebrew Bible which are collections of books written by a number of different persons over centuries, is regarded to have a single source, God (albeit transmitted from the Archangel Gabriel) and importantly, over the course of at least twenty-two years.[10] The Qur'an is divided not only by chapter (sura) but also between revelations between the almost thirteen years of the Prophet's residence in Makkah and the ten-year residence in Madinah before the end of his life. The Makkan and Madinan parts of the Qur'an are distinguished from one another based on the principal objectives

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1973).

8. See Anver M. Emon, *Religious Pluralism, and Islamic Law: Dhimmīs and Others in the Empire of Law*, 18-19 (2014).

9. See Wael Hallaq, *Quranic Magna Carta in Magna Carta, Religion, and the Rule of Law*, 160 (eds. Robin Griffiths-Jones and Mark Hill: 2015).

10. See Cyril Glasse, *The Concise Encyclopedia of Islam* (Harper and Row, 1989), 228–232. See also Mohammad H. Kamali, *Principles of Islamic Jurisprudence*, 21-23 (3rd ed. Cambridge: Islamic Texts Society, 2003).

of each period.[11] The primary objectives of the Qur'an during the Makkan period were to establish the fundamentals of the faith. Yet, the principal objective during the Madinan period was to promulgate a series of societal proscriptions from the Divine in light of the creation of the first Islamic society in a wide range of areas including family life, social interactions, and business transactions.[12]

Thus, for the purposes of the present inquiry, we begin with the promulgation of prescriptions whose aim is not merely metaphysical or purely theological, but rather responsive to the emerging religo–political society within Madinah. Yet contained within the Qur'an are not just a variety of subjects, but also a variety of linguistic references indicating its status as a lawgiving book, for example, including commands (awamir) and prohibitions (nawahin); it states what is licit (halal) and illicit (haram) as well as obligations (talaklif) in contradistinction with ethical directives throughout the sacred text.[13] And perhaps of equal significance, the Qur'an makes no indication that the proscriptions contained therein are of limited duration or bound to a particular age, period or society or in any way suggest Muslims may themselves be unbound by its precepts. Finally, despite the nature of its immutability and legality, close inspection of the variety of its proscriptions reveal them to be consistently and characteristically flexible since they take into account and adapt to diverse contingencies or changing conditions.

Despite these Qur'anic truisms, one must also be cognizant of the various challenges to interpreting the sacred text. Perhaps foremost are the structural challenges confronting any reader of the Islamic sacred text. First, the Qur'an has no narrative framework. Unlike the Bible, for example, the Qur'an is not organized chronologically, but rather places the longest suras before the shortest.[14] And even within suras, topic and tone can fluctuate dramatically. Moreover, novices who lack a familiarity with the life of the Prophet and the particulars of Arab customary law need to contemplate adequately the context of the Qur'an's content. They may also be unlikely to understand many Biblical and pagan references made throughout the text. Moreover, without a chronological order, readers

11. See Kamali, *Principles of Islamic Jurisprudence* at 21-23.

12. See id.; see also, Khan, *Practitioner's Guide to Islamic Law* at 14ff. Despite common assumptions, the Qur'an is by no means primarily a legal text. Instead, the Islamic sacred scripture is primarily concerned with discourses about God, His nature, accounts of Biblical prophets and the Final Judgment. Instead, less than seven percent of the Qur'an's total verses relate to legal matters. And of those "legal" verses, nearly half of them relate to ritual matters or ibadat, (e.g., requirements for fasting during the month of Ramadan, conducting prayers, and proscriptions about almsgiving).

13. See Kamali, *Principles of Islamic Jurisprudence* at 16-57.

14. See Mohammad Hashim Kamali, *Shari'ah Law: An Introduction* 23 (2008).

are left to contemplate the precise meaning of each verse as it relates to other verses that address the same topic. The challenge of chronology becomes increasingly evident when a reader (or an educated jurist for that matter) must decide whether a verse carries an imperative command, whether that same verse abrogates a verse that precedes it, or whether a verse is allegorical or simply a mysterious allusion, subject to a number of interpretations or review at a later time.[15] Such considerations make it unwise to jump to casual conclusions about any particular passage within the text. "The Qur'an, in other words, is a book which cries out for interpretation."[16] For these and other reasons, it has always been necessary to resort to another source to obtain fuller meaning from the Qur'an, which has led believers to the Qur'an's transmitter, expounder, judge, and human exemplar: the Prophet Muhammad. This, in turn, has led them to the Sunnah, or "the example," "way," or "precedent set forth" by the Prophet Muhammad.

b) The Sunnah as an Indispensable Legal Exposition

While the Qur'an is undoubtedly God's word, and therefore, His law in the mind of the believer; Prophetic tradition or the Sunnah was regarded as an indispensable legal exposition to the Qur'an or perhaps less obliquely, the Qur'an as lived through the Prophet Muhammad. The Sunnah, as a primary source of law, is generally defined as the spoken and acted example of the Prophet Muhammad. Yet conceptually, sunnah (pl. sunan) predated Islam referring to any set of customs, precedents, or practices by a particular person or persons; albeit it was often used to refer to the collective practices of a tribe.[17] And consistent with pre-Islamic understanding, as the new faith emerged, sunan were articulated not only as to the Prophet Muhammad, but also for each of his immediate political successors (al-Khulafā' ar-Rāshidūn);[18] and consistent with its pre-Islamic usage, there even was a collective sunnah for the first forty to sixty followers of the Prophet, called al-Sabahah ("The Companions"), who were defined as "someone who saw the Prophet Muhammad, believed in him and died a Muslim."[19]Beginning

15. See Toby Lester, "What Is the Koran?" The Atlantic Month'y, Jan 1999, 43–56. Recently discovered evidence suggests that there may be other variants of the Qur'an still in existence. See also Ibn Warraq, ed., *The Origins of the Koran: Classic Essays on Islam's Holy Book* (1998).

16. Daniel Brown, *A New Introduction to Islam*, 82 (2d. ed, 2009).

17. While the term "sunnah" is mentioned in the Qur'an in the sense of an established practice or course of conduct, the Sunnah of the Prophet is mentioned more obliquely within the Qur'an (see, for example, 48:23 and 17:77). The Sunnah of the Prophet is not clearly mentioned in the Qur'an, but the closest parallel, the uswah hasanh ("excellent conduct") of the Prophet, is mentioned (see 33:21); this is interpreted as a reference to the Prophetic Sunnah.

