



*Near Eastern Languages and Civilization*

*The Farhat J. Ziadeh  
Distinguished Lecture  
in Arab and Islamic Studies*

ZIADDEH LECTURE 2008

Dear Friends and Colleagues,

It is my distinct privilege to provide you with a copy of the sixth Farhat J. Ziadeh Distinguished Lecture in Arab and Islamic Studies, "*Shari'a as Law and Legal System: Changing Perceptions*," delivered by Frank Vogel on May 6, 2008.

The Ziadeh fund was formally endowed in 2001. Since that time, with your support, it has allowed us to strengthen our educational reach and showcase the most outstanding scholarship in Arab and Islamic Studies, and to do so always in honor of our dear colleague Farhat Ziadeh, whose contributions to the fields of Islamic law, Arabic language, and Islamic Studies are truly unparalleled.

Farhat Ziadeh was born in Ramallah, Palestine, in 1917. He received his B.A. from the American University of Beirut in 1937 and his LL.B. from the University of London in 1940. He then attended Lincoln's Inn, London, where he became a Barrister-at-Law in 1946. In the final years of the British Mandate, he served as a Magistrate for the Government of Palestine before eventually moving with his family to the United States. He was appointed Professor of Law and Islamic Studies at Princeton University, where he taught until 1966, at which time he moved to the University of Washington.

The annual lectureship in his name is a fitting tribute to his international reputation and his national service to the discipline of Arabic and Islamic Studies. The event and publication would not be possible without the generous support of many contributors including students, colleagues, friends, and above all Farhat and Suad themselves, and their family members. On behalf of our department I extend my deepest thanks to them and to all of you who have supported the Ziadeh fund. You truly have made a difference!

Sincerely yours,



Scott B Noegel  
Chair, Near Eastern Languages & Civilization  
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*The Department of  
Near Eastern Languages and Civilization  
at the University of Washington*

**The Sixth Farhat J. Ziadeh  
Distinguished Lecture in  
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May 6, 2008

*Shari'a as Law and Legal  
System: Changing Perceptions*

**Frank E. Vogel**

**Frank E. Vogel** is an independent scholar and consultant on Islamic law and the laws and legal systems of the Muslim world. He taught Islamic law at Harvard Law School from 1987 to 2006, retiring in 2007. He held the Custodian of the Two Holy Mosques Chair for Islamic Legal Studies from 1993 to 2007, and founded the School's Islamic Legal Studies Program, serving as its Director from 1991 to 2006. Major publications include *Islamic Law and Legal System: Studies of Saudi Arabia* (a study of past and present applications of Islamic law through case-studies of Saudi Arabia); *Islamic Law and Finance: Religion, Risk, and Return* (with Professor Samuel Hayes of the Harvard Business School) (an analysis of Islamic finance law and practice as an application of Islamic law); and the 150-page entry "The Contract Law of Islam and of the Arab Middle East," in *International Encyclopedia of Comparative Law*. He has offered courses of varying lengths on Islamic law and legal systems, contemporary Islamic legal thought, Islamic contract and commercial law, Islam and human rights, comparative adjudication, Islamic constitutional history, and U.S. contract law. He conducted research in Saudi Arabia for five years and in Egypt for one year, and has traveled and lectured widely throughout the Muslim world. His education was at Harvard College (A.B. 1972), Washington College of Law at American University (J.D. 1975), and Harvard University (Ph.D. in Law and Middle Eastern Studies 1993).



# *Shari'a as Law and Legal System: Changing Perceptions\**

**Frank E. Vogel**

Shari'a is to Muslims the perfect template for human life, revealed to the Prophet Muhammad as a guidance to all mankind until the end of time. Shari'a is to be known in its entirety from the Qur'an – God's own book revealed word by word to the Prophet Muhammad - and from the Sunna – the example of the Prophet Muhammad as preserved in authenticated reports about him and his disciples. The Shari'a is central, basic, to the Islamic religion, held up as the very definition of what it is to be Muslim both individually and in community; it gives guidance as to every human action, as to how to perform it so as to please God and gain salvation.

To the modern non-Muslim, all what we have said so far about Shari'a sounds religious: it sounds like so much religious doctrine defining faith and religious community and claiming to stem from ancient scripture. But another aspect of Shari'a departs entirely from conventional understandings of religion. The Shari'a is not only religion; it has also served as the living, actual law of myriad states over a great part of the world for fourteen centuries. It was and is the law that fixes Muslim religious ritual and communal obligations, but it has also been entirely law in our usual sense of the term. Clearly, if Shari'a has been both religion and law to this degree, then, we must conclude, Muslims of the past, and perhaps many in the present, must draw the distinction between law and religion differently than most of us do. And along with that difference, we would expect that a host of other distinctions we use to draw lines between law and religion – such as contrasts between church and state, morality and law, ideal and real, other-worldly and this-worldly, individual and state, private and public, theory and practice – may be different as well.

The trait of Shari'a to which I am pointing – its apparent mixing of law and religion – seems, more than any other of its traits, to puzzle the modern outsider trying to appreciate Islam. The confusions, stresses, controversies – and increasingly polemics, even salvos of cultural war – arising over this question seem not to be diminishing, but growing. As Shari'a becomes a household word worldwide, the task of making it better understood seems to become all the more daunting.