18. See Wael Hallaq, *Sharia: Theory, Practice, Transformations*, 34-36 (2009).

19. See Jonathan Brown, *Hadith: Muhammad's Legacy in the Medieval and Modern World* 87 (2009).

immediately upon the Prophet's death, believers sought to clarify their understanding of the Qur'an by focusing on the development of a Prophetic-centric sunnah, which a growing number of jurists came to believe should serve as a source of law alongside the Qur'an.[20] The argument in favor of a Prophetic-centric sunnah was arguably the Qur'an itself: "You who believe, obey God and the Messenger, and those in authority among you," (4:59); and "Whoever obeys the Messenger obeys God" (4:80).[21] A more strident view in favor of this body of Prophetic precedent was that it served as an essential element to understanding the Qur'an itself because it clarified matters contained in the Divine text.[22] Over time, what was once a pre-Islamic concept describing a broad-based narrative structure became confined to a single person, the Prophet Muhammad, and in particular, his acts, sayings, and matters for which he gave tacit approval, but also his physical attributes, as well as his overall character.[23] But this sunnah was even more. By virtue of the Qur'anic injunctions mentioned above and elsewhere, it was elevated from a continuum of precedents to a narrative of prescribing the normative conduct of believers; namely, the Sunnah.[24] Yet, at its core, the fundamental definition of what constitutes the Sunnah as a source of Islamic law is Prophetic custom or precedent as it pertains to matters of religion. The Prophet himself acknowledged as much when he once recommended to farmers that they harvest dates in a particular way. When his advice turned out not to have worked, the Prophet remarked, "I am but a man, if I give you a command regarding religion, then take it. But if I make a statement of my own judgment, then I am but a man. . . . [Y]ou are more knowledgeable about the matters of your world."[25] If Muslims had populated only middle Arabia and had always lived as Arabs did during the time of the Prophet, perhaps the revealed sources of the Qur'an and the Sunnah might still be sufficient for the purposes of determining the scope of Islamic law. History, however, led Muslims on a different course and a reach that would be twice the size of the Roman Empire.[26]

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20. See Wael Hallaq, *Sharia: Theory, Practice, Transformations* at 36-37.

21. The Qur'an: A New Translation, (trans. A. S. Abdel Haleem: 2008). Except where noted, all quotations from the Qur'an are from this source.

22. See Daniel Brown, *Rethinking Tradition in Modern Islamic Thought* 8–12 (2003).

23. See Kamali, *Principles of Islamic Jurisprudence* at 50.

24. See Wael Hallaq, *Sharia: Theory, Practice, Transformations* at 43-51.

25. Brown, Hadith at 11.

26. See Rein Taagepera, "Expansion and Contraction Patterns of Large Polities: Context for Russia" 41 Int'l Stud. Q. 475-504, 496 (1997).

c) Fiqh: Jurist-Made Law and Its Fallibility

In an effort to address matters not within the precise confines of either the Qur'an and/or the Sunnah (as understood through the hadith literature), jurists, in particular, began to articulate the various ways in which Islamic law could be faithfully and adequately derived. This articulation was encapsulated in the legal hermeneutic or legal theory known as the usul al-fiqh ("the roots of jurisprudence").[27] Put simply, the usul al-fiqh articulated a precise, step-by-step approach that utilized both the sources of law as well as variety of principal doctrines to Islamic jurisprudence, including, but not limited to qiyas (analogical reasoning), ijma (consensus), 'urf (custom), istihsan (equity), and istislah (public interest), among others, to reach a desired, yet faithful interpretation of Islamic law.[28] Muslim scholars engaged – and continue to engage – in a rigorous interpretation of the sources and the various legal doctrines to extrapolate detailed legal rules that seek to address the multitude of aspects of Muslim life, from how to pray and avoid sin to making contracts and writing a will.[29] These rules and the rulings associated therein are called fiqh, which literally means "understanding," but was meant to convey the concept of jurisprudence.

Fiqh, however, also reflected the fundamental epistemological premise that it was fallible. That is, Muslim fiqh scholars undertook the work of interpreting divine texts with a conscious awareness of their own human potential to err. They thus recognized their extrapolations of fiqh rules were at best only probable articulations of God's Law and that no one could be certain to have the "right answer."[30] In other words, Divine Law (shari'a) represents absolute truth, but all human attempts to understand and elaborate that truth are necessarily imperfect and potentially flawed.[31] Fiqh scholars or jurists have always been acutely aware that although the object of their work is God's Law, they do not and cannot speak for God. Confusingly, however, these rules are often described

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27. *See* Hamid Khan, *Nothing is Written, Fundamentalism, Revivalism, Reformism and the Fate of Islamic Law*, 24 MICH J. OF INT'L L 273, 286 *ff* (2003).

28. See generally, See Kamali, *Principles of Islamic Jurisprudence*.

29. Id. at xxi

30. See Khaled Abou el Fadl, *Speaking in God's name: Islamic law, Authority and Women* 39 (2001) ("Islamic legal methodologies rarely spoke in terms of legal certainties (yaqin and qat'). The linguistic practice of the juristic culture spoke in terms of probabilities or the preponderance of the evidence . . . . Muslim jurists asserted that only God possesses perfect knowledge–human knowledge is tentative . . ."). For more on this concept in the various schools of Islamic jurisprudence, see Aron Zysow, *the Economy of Certainty: An Introduction to the Typology of Islamic Legal Theory* (2013).

31. See Tamir Moustafa, "Islamic Law, Women's Rights, and Popular Legal Consciousness in Malaysia", 38 L. & Soc. Inquiry 168, 171-74 (2013).

within popular parlance as "sharia," implying that "fiqh" and "sharia" are synonymous.[32] But it must be emphasized fiqh remains the product of human legal interpretation and therefore, fallible and thus, open to question and interpretation, whereas sharia—God's Law is not. This paradigm of the fallibility of fiqh can perhaps be understood in the same way that even as a Muslim must accept the premise the Qur'an is considered the Word of God, they are not bound by a particular interpretation of the sacred scripture.[33]

d) Ruler-Made Law and the Fiqh/Siyasa Dynamic as Rule of Law

Yet, jurist-made law or fiqh was not the sole law that existed within classical Islamic legal systems, there also existed a body of law that was considered within the sole discretion of the rulers known as siyasa.[34] It is imperative to bear in mind that siyasa and fiqh were fundamentally different types of law. Unlike fiqh, siyasa laws were not extrapolated from scripture by jurists (through the theory of usul al-fiqh), but rather crafted by rulers according to their own philosophies of government and ideas about how best to maintain public order and, yet, also aimed at upholding the legitimacy of Islamic law writ-large.[35] At the same, classical jurists recognized that lawmaking by temporal holders of power came to be viewed as seen as legitimate because of the widespread consensus within Islamic jurisprudence that the ultimate purpose of the sharia is to promote the welfare of the people (maslaha).[36] Because rules extrapolated from the scriptural sources (i.e., The Qur'an and the Sunnah) cannot cover all the day-to-day public needs, jurists recognized that another type of law besides fiqh was necessary to fully serve the public good. The only institution capable of creating and enforcing these sorts of rules is the power that controls the use of force that is, the siyasa power held by rulers.[37] In Islamic political

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32. See Khan, *Practitioner's Guide* at 1.

33. Using the word sharia to refer to fiqh rules not only creates the impression that a given rule is incontestable divine law, but also ignores the existence of other equally valid fiqh understandings of divine law on the same topic. This blurs the line between the divine and human voices, a line that Islamic jurisprudence takes very seriously. See e.g., Leila Ahmed, "Early Islam and the Position of Women: The Problem of Interpretation", in Women in Middle Eastern History: shifting Boundaries in Sex and gender, 61 (Nikki R. Keddie & Beth Baron eds., 1991)(debating the various fiqh approaches to questions of divorce).

34. See e.g, Noah Feldman, *The Fall and Rise of the Islamic State* 27-35 (2008); Frank Vogel, *Islamic Law, and Legal System, Studies of Saudi Arabia* (2000), 190; Baber Johansen, "A Perfect Law in an Imperfect Society. Ibn Taymiyya's Concept of 'Governance in the Name of the Sacred Law,'" in *The Law Applied: Contextualizing the Islamic Shari'a*, 261 (eds. Peri Bearman, Wolfhart, Heinrichs, and Bernard G. Weiss: 2008).

35. See Vogel, *Islamic Law, and Legal System, Studies of Saudi Arabia* at 52, 171-73;

36. See Felicitas Meta Maria Opwis, *Maslaha and the Purpose of the Law: Islamic Discourse on Legal Change from the 4th/10th to 8th/14th Century* 1-8 (2010).

37. See Khaled Abou El Fadl, "Islam and the Challenge of Democratic Commitment", 27 Fordham Int'l L.J. 4 (2003)("Particularly after the age of Mihna the jurists] were able to establish themselves as the exclusive

science, this authority came to be known as siyasa shari'a ("governance according to the sacred law").

According to the theory of siyasa shari'a, a Muslim polity could legitimately be governed by any "possessor of coercive power" (wali al-amr), which caliphs, kings, sultans or other kinds of rulers.[38] Generally speaking, to ensure those "political" laws were legitimate, the ruler consulted with classical Islamic jurists to ensure his laws both did require Muslims to perform acts deemed forbidden (or abstain from acts deemed mandatory) under fiqh; and/or cause general harm to society by violating the goals (maqasid al shari'a) that Islamic jurists accepted as goals of the law.[39] This consultative approach is termed hereinafter as the fiqh-siyasa dynamic. Viewed more closely, the dichotomy – and interplay – between fiqh and siyasa, however, did more than simply delineate the scope of authority between jurists and rulers as to their respective aspects of Islamic law, arguably, it also served to articulate a theory of the rule of law under classical Islamic law.[40]

Essentially, the classical Islamic theory of the rule of law essentially divided authority between the jurists, who determined fiqh, and the rulers who governed via siyasa shari'a. This system of governance was symbiotic, replete with checks and balances; but it was not a system that featured separate branches within government (e.g., executive, legislative, and judiciary).[41] Instead, it was a system that involved the government, as embodied by the ruler, and the body that operated outside government: the jurists. It also worth emphasizing, the jurists derived their authority as sole interpreters of the sources of Islamic law through their fidelity to God and their epistemic adherence to the usul al-fiqh as their means of interpretation. And because of doctrines such as ijma, which required the consensus of all jurists to reach a binding precedent, and ikhtilaf,

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interpreters and articulators of the Divine law. . . . [T]he inquisition [Mihna] was a concerted effort by the State to control the juristic class and the method by which Shari'ah law was generated. Ultimately, however, the inquisition failed and, at least until the modern age, the jurists retained a near exclusive monopoly over the right to interpret the Divine law"). This ultimately led to the separation of fiqh and siyasa as different types of lawmaking, and it is the primary reason that there was never a merging of "church" and state in Islamic history.

38. Clark B. Lombardi and Nathan J. Brown, "Do Constitutions Requiring Adherence to Shari'a Threaten Human Rights? How Egypt's Constitutional Court Reconciles Islamic Law with the Liberal Rule of Law", 21 Am. U. Int'l Law Rev. 379, 404 (2006).

39. See Asifa Quraishi, "The Separation of Powers in the Tradition of Muslim Governments," in Constitutionalism in Islamic Countries: Between Upheaval and Continuity, 65–67 (eds. Rainer Grote and Tilmann J. Röder: 2012).

40. See Quraishi, "Separation of Powers," at 63–73; see generally, Noah Feldman, *The Fall, and Rise of the Islamic State* (2010).

41. See Quraishi, *The Separation of Powers in the Tradition of Muslim Governments* at 63–73

which allowed, and even encouraged, freedom of opinion, jurists examined each matter separately and often without feeling bound by interpretations of other jurists. Yet a jurists' authority, however, was arguably channeled through the auspices of the ruler, who executed the jurists' interpretations of fiqh, specifically within the ruler's courts or when jurists were employed as tax collectors, scribes, secretaries, and market inspectors.[42] Yet, these jurists often avoided forming too close of a relationship with the ruler so as not to dilute their primary obligation of faithfully interpreting God's law and becoming too political. Over time and through their monopoly over scripturally deduced law within a state where God's law was accepted as paramount, the jurists built themselves into a powerful, independent, effective check upon the ruler.

As a general matter, a classical era Islamic ruler was regarded as a political heir to the Prophet Muhammad, a status underlined by such self-proclaimed titles as "commander of the faithful" (amīr al-mu'minīn). Despite their political standing, and after a brief yet failed attempt in the ninth century rulers were regarded as lacking the authority to interpret the scripturally based religious law.[43] That authority lay with the epistemically-qualified juristic class. To bolster their legitimacy, a ruler's authority, therefore, became closely linked with his willingness to enforce and faithfully follow the dictates of fiqh, as it was interpreted by the jurists. Specifically, the ruler, thanks to his role as "successor" or "deputy" to the Prophet, derived Islamic legitimacy by enforcing the jurists' interpretations of fiqh.[44] At the same time, only the ruler could offer the jurists the authority needed to enact their particular interpretations of Islamic law by staffing positions within his realm with members of the juristic class.[45] Put simply, this interplay between the apolitical, but religiously dedicated jurists acting as interpreters of Divine Law, and a ruler acting through the dictates of fiqh and filling the gaps for its administration, by way of his siyasa, produced a system of government in which human beings do not have unfettered authority over other human beings.[46]

Perhaps the best illustration of the interplay between the jurists and the ruler in terms of governance can be found by examining the role of Islamic judges, or qadis, and muftis, or Islamic jurist-consultants. A qadi is a judge responsible for the application

42. See Feldman, *The Fall and Rise of the Islamic State* at 35-36.

43. This attempt was known as the Minha ("inquisition") when a series of Abbassid caliphs in the ninth century attempted to impose a particular theological belief upon the population. See Duncan B. Macdonald, *Development of Muslim Theology, Jurisprudence, and Constitutional theory*. 153-185 (1903).