One purpose of my talk today is to try to shed some light on the puzzle of how Shari'a has managed the feat of being both core religious doctrine and the real law of states and legal systems. But another purpose of my talk is to address a narrower problem – the problem of a likely recent shift in Muslims' and the Muslim world's own understanding of Shari'a, as both law and religion,

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\*It is a great honor to be asked to speak in this series named after the renowned scholar of Islamic law, Professor Farhat Ziadeh. He has long been an object of admiration to me as he has achieved what most of us fail in, to achieve close study of Islamic law as law – he being a trained lawyer and jurist – while at the same time understanding and conveying its significance for religion, culture, philosophy, society, politics, and everything else.



and its consequences. Of course, just as western notions of the relationship of law and religion, of church and state, and so forth, have changed over time, so have basic ideas about Shari‘a shifted among Muslims. They have of course evolved from the beginning, and are still evolving. But their evolution today is marked off from all earlier stages of evolution in one striking way – that it follows a rupture in the fabric of Muslim enactments of Shari‘a over time. This rupture was the colonial era, which engulfed nearly the entirety of the Muslim world by the 19<sup>th</sup> century. In this period the Muslim world experienced, for the first time since its founding, an episode when broad spheres of daily legal life that had always been governed, in name and mostly in fact, by the Shari‘a abruptly – in just a few decades – passed under the rule of laws deriving from outside the world of Islam. Not only the content of the laws were changed, but most of the private and public institutions that were the law’s essential complement – legislative, adjudicative and educational bodies as well as religious ones – were either swept away or vastly diminished in scope and influence. These events, striking home within the realm that again we would call “law” not “religion,” have left not only the legal but necessarily also the religious meaning of Shari‘a these days in great turmoil and flux. Naturally many Muslims call for a return to conditions in the period before this colonial rupture (which I shall refer to here loosely as “pre-modern”). But we find that they rarely agree about what aspect of the past to regain, and how they can regain it when everything about modern conditions has so drastically changed. And we find that any project to reenact aspects of Shari‘a without change, in relatively traditional fashion, can occur only with shifts in form, content and conception when compared with understandings and contexts of the past.

Why does this matter? Why does it matter if the common past understandings of Shari‘a as law, with a particular set of attendant institutions and practices, have been swept away, even very suddenly? Do Muslims not continue to live Islam? There are many reasons why this historical rupture still has its impact, and why we need to understand it better; I’ll name here only three. First, the pre-modern Shari‘a tradition exercises much authority even today; it is something toward which everyone must take a position – even those who claim to renounce it, whether to replace it with something new (a rare stance) or, leaping over it, to credit only the earliest Islamic era. For example, when many Muslims, whether *ulama* or lay people, use the term Shari‘a they still largely mean by that term – in varying degrees – the body of legal interpretation developed by pre-modern private scholars and recorded in their books. Second, whenever, in turn, this received body of learning about Shari‘a is relied on, it will, in my view, largely import with it unwritten aspects of that tradition, including the religious and legal institutional structures for which and within which the learning itself was produced. Third, I suspect that contemporary Muslims have not entirely forgotten the pre-colonial past of late Muslim imperial rule – Ottoman, Qajar, or Mughal – whether in habits of religious and legal thought and belief both learned and lay, in institutional patterns legal and otherwise, or in constitutional and political expectations.

Again, we have two purposes in inquiring today into the question of how law and religion – again in our conventional uses of these terms – related in the pre-modern Islamic tradition. These are, first, to deepen our understanding of Shari‘a both of the past and the present, particularly as to how it conjoins law and religion; and, second, to help us understand how contemporary Muslims’ understandings of Shari‘a may or may not have shifted, with great potential consequence for both the theory and practice of Islam, both legally and religiously. More concretely, what I offer in this paper is some tools useful for this dual inquiry. These tools are a short list of characteristics, premises, or common tenets of the Islamic tradition, as it existed right up to the colonial rupture I



mentioned, choosing ones that cut usefully across our usual ideas of law and religion. These traits or tenets are (perhaps as a result) also deeply implicated in the diverse transformations, controversies, and projects emerging these days among Muslim states, groups and individual thinkers and actors.

### Five Premises

I will offer five basic general traits, or precepts, of Shari'a thought and practice inherited from the pre-modern period, that is, precepts true of Shari'a over centuries prior to the rupture.<sup>1</sup> Of the five the first three and the fifth can be traced back to the classical era of Shari'a's emergence as a scholarly tradition in the 2<sup>nd</sup> and 3<sup>rd</sup> centuries after Muhammad, or the 8<sup>th</sup> and 9<sup>th</sup> centuries CE. The fourth premise, on the other hand, has to be more recently dated, but even it can be traced back at least five centuries, to the 14<sup>th</sup> century CE or earlier. I should note that, perhaps because all these premises are suggested by comparisons with modern law, I do not state them in terms that would ordinarily be acknowledged by the tradition itself, or as something of which it was ordinarily self-aware. Indeed, as I state them these premises seem novel ideas, and moreover ones that strain the self-conceptions of both systems being compared – I submit that this again is because they arise from comparisons between disparate systems. A general caveat is that the power of these premises may be cloaked or obscured in many Shari'a phenomena even historically; but my claim is that, whenever we conduct deeper examination, we shall find them powerfully framing Shari'a behaviors, if not at the surface then at levels of ideology and general orientation. Another caveat is to warn that these premises may particularly appear absent or rejected in some contemporary manifestations of Shari'a. But this is part of my point – that using them we will likely detect shifts of Muslim behaviors, consciously or unconsciously, away from pre-rupture, Shari'a patterns.

A last comment is that my statement of these premises employs Sunni form and content, but analogies to them can almost always be found in Shi'i legal systems too wherever these have existed.

My first premise about the pre-modern Shari'a tradition is one that sounds particularly religious. It is the belief that Shari'a is *self-executing*: it applies of its own force, addressed directly, without intermediary, to every believing individual. The Qur'an, or a report about the Prophet taken as authenticated, speaks immediately to everyone, frequently with commands. Reading such a command (about inheritance, marriage, witnessing, paying alms, praying), the believing Muslim feels bound by that command as if it were addressed directly to him or her. No worldly institution plays any essential role. Note how this premise relates not just to belief but also to command, to law.

With this premise Shari'a defines as its fundamental point of departure the individual conscience intent on obeying God's command. As to religion, the virtues of this starting point are clear – among them a protestant-like freedom from ecclesiastical intermediaries, spiritual egalitarianism, profound personal moral responsibility, and, most fundamentally of all, an intense religious inspiration from the belief that one can encounter the transcendent, the numinous, through concrete texts one holds in one's hands. In law also this approach has the virtue of a universal morally-rooted individual devotion to the law. But this premise also poses clear disadvantages for law, for the enterprise of upholding God's order at large in the world, for creating a legal system. In particular, what room does it allow for the framing of corporate legal structures, structures that issue from a group



and regulate its existence and actions? Islamic law did accomplish this last task, though rather weakly and indirectly. One way it did so (I discuss others below) was by defining all obligations relating to worldly groupings as “obligations of the sufficiency” (*fard kifaya*), obligations understood as falling individually on each member of the group until a sufficient number of that group stepped forward to fulfill it. In other words, legal roles and functions that would otherwise be performed by or through an inanimate institution lacking a human conscience are redefined as the religious obligations of a number of individual human consciences.

Now to the second premise. This is that the Shari‘a is *transitive, delegated*. By this I mean that Shari‘a is not just a moral duty that the hearer must fulfill himself, apply to himself – something more understandably religious in our modern conception. Rather, Shari‘a is equally a law, something that the one to whom it is addressed must enforce not only on himself but also on all others over whom he wields legitimate power or influence, often by force. In other words, the Shari‘a offers its discrete commands with the fundamental expectation that individuals are obliged to do their best to uphold it, enforce it, see it enacted, not only on themselves but in this world. The Qur’an addresses human beings as God’s delegates, vicegerents (*khalifa*) and enjoins them to rule by what God has revealed, to judge by truth, and to order the good and forbid the evil.<sup>2</sup> Shari‘a commands define and limit the powers that one person exerts over others (husband and wife, ruler and subject, judge and litigant, etc.), and thus incorporate authority, governance, and politics. In this way delegations under this premise are not wholesale, but are meant to run within legitimate channels. A *hadith* declares that everyone is a shepherd and has a flock, and all – from the son in his father’s house on upward to the ruler and his subjects – are held to account for their flock.<sup>3</sup> This premise is probably the root reason why Muslims find themselves intuitively at odds with the notion of secularism. I offer some illustrations of this premise below.

The third premise will take somewhat longer to cover, and involves some sub-points. It is that Shari‘a is *textual*: to know God’s law is an exercise not of politics, collective deliberation, or, again, of an institution, but of sheer textualist interpretation—an effort to ascertain what is the most likely meaning of the revealed texts. (This effort at interpretation is, by the way, referred to as *ijtihad* – a term whose meanings sum up most of the philosophy and theory of Islamic law.) Islamic law presents itself as nothing more than the extended interpretation of the two scriptures dating to the lifetime of the Prophet Muhammad in the early 7<sup>th</sup> century – first, the Qur’an itself, taken as God’s literal words conveyed literally to Muhammad, in Arabic, impeccably transmitted down through the generations; and second, the Sunna, the example offered by the Prophet Muhammad during his lifetime, including his legal rulings and judgments, considered embodied in collections of historically authenticated written reports (called *hadiths*). Remembering that Shari‘a is understood to contain rulings to govern every single human act from the time of the Prophet to the end of time, the question arises: how can an infinite number of answers – which with some plausibility can be ascribed to God and His Prophet – be unfolded from a finite body of texts? Clearly such an enterprise strains the interpretive exercise to the utmost, and focuses close attention on the methods and authorities by which this interpretation is carried out. Indeed, Islamic jurisprudence derives from this juncture an epistemological obsession – one that, first, insists on, and claims to accomplish, an independent factually – and rationally – established authentication of the texts themselves, and that, second, asserts that the methodology it uses to interpret those texts is one that the revelation itself decrees. In that way it strives to claim divine authority for its interpretations, even when these wander far from anything found explicitly in the texts. The tradition does not claim that the inter-