44. See Feldman, *The Fall and Rise of the Islamic State* at 50-51.

45. Id.

46. Khaled Abou El Fadl, *Islam and the Challenge of Democratic Commitment* at 4, 64.

of Islamic jurisprudence. The office of qadi emerged during the life of the Prophet Muhammad when judges were dispatched far and wide to adjudicate disputes within an ever-expanding empire.[47] Early qadis tended to dispense law according to the prevailing custom, complemented by their own understanding of Islamic law. But as Islamic jurisprudence or fiqh developed and expanded, the qadi's role in the interpretation of the law diminished as they came more to serve as executors of law.[48] Judicial roles, however, were hardly insignificant under Islamic law. Serving as a qadi was equated with the role of God on Judgment Day, especially when one considers that jurists were often unabashed about the fact that their legal interpretations, which often amounted to mere understandings, could be made permanent by the ruling of a qadi, effectively turning private fiqh into shari'a.[49] For this reason, jurists were known to go out of their way to avoid the role of judging litigants before them. Some would openly weep to avoid being elevated to the position of qadi, for fear that their judgments under Islamic law would be wrong, resulting in eternal punishment.[50] In contrast, contemporary qadis are considered mere functionaries of governments. But as officials during the classical period, their job was to apply fiqh and, when necessary, siyasa laws, under the auspices of the ruler.

The job of aiding qadis in the particulars of fiqh fell to muftis. A mufti is a member of the juristic class who is intimately familiar with the precepts and doctrines of fiqh but who is appointed by the jurists to aid a qadi in deliberations that touch upon fiqh.[51] Termed jurisconsults; muftis were specialized consultants on Islamic legal matters. During the classical period, muftis were viewed as the jurists' highest representatives to the ruler's courts of law and worked alongside the qadi, who represented the ruler.[52] A mufti's defining duty was to issue a fatwa or an Islamic legal answer to a question he was asked to address. Consulting a mufti was generally free of charge and therefore, was generally accessible to members of the community.[53] Questions addressed to the mufti were either brought to him by members of the community or even by qadis themselves who found some cases brought before them too difficult to decide.[54] A mufti's opinion,

47. See Wael Hallaq, *Sharia: Theory, Practice, Transformations* at 36-43.

48. See id. at 126-135.

49. See Vogel, *Islamic Law, and Legal System, Studies of Saudi Arabia* at 19-20.

50. See Zulfiqar Ayub, *The Biographies of the Elite Lives of the Scholars, Imams and Hadith Masters* (2015) at 79.

51. See Feldman, *The Fall and Rise of the Islamic State* at 51-52.

52. See id.

53. See Wael Hallaq, *Sharia: Theory, Practice, Transformations* at 172.

54. Id.

like the opinion of any jurist, was known as a fatwa (pl. fatawa).[55] The centrality of the fatwa within a Muslim court of law therefore also explains why decisions of a qadi were neither kept nor published because the fatawa were the legal products collected and published as well as complied within subsequent legal treatises. But in contrast to other fatawa, a fatwa issued by a mufti and accepted by a qadi as the judgment of a court within in an adversarial proceeding was binding on the parties operated as the basis by which by Muslim policy enacted law.

e) Classical Attempts at Limiting Ruler-Based Authority

Despite elaborations as to the design of how classical Islamic law operated as a rule of law based system (i.e., interplay between fiqh and siyasa), one particular area of concern, both as to classical thinkers, but also as those examine how to extrapolate classical-based understandings into the modern context – which shall be the focus of Part III – is the precise limits – or perhaps even more importantly – the precise constraints upon the siyasa authority of the ruler. In his seminal work, Al Risala, Muhammad Idris al Shafi'i (d. 820), began this odyssey through his articulation the principal hermeneutic of classical Islamic fiqh, known as the usul al-fiqh. Perhaps his most profound contribution to the formative period of Islamic jurisprudence was an unabashed adherence to the idea that Prophetic Tradition should serve as a source, alongside the Qur'an, to formulations of Islamic law:

> God has obliged us to follow everything the Prophet instituted (sunna). And He has rendered adherence to this obedience to Him and turning away from it disobedience [to Him] for which He excuses no one.[56]

Al-Shafi'i's discourse in al-Risala suggests the ultimate aim of these words was to confirm the Prophet's authority as an independent source of law whose legislation was binding even on matters about which the Qur'an was silent.[57] Because however, his aim was merely to establish rather than define the Prophet's authority, al-Shafi'i's formulations remained broad and remained broad and imprecise. For centuries thereafter, classical scholars would debate the precise legal effect of the Sunnah and to what extent Prophetic Tradition became a binding part of the community of Muslims. Yet, absent from this discourse was any classical scholarly treatment as to the question about if the Prophet is accepted, in full or in part, as an independent source of law,

55. See Kamali, *Principles of Islamic Jurisprudence*, at 238–242.
56. Muhammad b. Idris al-Shafi'i, al-Risala, (trans. Ahmad Muhammad Shakir) (Beirut: al-Maktaba al-Ilmiyya).
57. Id. at 91-92.

what would be the implications of this authority upon that ruler. In other words, given the extent to which the caliphate was modeled as a political successor to the Prophet Muhammad, an observer is obligated to examine the juridical rhetoric used to interpret the Prophetic model in such a way that would enable them not only define but also limit the authority of the ruler.[58]

An early theory on the scope of a ruler's authority was developed by Abu al-Hasan Ali Ibn Muhammad Ibn Habib al-Mawardi (d. 1058). Mawardi envisioned the caliph as an ideal ruler who exercised unlimited power in the realm of governance, immune from removal, even when he failed to uphold God's law, provided he himself was a scholar of Islamic law in his own right.[59] This stipulation was, of course, self-serving for the jurists. Mawardi and other legal scholars believed only those who thoroughly understood the usul al-fiqh and its propensity for diversity were adequately positioned to lead a Muslim polity.[60] In other words, Mawardi and other classical jurists essentially constructed a theory of siyasa that preserved the elite position of the juristic class as sole interpreters of Divine Law; from this theoretical position they could critique the government and determine who was best qualified to become leaders. As discussed below, while Mawardi's theory of governance proved difficult to implement given the practicalities of rule.

The Hanbali scholar Taqi ad-Din Ahmad ibn Taymiyyah (d. 1328) in his treatise Governance According to Shari'a Law in Reforming Both the Ruler and the Ruled challenged and refined the position held by Mawardi.[61] Calling for a cooperative government involving the ruler and the jurists, he rejected the view that jurists should leave the worldly realm of politics to the unlimited discretion of the state; instead of strengthening Islamic law by denouncing a sinful ruler, jurists should participate in governance by granting a ruler greater legitimacy.[62] To this end, he advanced a more realistic image of a ruler, unencumbered by the formal requirements advocated by Mawardi. For Ibn Taymiyya, a ruler need only uphold fiqh. Furthermore, the ruler's

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58. See Sherman A. Jackson, *Islamic Law and the State: The Constitutional Jurisprudence of Shihab al-Din al-Qarafi* (1996).