pretive process, *ijtihad*, is infallible, or that it issues in rulings that may be called divine. Rather, it claims only that any result of the interpretive process is, in the opinion of the individual interpreter who produces that interpretation, more likely to be true than any alternative. In choosing rulings there is a constant stock-taking of probability. The rulings, relatively few, that are taken as revealed in the Qur'an or Sunna to a certainty are given special status; as to them, no interpretation is presumed possible or allowed. For all others, and inevitably for the practical enforcement of any ruling, interpretation yielding only probability is the only resort.

Here the question arises, however. If interpretation is merely probable, then how can obeying it fulfill one's religious obligation to obey God? The example often used is the believer alone in a wilderness lacking any indication of the *qibla*, the direction of Mecca, toward which he is obligated to orient his prayer. How to proceed? He must make his best guess of the *qibla*, performing his *ijtihad*. His prayer is valid even if later he comes upon better – or even certain – grounds for believing the direction of Mecca to be somewhere else.

As we have said, interpretation is proper only where the texts are under-determinative, in-explicit.<sup>4</sup> In such situations, of course, possible interpretations will be many, each interpreter potentially reaching a different conclusion. If the revealed texts, taken concretely, are the sole resort of truth – as we have posited with this premise – then there is no way to narrow the disagreement; if the texts fail to do so, then no other process, no human institution claiming to positivize truth on behalf of God, may intervene to narrow the disagreement or fill gaps. In such a situation the law must remain underdetermined, and its rulings multiple. Textual indeterminacy is a marker for transcendence. Human beings are left with only a few texts taken as clear, and a multitude of plausible interpretations.

This observation ushers in a crucial distinction between two terms, both of which we translate into English as “Islamic law.” These are *fiqh* and *Shari'a*. *Shari'a* is, as we have seen, God's perfect law revealed in the Qur'an and the Sunna. *Fiqh*, on the other hand, means literally “comprehension,” and refers to the sum total of human efforts to learn from the Qur'an and Sunna God's commands for human action in this world. It is often translated as “Islamic jurisprudence.” *Fiqh* is a human product, and hence fallible and variant. While God may have revealed through the Qur'an and Sunna a single perfect ruling for every human act, human weakness is such that discerning that ruling is possible only with fallibility and multiplicity.

As a last point under this premise, the question arises – what authority is turned to to carry out these interpretations in the name of the *Shari'a*? In a sense the premise of textualism bears within it its own answer to this question. If textual interpretation – and not the weighing of welfare, or the contingent needs or demands of social groups, for example – is the basis on which law is justified, then those who are most learned in the texts and their manipulation – namely, scholars – will inevitably be the legislators and law-appliers in this system. Since the only law stems from texts, similarly, only those steeped in those texts can claim authority to elaborate law from them. Knowledge of the texts and skill in their interpretation – not worldly position, relationship with those in power, representation of social groups or the like – counts. As a result, Islamic law is, as is well known, a “jurists' law,” a law known not from state enactments or court judgments, but from the opinion of learned jurists. With this we encounter one of the most sweeping of the delegations of authority supposed by the second premise – that the learned have a *Shari'a*-dictated obligation to



offer religious-legal advice to those ignorant of the texts.

Now, having introduced these three premises, let us stop for a stock-taking. These three premises declare the ideal of the textual revelation as sovereign over all aspects of human life—including every level and phase of social life, among them power and domination. Clearly, these premises are highly idealized in their statement. But, when we imagine the practical system that they entail, the practical institutions into which they would be translated, they clearly announce a regime of law in which religious-legal scholars have gained the ideological upper hand and have striven to give not only religion but the law and constitution of Islamic states a form in their own image.

Much of what we have heard so far seems congenial to religion, but hardly a blueprint for a legal system. Clearly much more is needed to explain how so many legal systems have functioned under the banner of Shari‘a. Part of the answer we can detect in the second premise: the sacred law assigns legitimate roles to individuals, who exercise them as part of their religious duty; certainly among those individuals will be the head of state. More pieces of the puzzle come later with the fourth and fifth premises. But let us spend time here – in an intermission between the third and fourth premises – observing in more detail how – and how far – the scholars of Islam have managed to turn this religious, idealistic system, defined for now only in terms of the first three premises, into a functioning law. They did so by unfolding, under the umbrella of these three premises, a number of mechanisms bridging between what we conceive of as religion or morality on the one hand and as law on the other. We can examine three.

The first mechanism addresses the problem that the process of interpretation, *ijtihad*, is fundamentally individual and disparate, leading to as many opinions as there are scholars. How from this cacophony could a practical legal system be built? Here the scholars built on the notion just mentioned, that lay people lack the knowledge to find the law themselves and must turn to the learned for rulings that advise their own consciences. At an early point in Islamic legal history scholars extended this notion – called *taqlid* – beyond lay people to encompass the scholars themselves. Scholars began to count it their duty to follow the opinion of one more learned than themselves. Groups formed around exemplary individual scholars, and these groups created, over generations, ordered corpuses of law named after those scholars. In Sunnism this results in the famous four “schools of law.” This development was never represented as altering fundamental doctrine, for which ever-fresh *ijtihad* is utterly central. Rather the change was explained as due to contingent causes or simple human failings. While most scholars were told that their lot was to follow school views by rote, the elite among scholars continued to innovate to develop the schools and meet new situations. By this system of *taqlid* scholars were able to deploy coherent, ordered, relatively stable and predictable, but still adaptable bodies of law capable of serving as the law of empires. Notice, however, how this innovation kept entirely intact, as an ideological matter, the theoretical structure laid out in the first three premises.

The second mechanism used to translate morality into law was the scholars’ theory of the judicial function. Very early in Islamic legal history two modulations of *fiqh* enabled scholars to frame an effective judicial process consistent with the three premises. The first modulation was to charge judges to concern themselves only with matters that were externally enforceable, administrable, and had worldly effects, and not issues of purely private conscience or morality. The second



modulation is a direct application of what we have already learned. One of the authorities endowed – according to our second premise that Shari‘a is transitive – with legitimate authority to compel others is the judge, called the *qadi*. Even though his judgments stem from mere interpretation, *ijtihad*, he may compel others in the name of the Shari‘a. But the realization that the judgment is only a probable approximation of God’s own law leads to a crucial nuance: the idea that the judge’s decision is binding in the external realm, the *zahir*, and not in the inner sphere of conscience and belief, the *batin*. A litigant who in his conscience, *batin*, believes in another *ijtihad*, another view of the law, is still bound, in this world, in the *zahir*, to obey the judge; but if he knows to a certainty that the judge is wrong, either because of a categorical revealed text or his own knowledge of the facts, then (according to most scholars) he must resist the judgment; if he is the winning party, morally he cannot take advantage of it. Thus, a *qadi*’s judgment does not bind anyone’s belief, only their actions. Indeed, even the judge himself is not bound by his judgment: he may later rule differently even in a case with apparently identical facts. All this is just one entailment of the textual premise, and its principle that *ijtihad* leads only to probable truth, not God’s certain truth. Since only the latter can bind opinion, a judge’s decision becomes binding only because of the factual necessity, in that single case, to make a determination. Here revealed is the most basic of means by which Shari‘a’s bridges from the transcendent realm of ultimate divine truth to the everyday needs of a functioning legal system.

The third and last mechanism unfolded under the three premises is one not involving the institutions of the legal system but the content of the law itself. As did the Prophet when he acted as judge or legislator, so scholars framed their opinions about law with an eye to its implementation and administrability. In innumerable cases the scholars address the individual conscience, inciting its delicate weighing of individual intention and purpose against moral precept and scruple, while contriving at the same time to deploy rules and judgments capable of being outwardly litigated and enforced. Here there are innumerable examples. Perhaps the broadest in significance is the scholars’ adoption of the scheme of five moral-legal categories for acts. Between the two extremes of do and don’t – obligatory and prohibited – the scholars interposed three others: recommended, indifferent or neutral, and disapproved. They opined that only a breach of one of the first two categories – obligatory or prohibited – leads to punishment, either in this world or the next. Indeed, most human behavior falls into the middle zone of “indifferent.” The remaining two categories, recommended and disapproved, were considered mere advice to conscience that, if followed, led to reward in the hereafter but no other consequence. With this five-part division, the scholars could readily unfold a set of administrable legal categories. They held that an act that was prohibited was not only punishable but also usually (but not always) void or voidable in its legal effects; while an act that fell into any of the other four categories was permissible to perform, and had valid legal effects. Thus while Shari‘a could engage pure conscience, at the same time legal actors and judges could disregard moral niceties and get on with enforcing the law. Even with this result in hand, some prohibited acts escaped any legal sanction, and could even create valid legal effects. This situation could arise, for example, when the ruling in question depended directly on an intimate moral state of the actor, his or her intention, something the judge could not observe and the claim of which, and proof of which, the party could too easily manipulate to his own advantage and the disadvantage of others.<sup>5</sup> An example of this is the husband’s practice of divorcing his wife three times in a single session. The ideal doctrine, attributed to the Prophet himself, is that this divorce is prohibited and a sin if the husband meant to accomplish three divorces, but is lawful and valid (as a single divorce) if the husband meant merely to reiterate a single divorce. Yet all four schools re-



solved on interpreting every such divorce as if the husband had meant three divorces and enforcing them accordingly. While it paradoxically enables and enforces the most sinful of outcomes, it at least prevents the husband from using varying assertions about his intent to manipulate the wife and the court.<sup>6</sup>

These mechanisms exemplify how scholars built bridges between the idealistic law of the three premises and functioning daily law. But even with these taken into account, we realize that what we know so far of *fiqh* and scholars falls far short of a functioning legal system. What is so painfully missing is the state, certainly basic to our own notions of the law. Surprisingly, so much of *fiqh* unfolds without mention of the inevitable resort to the state, inevitable if only because of the Qur'an's own provisions as to criminal law, tax distribution, jihad, suppressing corruption, achieving social justice, consultation between ruler and ruled, and the like. Yet, for this and a thousand far more practical reasons, Shari'a must of course address the state, and scholars and the *fiqh* of course fundamentally depend on it. The only surprise lies in how cleverly *fiqh* and Shari'a ignore and postpone this necessity.