59. See Frank E. Vogel, Islamic Law, and Legal System: Studies of Saudi Arabia at 190.

60. See Antony Black, *The History of Islamic Political Thought: From the Prophet to the Present* 85-90 (2001).

61. See, e.g., Omar Farukh, *Ibn Taymiyyah on public and Private Law in Islam* (1966). For a detailed analysis of Ibn Taymiyya's thought, see A. K. S. Lambton, *State and Government in Medieval Islam*, 63-64 (1981) (explaining that Ibn Taymiyya "describes al-siyasa al-shar'iyya as a treatise on the general principles of divine government and appointment to the lieutenancy of the prophet and states that it was indispensable for the ruler and his subjects and for those in charge of affairs."

62. See Antony Black, *The History of Islamic Political Thought* at 154-159.

lawmaking authority was to be considered part of Islamic law itself. Hence, within the bounds of Islamic law, siyasa and fiqh should never conflict, and political leadership should draw upon both. Ibn Taymiyya's interpretation of the Qur'an's command to obey God, the Prophet, and "those in authority" over a Muslim polity reflects this harmonization; the phrase "those in authority" meant both the jurists and the ruler. And although Ibn Taymiyya argued siyasa was part of Islamic law, he did not require the ruler be a mujtahid, (i.e., one deemed capable of deriving laws according to the usul al-fiqh). Instead, a ruler's laws and practices were considered intrinsically valid provided they met two conditions: they did not contravene a revealed text or ijma, and they generally contributed to the public interest (maslahah). In other words, as long as the ruler did not compel people to sin, he possessed the necessary discretion to enact whatever legislation he thought would benefit society.[63] Perhaps noteworthy, Ibn Taymiyya's is also credited with framing the doctrine that allowed violence against unworthy rulers who failed the above-mentioned conditions.[64] In the contemporary era, political activists such as Sayyid Qutb (d.1966) have expounded and expanded on Ibn Taymiyya's position on domestic regime change.[65]

Shihab al-Din al-Qarafi (d.1285), a notable Maliki jurist, expressed concern about the expansive nature of Ibn Taymiyya's approach to siyasa.[66] In particular, Qarafi worried, if rulers were conferred with the authority to enforce Islamic law without the burden of understanding it, political considerations could reduce, or even eliminate, tolerance for diversity within Islamic law (ikhtilaf). Qarafi was ultimately concerned

63. See also Erwin Rosenthal, *Political Thought in Medieval Islam*, 51–61 (1958)(explaining that Ibn Taymiyya focused more on the ideal Muslim community governed by shari'a under Muslim prophets and lawmakers, rather than the political realities of the time). Among legal historians, there is some debate about whether early theorists of al-siyasa al-shar'iyya, such as Ibn Taymiyya and Ibn Qayyim al-Jawziyya, believed rulers must defer to the judgment of the jurists on the crucial questions of when the scriptures clearly required something or on whether a law served the public interest. Cf. Barber Johansen, A Perfect Law in an Imperfect Society: Ibn Taymiyya's Concept of "Governance in the Name of the Sacred Law," in The Law Applied: Contextualizing the Islamic Sharia, 259–94 (Peri Bearman et al. eds., 2008) (arguing that Ibn Taymiyya and Ibn Qayyim al-Jawziyya saw the legal analysis of the jurists as merely "interpreted laws" that are "respectable products of qualified human reasoning but as such . . . cannot command general obedience and do not, therefore, qualify as the law that should be applied by the political authorities"). This appears to have been accepted in some of the important empires and provided a model going forward. Such an interpretation of the principle became fully institutionalized and bureaucratized in the Mediterranean during the period of the Ottoman Empire.

64. Sadakat Kadri, *Heaven on Earth: A Journey through Shari'a Law from the Deserts of Ancient Arabia to the Streets of the Modern Muslim World* 187 (eds. Farrar, Straus, and Giroux, 2012).

65. See Antony Black, *The History of Islamic Political Thought* at 323.

66. See generally, Sherman A. Jackson, *Islamic Law, and the State: The Constitutional Jurisprudence of Shihab al-Din al-Qarafi.*

that placing Islamic law in the hands of politicians had the potential to erase its character of a Divine body of law untainted by whimsical human self-interest. Consequently, Qarafi proposed that siyasa be applied only to laws dealing with civil and criminal matters; it should not encroach on ritual issues. Furthermore, siyasa should be limited to certain fiqh categories of rules: the reach of political elites should extend only as far as the obligatory or prohibited categories of conduct; gray areas of behavior, such as those subsumed under the "recommended" and "repugnant" categories of fiqh, were off limits. More importantly, Qarafi believed that government intervention—for example, acting as the enforcer of Islamic law—should be the exception rather than the rule; state mediation is unneeded when accessing individual legal rights and obligations.

Despite the contributions of each of these classical scholars as to the question of either the limits or the constraints on a ruler's authority, classical jurists remained virtually silent, producing not a single systematic theory capable of limiting the ruler's authority without assuming either a ruler's flagrant violation of shari'a or his being circumscribed or usurped by more powerful sultans.[67] In her study, State and Government in Medieval Islam, A. K. S. Lambton would sum up Sunni constitutional theory in the following words:

> Normally the subject owes a duty of complete and unquestioning obedience to the [ruler]. If, however, the [ruler] commands something that is contrary to God's law, then the duty of obedience lapses, and instead it is the duty of the subject to disobey and resist such a command. This principle is frequently cited by later writers, but it never became an effective basis for 'limited government' or 'justified revolution' because first the jurists seldom discussed, and never answered, the question of how the lawfulness or sinfulness of a command was to be tested, and secondly no legal procedures or means were devised, or set up, to enforce the law against the ruler.[68]

In other words, absent a flagrant violation of shari'a or usurpation, it was generally understood by most, if not all, classical jurists that Muslim subjects operated from a baseline of obedience to the ruler. While this maxim is well understood, the origins of such a "laissez-faire" treatment of the ruler can be traced to the first century of Islam's emergence and, in particular, during the reign of the Umayyad dynasty (r. 661-750).[69]

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67. Wael Hallaq, "Caliphs, Jurists and the Saljuiqs in the Political Thought of Juwayni", 1 The Muslim World 1, 26-41 (1984).

68. A. K. S. Lambton, *State and Government in Medieval Islam* at 63-64.

69. See Abdulhadi Al-Ajmi, Abdulhadi, *The Umayyads, in Muhammad in History, Thought, and Culture: An Encyclopedia of the Prophet of God* (eds. C. Fitzpatrick and A. Walker: 2014).