The fourth premise then provides the Shari'a theory and practice that engages the state, namely, a body of thought and practice called *siyasa shar'iyya*, "governance according to the Shari'a." This theory explains the worldly structure, theoretical and practical, by which Islamic law actually governed numerous states and legal systems over a millennium.

But this premise comes with an immense shift of tone, of rhetoric, from the earlier premises. This premise is presented by the scholars not as pure, ideal doctrine but as only a painful compromise with contingent necessity. And notably the scholars present only this premise as emerging in history, as dictated by a sequence of events. Yet in my view it is as fundamental and essential a premise for explaining pre-modern Shari'a and Shari'a legal systems, in theory and in practice, as any of the others. I submit that the deprecating tone of the scholars toward it is essential to its due functioning.

All five of our premises do unfold or develop within Islamic legal history, but it is true that this fourth premise does so in later periods than the others. If we view *fiqh* in its historical evolution, one notices that it largely grew outward from private or individual matters toward matters that are public or collective. Even today *fiqh* law is far more complete and developed, and geared for the practice, in relatively private-law matters, where the individual's conscientious response to divine scripture is most engaged, such as morality, ritual practice, family law, property, contract, and tort.<sup>7</sup> And, most importantly for our purposes, *fiqh* only attained to a statement of a constitutional law describing and regulating the state after about four centuries, at a time when the caliphate was reduced to near-powerlessness.

What is largely left unsaid in *fiqh* writings is that the more public matters of law were, from the beginning, the domain of the state acting largely according to its discretion, ideally also in pursuit of the Shari'a and obedience to God's will. *Fiqh* and scholars initially only advised those in administrative control; later set down legal views that they argued rulers must follow; but only after a considerable time dared to claim that *fiqh* itself dictated the framework within which the ruling institution functioned and claimed legitimacy. The end point, which took centuries to emerge, was a position by which scholars understood the role of the state not as dominant over, or even as co-



equal to, their own role, but rather as constitutionally and doctrinally subordinate to *fiqh* itself. In the end they strove to represent the state's powers – legislative and adjudicative matters as well as executive ones—as delegated by *fiqh*. The state was to exercise them only within the overall framework of a duty to enforce and uphold the scholars' law, the *fiqh*. Initially it was the other way around, with the state dominant; but in the end the scholars gained the ideological upper hand. When the dust settled, in practice the scholars held a monopoly on truth and legitimacy, while the state monopolized material power. The role of power, rulership, and the state – its fulfilling of the functions delegated to it by *fiqh* – ended up being called by the name *siyasa* (meaning the running of things). Thus the system of implementation of Shari'a became as it were dualistic, with two clear poles – *fiqh* at one end, manned by scholars; and *siyasa* at the other end, manned by the state.

Medieval Islamic legal systems reflected a careful balancing of these two poles. Yet the equilibrium was never perfect. The two poles could not, in the very nature of things, dispense with each other; yet they also could never cease their mutual competition for constitutional position. Myriads of historical variations, in theory and in practice, succeeded each other. In later medieval times this dualistic system did achieve notable successes in durability, flexibility, and preserving the appearances of Islamic legality. It was able to bring the ideal law of *fiqh* into workable relation with fact, to maintain the transcendent and the mundane in reasonable balance.

What doctrines did *fiqh* deploy to attempt to govern or guide the actions of the ruler in these spheres of his unavoidable power and authority? A theory, articulated in the 14th century, remains influential until today. One element in it is to acknowledge openly that the ruler cannot and should not be expected to use a meticulous process of *ijtihad* in deciding his every action; indeed, this theory tacitly assumes that no ruler has the capacity to do *ijtihad*. *Siyasa shar'iyya* controls the legality of a ruler's actions in a very different way. It declares that the ruler may act freely – even to the point of issuing laws or legislating – as long as his action meets two criteria: one, that it serve the public good or general welfare, and two, that it avoids fundamental conflict with the Shari'a as understood by the scholars. The latter test – which has many possible meanings – is to be administered by scholars through the ruler's consulting them. Note how this theory is in a way the obverse of *ijtihad*. Instead of going back, as scholars must, to the revealed texts first, and consulting contingent need and utility only as a make-weight or exception (as the classical theory of *ijtihad* claims to do), this theory allows the ruler first freely to pursue the general welfare and only then to ask about Shari'a. And when he asks about Shari'a, it is only as a negative check, as to whether Shari'a is offended in its fundamentals.