With the rise of the Umayyads, the caliphate was not only understood along political lines but also in religious and spiritual terms, such that the caliph was presented as God's agent on earth. How the Umayyad caliphs and their supporters bolstered the caliph's religious legitimacy and spiritual role can be examined using the letter of the Umayyad Caliph al-Walid II (d. 744) designating his two sons, al-Hakam and Uthman, as his successors in 743. Considering the letter was meant to be distributed among the broader Muslim population, it not only offers an idea of how the Umayyads and their supporters understood the caliphal office, but also the ideology of the caliphate they wanted to transmit to their subjects.[70] The abridged letter is as follows:

> [God] made Islam the religion of His choice and He created Islam as the best thing for the chosen of His creatures....By [Muhammad] [God] dispelled the darkness and by him, He brought deliverance from error and destruction.... By him He set the seal on His revelation[.] Then God appointed His caliphs to follow the path of Muhammad's prophetic ministry, after He had taken His prophet unto Himself, and (after) He had sealed His revelation by Muhammad, in order that His rule should be accomplished, His [tradition] and His penalties established, and His precepts and laws adopted. This was done so that, by His caliphs, God might confirm Islam [] consolidate its sway [] safeguard its sanctuaries [and] administer justice amongst His servants[.] The caliphs of God succeeded each other as sovereigns over that which God had made them inherit from His prophets and that which He had entrusted to them. No one contests the rights of the caliphs without God striking him down; no one abandons their community without God destroying him[.] So it is by the caliphate that God preserves those of His servants on earth whom it is His will to preserve and those whom He has appointed to inhabit the earth. It is in showing obedience to those whom God has appointed to rule on earth that there lies happiness[.] But he who abandons that obedience, turns his face against it and opposes God thereby, squanders his allotted portion, disobeys his Lord, and loses for himself the things of this life and the next[.] The special repository of blessing bestowed on the community in this world, next to His caliphate which He established for them as a foundation and as a support for ruling them, is the covenant which God directed His caliphs to confirm and oversee for the Muslims in matters of moment[.] The authority

70. For a fuller discussion of the form and function of this letter, see Andrew Marsham, *Rituals of Islamic Monarchy: Accession and Succession in the First Muslim Empire* 154-159 (2009).

> [of the caliphs] embodied in this covenant is integral to the completeness of Islam[.][71]

Two principal themes emerge from the contents of the caliph's letter. First, the letter clearly suggests that despite the role of the Prophet of having delivered the religious message, rulers were Divinely appointed to essentially administer the legacy of the prophets and, by implication, served as agents of God in the sense they administered God's rule on earth insofar as they could be regarded as God's deputy (khalifat Allah) and accorded a religious and spiritual role.[72] Another recurring theme is obedience to the ruler as a rightful representative of God on earth. The letter begins with the significance of the caliph in the Muslim community and continues about the need for obedience and the consequences of disobeying the ruler as the embodiment of a lawgiver.[73] Thus, a clear message of obedience to the ruler is obligatory since only with obedience to the ruler can one obtain happiness; conversely, disobedience and dissension entail dire consequences for this world and the next. Perhaps most importantly, disobeying the ruler meant going religiously astray, which might potentially lead to anarchy (*fitna*).[74] Thus, the Umayyads set forth, from a religious perspective, a potent narrative for the expansive authority of the ruler.

If the Umayyad position were confined to their relatively short eighty-eight-year dynasty, perhaps this self-interested exposition would prove irrelevant. Yet when Mawardi, serving as a caliphal counselor, diplomat, jurist, and lastly, as chief judge, virtually enshrines the Umayyad position during the succeeding Abbasid Dynasty (r. 750–1258), and importing his remarks within classical fiqh, the duty to obey takes on a new level of authority within and among classical jurists. In his treatise, The Ordinances

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71. trans. Carole Hillenbrand The History of al-Tabari Volume XXVI: The Waning of the Umayyad Caliphate, (1989)(emphasis added).

72. Rather than the approach taken by the Umayyads, the Abbasids, and their successors would modify the title as "Caliph of God's Messenger" or khalifa rasul Allah. As Mawardi himself narrates:

> There has been a difference of opinion whether he may be addressed as "God's Caliph," some allowing it on the ground that he oversees what is owed God by His creation, in accordance with His words, glorified and exalted is His name: 'It is He Who placed you vicegerents [khala'if] on earth, and has exalted some of you in rank above others' (Qur'an, 6:165). The majority of scholars, however, object to this view regarding it as sinful to hold it. Only someone who is absent or mortal, they argue, may be represented by another, but God is neither. When Abu Bakr the Upright heard himself addressed as 'God's Caliph,' he responded, 'I am not God's Caliph, but the Caliph of God's Messenger.'

ABU AL-HASAN AL-MAWARDI, AL-AHKAM AL-SULTANIYYA, 1 transl. Wafaa Wahba, The Ordinances of Government (1996). See also Patricia Crone and Martin Hinds, GOD'S CALIPH: RELIGIOUS AUTHORITY IN THE FIRST CENTURIES OF ISLAM, 117 (1986).

73. Majid Khadduri, *The Islamic Conception of Justice* 19 (1984).

74. Crone, *Medieval Islamic Political Thought*, at 42.

of Government (Al-Ahkam al-Sultaniyya), Mawardi asserts, "men are naturally driven by a desire to ignore the promises of the hereafter for the sake of immediate pleasure."[75] Hence, in Hobbesian fashion, "rational beings tend by nature to submit to a leader who would keep them from inequity and settle their conflicts and disputes. Without rulers, [therefore] men would exist in a state of utter chaos and unmitigated savagery."[76]

Yet, order as opposed to chaos was more than simply a legal justification for allotting the ruler plenary authority. For jurists, anarchy is to be avoided at all costs because it precludes the ability of believers to observe the various ritual aspects of Islamic law.[77] Thus, within the Islamic legal system emphasis is consistently placed upon the primacy of the ritual practice before the legal dealings of the state.[78] Consequently, this allocation or avoidance of social anarchy meant the ruler often received a "pass," if they could, at a minimum, preserve general social order. Said another way, because jurists placed a primacy on maintaining social order, they were less interested in the containment of ruler-based excesses.

4. The Emergence of the Nation-State: Can Islamic Law Still Serve as a Rule of Law System?

History recounts the Islamic world was eclipsed by the encroachment of European colonialism and the final albeit slow demise of the Ottoman empires along with the Mughal and Qajar dynasties. Thus, contemporary Muslims have come of age in a variety of different political orientations, yet always within the auspices of the nation-state. For those modern Islamic states that aspire to conform their legal systems to classical Islamic law, they have found it, at best, ill fitting. This discomfort is in no small measure due to the European conception of the nation state.[79] Importing Islamic law into the modern context is more complex than simply replicating the classical institutions of governance. The nation state jealously demands consolidated legal authority and finds legal diversity intolerable: traits which are an anathema to the classical Islamic legal tradition. And

75. Abu al-Hasan al-Mawardi, al-Ahkam al-sultaniyya at 15-16.

76. Id. at 3.

77. See Antony Black, *The History of Islamic Political Thought* at 28.

78. See id.

79. With colonialism, the fiqh/siyasa dynamic was fundamentally altered if not destroyed in most Muslim-majority lands. With independence, these countries inherited a European nation-state structure of government that had now been woven into their economic, political, and social orders during colonialism. See Wael Hallaq, *An Introduction to Islamic Law*, 85-114 (2009). Rather than rejecting the European centralized nation-state formula left to them, however, political Islamist movements in these countries instead concentrated their efforts on making that central state "Islamic."

unlike Western legal systems, wherein the population derives law from a delegation of (sometimes royal) authority, Islamic law was the creation of organic legal experts qualified to fulfill a variety of legal functions. These jurists lived within the constraints of the Muslim world and often hailed from within society, and their enlistment into Islamic legal system was reflective of the pervasive egalitarianism emphasized by the Qur'an. Consequently, these factors alone might suggest attempts to export the classical system into the incubator of the modern nation-state are doomed to failure, yet valiant efforts have been made to reconcile this facial incompatibility.[80]

a) Codification of the Fiqh/Siyasa Dynamic

While some assert that systemic legal changes within the Muslim world were due to changing social needs and effective governance, no force exerted more change on classical Islamic law than totalitarian European colonialism. In particular, beginning in the eighteenth and continuing through the twentieth century, European legal models—predicated upon a Eurocentric conception of the nation state—were adopted throughout the Islamic world to varying degrees and at various times.[81] Although Islamic and common law traditions merged for a time (only to be entirely replaced by a European system) in British India, in most parts of the Islamic world, Islamic law was completely eclipsed or assimilated by the civil law tradition of continental Europe and codified, providing states with uniform and systematic legal statements. As these colonies began to break free of European hegemony, modern Islamic scholars attempted to harmonize classical Islamic legal precepts with their own newly formed nation-states.

Perhaps one of the most influential voices attempting to conform modern Islamic states with classical understanding of Islamic law as a rule of law system was Syrian-born Islamic thinker Rashid Rida (d. 1935). Like classical Islamic jurists, Rida argued the state should apply the law that was consistent with the clear scriptural principles and served the public interest, in other words, retaining the fiqh/siyasa dynamic.[82] But

80. Consider, as classical scholars consider the precise boundaries of executive authority they were concerned the law itself might become too politicized and therefore, subservient to the dictates of the ruler. If the nation-state today is it an amalgam of different rulers seeking self-interested legal authority then the question arises how does the Islamic law "intrude" into such a system. Contemporary thinkers have long argued that simply importing Islamic law would be sufficient because of Islamic law's inherent legitimacy, but arguably, the classical system's legitimacy turns on more than scripturally-adduced rules, but also rests upon the humility of epistemically qualified jurists.

81. For an in-depth analysis of European attempts to minimize and extinguish Islamic law during the colonial period, see Wael Hallaq, *Sharia: Theory, Practice, Transformations* at 371-442.

82. Hamid Enayat, *Modern Islamic Political Thought*, 78–81 (1982)(noting that Rashid Rida sought an Islamic state both grounded in sharia law and able to address problems through dynamic interpretations of sharia

unlike classical approach, he offered a distinctly modern method of identifying clear scriptural principles. Rida's contemporary, Abd al-Razzaq al-Sanhuri, departed even more radically from the traditional of fiqh/siyasa dynamic.[83] Inspired by European nationalist legal theory, Sanhuri argued a handful of principles, consistently followed at all times and places, could be identified as common to all the competing interpretations of classical fiqh. For Sanhuri, the law of a modern Islamic state must be consistent both with those fiqh principles along with the public interest.[84] Many of these principles were extremely general, and Sanhuri somewhat perplexingly concluded most rules found in modern European codes codes imposed during the colonial period were nonetheless consistent with classical fiqh.[85] He, also, however, suggested the public interest might require Muslim-majority states to apply transplanted European rules even though a government might reasonably decide instead to take a rule directly from classical fiqh.[86]

As Muslim-majority nations became independent, classical-oriented jurists continued to push unsuccessfully for the state to reform its laws to ensure they were consistent with the classical fiqh/siyasa dynamic. Many of the most important Islamist political factions, however, allied themselves instead with modernist theories, and as Muslim-majority states emerged, Islamist factions, particularly those who embraced Sanhuri's theory of Islamic law, strongly influenced the course of mid-century legal reform. Specifically, Sanhuri was commissioned to draft the new 1949 Civil Code for Egypt.[87] Not surprisingly, this code retained much of its European legacy.[88] While criticized by advocates of classical Islamic law as "pseudo-Islamic."[89] Sanhuri's code was widely celebrated as a "successful" attempt to harmonize Islamic with European law. Soon a number of Muslim majority states emerging from colonial domination adopted "Sanhuri-inspired" codes.[90] By doing so, they could indigenize national legal systems, as well as ensure the legal system remained consistent with essential elements

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83. See Guy Bechor, "The Sanhuri Code, and the Emergence of Modern Arab Civil Law" (1932 to 1949), in 29 Studies in Islamic Law and Society 1, 2 (Ruud Peters & A. Kevin Reinhart eds., 2007)

84. Amr Shalakany, Between Identity and Redistribution: Sanhuri, Genealogy, and the Will to Islamise, 8 Islamic L. & Soc'y 201, 204 (2001)

85. Id. at 228.

86. Id. at 234.

87. See Enide Hill, *Al-Sanhuri and Islamic Law* 182 (1987).

88. See id. at 187.

89. See Farhart J. Ziadeh, *Lawyers, the Rule of Law, and Liberalism in Modern Egypt* 139 (1968)("The utilization of shari'ah as only a supplement to other sources was unacceptable to the traditional groups, particularly those trained in shari'a law.").

90. See Hill *Al-Sanhuri and Islamic Law* at 39–40.

of the transplanted European legal codes under which legal relationships had already been formed.[91] All of the so-called "Sanhuri codes" resembled the 1949 Egyptian Code. Thus, each arguably used Islamic law as a "source" of law in two different ways. First, each code assumed that embedded in the fiqh tradition were a limited number of extremely general principles induced from the fiqh tradition as a whole. Second, each code incorporated some actual rules from the fiqh tradition.