Other key elements in *siyasa* theory are handed down from the older, more ideal theory of the caliphate for which *siyasa shar'iyya* is the compromised substitute, the concession to the community's falling from the ideal. Even the older ideal theory enjoins on Muslims that, except in several ambiguously stated cases, they should never rebel against a ruler if it costs civil unrest. Nor is any means or mechanism instituted with the function to remove a ruler if he fails to meet the requirements of office. *Siyasa shar'iyya* theory takes these concessions even further. It assumes that any actual ruler will fail of the idealized requirements of the old theory, but yet he is given the same authority as a legitimate ruler. The ruler's failings are to be made up by cooperation with the scholars, working with them toward the goal of the highest possible implementation of Shari'a. Note how this theory leaves the scholars themselves, with their power to deliver legitimacy, as the sole constitutional check on the ruler; indeed, that is exactly the scholars' intention, since any other constitu-



tional check would fall outside the scholars' terms of reference and undermine their power. As defined by scholars under the evolved theory, the legitimacy of the state depends no longer on the person of the ruler but only on whether, cooperating with the scholars, he upholds Shari'a.

We emerge therefore with two legal sub-systems deploying complementary and cooperative functions, balancing and checking each other. Jurists' law or *fiqh* is grounded in texts, is formulated by private pious conscience, is justified by religious knowledge, claims independence from the state, addresses individual conscience and acts, and aims for transcendent truth. The other legal sub-system, *siyasa*, is based in utility, is legislated by the state, is justified by the needs of the community, addresses the collectivity, responds to contingencies, and aims for religious truth only in the compromised sense of affording no fundamental conflict with Shari'a. With this theory we at last emerge with the necessary elements for successfully functioning legal systems.

Our last, fifth, premise will detain us only briefly. Like the fourth, it represents an aspect of Islamic legal systems arising outside the ideal system of the first three premises. It is to acknowledge, as a basic trait of Islamic legal systems, that pre-modern Shari'a, even incorporating *siyasa*, has always faced legal competitors. It has always been in competition or cooperation with other bodies of law that, unlike *siyasa*, are not (in any widely accepted sense) Islamic in origin. These are the various bodies of customary law: laws (secular and religious) generated from the ground up by various groupings within society, whether regions, ethnic groups, tribes, religious sects, neighborhoods, trade guilds, or the like. Shari'a at times co-opted custom, such as in commercial matters; at the other extreme it wholly opposed it. Yet custom has always been Shari'a's doppelganger. Perhaps in this we see a natural complement or counterbalance to *fiqh*'s idealistic – and highly religious – centering of both law and religion on the universal human conscience, to the stark disregard of any contingent group identities or structures.

At last, having completed our list of premises, I hope it is already clear that they may help us better understand how traditional Shari'a and *fiqh* navigate our distinction between law and religion. But nothing yet shows how these five premises help meet the second purpose I identified in the beginning – to trace how, when modern Muslims propose new or old religious or legal implementations of Shari'a, subtle shifts may be occurring, either in content or in context, and that these may have unintended consequences that one might predict by studying patterns from the past.

Here I have to be brief, but can mention a few examples of this phenomenon. One can identify a number of inherent problems in the many idealistic projects that seek a return to Shari'a predicated on simply restoring old *fiqh* laws. As the first of such problems, to invoke *fiqh* alone, while disregarding its balancing counterpart *siyasa*, is to engage only half of the laws and legal system within the framework of which that old *fiqh* was written, which that old *fiqh* assumed as its context. It is to ignore the most basic lesson of *siyasa shar'iyya* doctrine – that *fiqh* alone is insufficient for running a legal system. An example of this is the effort of the new Islamic Republic of Iran to substitute for the various laws passed by the Shah only Twelver Shi'a *fiqh*, largely as mediocrally understood. This attempt led to multiple clashes between the legislature and scholar-guardians of Islamic legal propriety. In the end the Shah's laws largely still stand in substance, and the constitution had to be amended to admit the principle of utility, modeled on *siyasa*.



A second problem with applying *fiqh* alone, ignoring its old context, is as to whether it can be correctly applied when the legal institutions that used to apply it – and which were the very external counterparts of its provisions – have now been swept away or radically transformed. An example here is the worldwide scourge by which Muslim sects have turned on each other violently, declaring each other infidels. Unfortunately, there often is much support in literal *fiqh* rulings for such harsh outcomes. What in the past held such dire measures in check was the simple inability of *fiqh* to govern the whole of the legal field; dogmatic stringencies generally remained theoretical, powerfully overbalanced by the realism of the state or of custom. Another example along the same lines is the anomaly that nowadays convictions for the severe Qur’anic crimes, the *hudud*, are occurring in Muslim states (such as Afghanistan under the Taliban) in situations where predecessor Muslim regimes would never have acted similarly; this is because in the past institutional checks and unwritten norms greatly inhibited the application of *hudud*. A last example is the puzzle posed by extremist groups including al-Qa’ida who apply standard *fiqh* doctrines, as on *jihad* and intolerance of other groups, but, because they neglect how historically these doctrines were enforced – chiefly through the ruler’s prerogative to declare and prosecute *jihad* and through the deploying of standing armies – are simultaneously considered deviant from Muslim tradition in the intuition of most Muslims.

A third and last problem with turning to *fiqh* alone to accomplish all the blessings hoped for from Shari’a is that to do so ignores the sheer limitations of *fiqh* as confessedly a law, and one which largely applied in the sphere of private or civil law alone, and then usually only to achieve individual compliance or resolve disputes. An example here may be the current practice of Islamic banking – which is essentially just commercial banking according to the opinions of traditionally trained scholars, who take centuries-old *fiqh* writings on commercial law and apply them within the sophisticated, rapidly evolving and globalizing world of international finance. Many Muslims feel that the result of this exercise fails as not advancing the cause of a larger Islamic economic system that would better reflect Shari’a norms of economic justice, equal opportunity, relief of the poor, the economic advancement of Muslims generally, and so forth. But this is to forget how difficult it would be to achieve such broad goals through commercial law alone.

Another set of examples of shifts in conceptions of Islamic law concerns anyone who thinks that an Islamic state can claim to apply perfect divine law. This is to ignore the Shari’a tenets dictating that any decision, whether of religious scholar, a judge and – most of all – any state or ruler, takes its place only in the contingent sphere of action not certainty. Thanks to *siyasa* and customary law, actual Shari’a systems of the past always delivered their everyday law with large doses of contingency and expediency mixed in. Yet lay people these days may miss this nuance or have forgotten this history; and even activists may dream of a modern nation state where only pure divine law is upheld. Meanwhile this widespread misperception has caused several liberal Muslim scholars in the United States, particularly Professor Abdullahi An-Na’im, to argue that Shari’a, at least when applied today in the context of a modern nation state, can never be applied compulsorily by the state, precisely for the religious reason that to do so defeats the Muslims’ freely willed practice of Islam. Interestingly, Professor An-Na’im makes his book-length argument without ever referring to the notion of *siyasa shar’iyya*.<sup>8</sup>

Perhaps an example of another trend, the perhaps partly unconscious recreation of old patterns, is that by which new constitutions embrace anew the old *siyasa shar’iyya* theory, providing in



effect that legislation must not offend basic tenets of Shari'a. This was the outcome even when Iraq and Afghanistan drafted their new constitutions under intense international pressure to liberalize, democratize, and if possible secularize.

I hope this list suffices to show the value of analyzing modern Shari'a phenomena in the light of patterns of law and religion known in the pre-modern past. Again, by doing so I hardly mean to bemoan a past that is finished or to deny Muslims' ability to redefine Islam continually. But I do mean to point to some inconsistencies, incongruities, and possible unintended consequences that contemporary activism or argumentation about Shari'a may face if they wholly ignore the lessons of the past.



## Endnotes

<sup>1</sup> I have discussed these premises, though in much abbreviated and somewhat divergent form, in my chapter “A Case Comparison: Islamic Law and the Saudi and Iranian Legal Systems,” in Robert Hefner, ed., *The New Cambridge History of Islam*, Vol. VI, *Muslims and Modernity: Culture and Society Since 1800* (Cambridge: Cambridge University Press, 2009).

<sup>2</sup> See, e.g., Qur’an 38:26, 4:105, 5:48, 3:110, 9:71.

<sup>3</sup> This *hadith* is reported by the two most authoritative Sunni compilers of *hadith*: al-Bukhari (d. 870 CE) (*Sahih*, Jum‘a 1:160, Ahkam 4:233) and Muslim (d. 874 CE) (*Sahih*, Imara 20,21).

<sup>4</sup> See Qur’an 3:7.

<sup>5</sup> Sometimes an act was declared to have one valuation in conscience or religion (*diyanatan*) and a different valuation before the judge (*qada’an*).

<sup>6</sup> This is also an example of a fourth mechanism, common to all laws: the fixing of legal rules according to the most common form – moral or factual – in which the act or event in question occurs, without making that rule depend on a more minute examination of the morally or legally significant facts or intentions of the parties.

<sup>7</sup> *Fiqh* seems to give far less acknowledgement to the state and its interests than one would expect from the Qur’an and the record of the Prophet’s lifetime, or indeed than one sees in the early history of the community. Looking only at the Qur’an, we find that it announces a number of prominent themes about law and legitimacy that seem to pertain more to the state or the collectivity than to a law framed solely by jurists. Examples are recognition of humanity as God’s vicegerent or agent on earth; the duty to obey those “in authority” [*ulu al-amr*]; punishing those who infringe God’s commands; the alms tax to be gathered by the state; and struggle on behalf of God, including war to uphold the faith. Other themes tending to pertain to the level of the state, constitution and law *fiqh* fails to develop fully or institutionalize, leaving them vague and under-utilized. Examples of these are the pervasive command to do justice and equity (*‘adala* or *qist*); the duty to oppose injustice, oppression or tyranny; the institution of the Muslim community; ordering the good and forbidding the evil; the obligation of the ruler to consult others, and, as practiced by early caliphs, a proto-legislative body; the contract between ruler and ruled; and the repeated condemnation of corrupting the earth.

<sup>8</sup> Abdullahi Ahmed An-Na‘im, *Islam and the Secular State: Negotiating the Future of Shari‘a* (Cambridge, MA: Harvard University Press, 2008).