Sanhuri's attempt to reconcile the modern nation-state's need for codification of law with classical Islamic law was undoubtedly a valiant effort since it attracted widespread acclaim and adoption by a number of Muslim-majority states. Moreover, both explicitly and implicitly, the modernist scholar, arguably, attempted to replicate the fiqh/siyasa dynamic apparent within classical Islamic legal systems.[92] Yet the modernist – or as currently framed – Islamist approach of reconciling classical Islamic law within the apparatus of the modern nation-state, at best, remains riddled with inconsistency, and therefore, fails to the test of acting as an effective rule of law system.

b) Islamists' Selective Adoption of Classical Law and Lure of the Nation-State

In the Islamic world, the modern nation-state has attempted to assume a level of responsibility that far surpasses classical predecessor. For example, in the Ottoman Empire, the government's prime function was the provision of external and internal military security; its second, to keep the economy running by controlling provisions and honest market practices. Both functions depended on taxes, soldiers, and a corps of civil servants. As a third task, the state maintained Islam's supremacy, whose authority rested not within the purview of the ruler since God is the only lawgiver, but to the body of jurists interpreted His law. Theoretically, the government was there to keep a political framework within which subjects would fulfill their religious and social obligations. Yet with the advent of modern Islamic states and the modernization impulse, meant that once effective Muslim polities had to assume more and more responsibility for the daily lives of its citizenry. Without delving into the various case studies, the result has largely been a failure. In the place of an ineffective nation-state, are Islamist movements (defined for as a person who seeks a more prominent role for Islamic law within the law of the state) attempting to fill the various socials gaps states have been unwilling

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91. Id.

92. Enide Hill, *Al-Sanhuri and Islamic Law* at 71-83 (describing the scholarly debate at length and taking the position that the Civil Code was, in fact, more Islamic than is commonly believed); cf J.N.D. Anderson, *The Shari'a and Civil Law: The Debt Owed by the New Civil Codes of Egypt and Syria to the Shari 'a,* 1 Islamic Q. 29 (1954)(describing the Code as more European than Islamic).

or incapable of providing. From this vantage point, Islamists, politically motivated and armed with an agenda of curing the ills of these societies, assert the only pathway for effective is through the adoption of Islamic law

In response, many Muslim-majority states began enacting laws that only selectively revived elements of classical Islamic law. The driving force behind this movement was not provided by a dramatic shift in global politics or by the reemergence of a unified Muslim polity such as a caliphate. Instead, it was supported by a broad-based reassertion of a transcendental identity: being Muslim. In other words, the reemergence of Islamic law can be, in part, attributed to "the universality and centrality of religion as a factor in the lives of the Muslim peoples."[93] Such an avowed adherence to religious identity, especially in the contemporary era, has often been translated into a reinstitution of Islamic law. But it is equally important to consider what this formulation looked like. Specifically, inasmuch as many Muslims and Muslim-majority states seek to maintain an Islamic identity and even embrace Islamic law, the issue is the form it takes as well the way in which it is interpreted and by whom. The results thus far only serve to demonstrate that inasmuch as Islamists assert their desire to reestablish the classical tradition, they have largely acted with indifference to the challenges and political opportunism of the nation state.

Surveying relevant law within an array of Muslim-majority states reveals only a selective application of classical Islamic law within certain areas of jurisprudence infused with mixtures of European laws.[94] The selective application of Islamic law within modern states is meaningful only insofar as it fundamentally represents the extent to which the state deliberately chooses to make it so. Without question, no reasonably developed state no matter how Islamic it purports to be has sought to replicate the classical Islamic legal system in any sort of comprehensive fashion. The result: "a broad phenomenon of legal selectivity that effectively recognizes the primacy of the state to determine when God's Law shall be used, and when it shall be cast aside for a favored alternative, more often than not a legal transplant from Europe."[95] Perhaps more troubling, if not altogether fatal, is that the current slate of Islamists abound within a variety of Muslim-majority states that seeks derives their authority precisely on the basis of returning lawmaking to God "is no more enthused than anyone else in

93. See Abdullahi An-Na'im, *Toward an Islamic Reformation: Civil Liberties, Human Rights, and International Law* 3 (1996).

94. See Khan, Practitioner's Guide at 43.

95. Haider Ala Hamoudi, "The Death of Islamic Law", 38 Ga. J. Iin'L & Comp. L 293, 294 (2015)

permitting God's law to retain any real level of supremacy over the law of the state."[96] Thus far, inasmuch as the contemporary Islamist's political rhetoric suggests an attempt recalibrate the classical tradition within the state, the pull of the nation-state has proven too seductive for an honest discourse that posits a system where the rule of law pervades. To conduct an honest state of affairs would require a measure of both legal humility and perhaps less obliquely, an abdication of authority that Islamists have sought to amass within the nation-states they seek to control.

5. Conclusions: An Uncharted Territory: A New Juridical Emphasis?

Thus far, there appear no clear answers in how to replicate the classical tradition within the modern nation-state context.[97] Yet the passage of time has made the call to restore Islamic law ever more intense. It's urgency, has been done as a response to modernity. That is call has taken on a political grievance, has also demonstrated need to assume an alternative mode of governance in contrast to the intrusive all dominating modern nation-state, which has proven largely ineffective to the task. In this regard, there has been a renewed discourse about how Islamic law persists in the modern era. Yet, this discourse is likely to be born of various forms pious scholarship. While it is beyond the scope of this paper to analyze the various proposed theories of Islamic law that might replace the classical orientation, it does not preclude the possibility of re-evaluating essential aspects implied within siyasa/fiqh dynamic that that typified the classical Islamic legal conception of the rule of law.

At the very least, robust efforts need to be made from Islamic jurists to calibrate a religiously oriented, yet effective, check on state authority. Without a full-fledged juristic discourse about political theory, the current state of affairs will remain. In other words, legal scholars must move beyond the fiqh-siyasa dynamic, but instead a more comprehensive evaluation how political authorities may be controlled. Thus far, classical scholars have approached the constraints on the excesses of the ruler with a false sense of assurance. They assumed that the Minha firmly and forever resolved the issue a ruler-based interference in matters of religious law and conversely, offered the ruler of plenary authority to the point, at a minimum, the threshold of their legitimacy is anything but wholesale social disorder.[98] Yet the emergence of the nation-state not only demonstrates that excessive authority should be a matter of concern as many

96. Id.

97. See Wael Hallaq, *Sharia: Theory, Practice, Transformations* at 371-442.

98. See Macdonald, at 153-185.

Muslim-majority states wrestle with questions about Islamic law. It should always be emphasized that under classical Islam, it was private individuals and not the ruler who undertook the mission of developing the law. That is, the law, contrary to what happens in modern nation states, was not the exclusive preserve of the state. Jurists developed law in conscious opposition to the state.[99] Thus, the current situation, at the very least, re-raises the thousand-year struggle about political domination over religious law. If jurists are unwilling to challenge political authority in matters of Islamic law, then perhaps they are unwilling to honor the tradition of a jurist-made law and fail to honor a tradition of elevating pious epistemology in favor of political expediency. Ibn Hanbal's willingness to challenge Caliph al-Mu'tasim is memorialized as perhaps one of the most important turning points in the formulation of Islamic law since it reinforced the position of a decentralized nature to religious jurisprudence. Ibn Hanbal's example should also be celebrated within the mind of most Muslims as a matter of pious defiance to the tyranny of religion. If not, then it raises the real question, of how robust Islamic law can act as a rule of law-based system?

99. See Sherman Jackson, "Jihad and the Modern World", 7 J Islamic L and Culture (2002) 11.