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One cannot understand the relationship between Islam and politics until one appreciates the centrality of law to Islamic civilization. More than any other cultural phenomenon, law expresses the Islamic attitude towards the world. In an often quoted phrase, law represents "the epitome of the Islamic spirit, the most typical manifestation of the Islamic way of life, the kernel of Islam itself" (Schacht 1955, 1:28).

The character of Islamic law is, in many ways, similar to Talmudic law. Both are juristic, scholarly, and casuistical. Both retain intellectual vibrancy through specialized schools even when Jewish or Islamic states choose to ignore the substantive and procedural rules of their classical legal stystems. Both developed through debate, exegesis, interpretation, and commentary.

On the other hand, for Islam, the classical law (the Shari'a) is the standard by which political action is measured. For Islamic fundamentalists, the Shari'a is the only legitimate means of state rule. For reformers, the Shari'a (at least in its entirety) no longer meets the moral, economic, or political needs of the modern Muslim state. For eclectics, parts of the Shari'a (and of the numerous accepted variations among the schools of law) can be melded together with other legal structures to create a modern, but still Islamic, political entity. For some Marxists, it is an anachronism to be rejected. For certain Islamic jurisprudes, the Shari'a can be developed anew, consistent with its fundamental sources and principles, to meet the needs of twentieth century Islam. Whichever of the many governmental forms a modern Islamic state may take, the Shari'a remains a visible standard, consciously applied, modified, reformed, rejected, or redeveloped as the case may be. Except for some orthodox Jews in Israel, the Talmud does not play the same role in political Judaism.

Like those of Christianity, the moral precepts of Islam have, as a matter of historical fact, been in nearly constant tension with the state. Christianity conceives of the Church and the state as divinely sanctioned separate entities living in harmony with one another, however, classical Islam conceived the Shari'a and the state to be one. In fact, the state and the religion, the community and the individual, are all one. The state does not create the law. Rather the law precedes the state. The state exists solely to effectuate the law among the community of believers.

Islam never developed a hierarchical ecclesiastical structure as sophisticated or as self-sufficient as has

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Christianity.[1] Its institutional need for state support has been greater. Further, although the Church and Canon law influenced Western law enormously (Berman 1983), nonetheless Christianity has consistently permitted much if not most of the law to be developed legitimately by the secular arm, limited only by the moral and philosophical traditions of the religion. Yet although classical Islam gave the state no real independent role, the history of Islam has seen a much more vital role for the state. Both religions have analogous limits on the obligation of citizens to obey. A Christian may not obey a positive law contrary to divine law or to the fundamental principles of the natural law. Similarly, a Muslim has no duty of obedience to a law that would violate the Shari'a (Lambton 1981, 19).

Although Islam and Christianity (as well as Judaism) are "revealed religions," Christianity has historically concentrated most of its energies and disputes over philosophy, theology, structure, and ritual. Despite vigorous and heated debates over theology and philosophy, especially early in its history, Islam has nonetheless focused primarily on law (of which ritual is a significant part). For Islam, that law is divine in origin. Although highly developed and sophisticated (at a far earlier time than Western law), the mature Shari'a is based on the command theory of good. For the Muslim, the essence of God is so ineffable and so unknowable and the mind and will of man so frail, that the only good that man can arrive at is through God's command. Except for occasional periods of some Greek influence, Islamic philosophy never developed to where it could hope to supplant the law in the determination of what constitutes "right" behavior.

With the lack of a developed Church structure (at least in Sunni Islam), of a competing philosophical tradition, or of a formal acceptance of an independent function of the state, Islam has relied upon the Shari'a as the touchstone of its religion, its world view, and its cultural identity. As a consequence, the Shari'a is encyclopedic, covering religious duties, private law, and some incipient elements of public law, all with equal force. Prayers, fasts, pilgrimages, and religious taxes are included with the laws of war, marriage and divorce, family law, sales, bailments, bankruptcy, capacity, preemption, property conversion, partnerships, property law, intestacy and succession, judicial procedure, gifts, evidence, criminal law, and slavery. Not only are detailed rules present in these and other categories, but voluminous commentaries as well.

The Shari'a provides for civil remedies, and various forms of compulsory and discretionary punishments for penal offenses. But not all of the rules developed by the jurists carry worldly sanctions. Many offenses are to be rectified by the voluntary penitential acts of the wrongdoer. The Shari'a is part of a sophisticated five part ethical categorization of human actions. In Islam, any act performed voluntarily by a competent adult may be (1) obligatory, (2) praiseworthy, (3) neutral, (4) blameworthy, or (5) forbidden. Generally speaking, sanctions and remedies are limited to acts related to the first and last categories. For example, since drinking wine is forbidden by God, one who does so must be punished by lashes, following a proper finding of guilt at trial. Similarly, the law obligates a husband to provide food, shelter, and clothing for his wife so that she may live in reasonable comfort. If he fails to maintain his wife, she may bring an action through which a judge can issue an order compelling the husband to support her, or, in one of the schools of Islamic law, if the husand refuses the judge may require him to divorce his wife (a mechanism that in effect permits a wife to obtain a divorce for cause) (Khalil 1980, 151).[2] Certain other obligatory acts are required for legal validity. For example, if one knowingly fails to incline one's body towards the *kaba* at Mecca during prayer, the prayer is invalid (Nawawi 1914, 32).[3]

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Praiseworthy and blameworthy acts normally receive no reward or penalty in the law, but go to a man's relationship to God and his final judgment. It is praiseworthy, for example, "to pray only in a humble and submissive manner" (1914, 31). Emancipating slaves is meritorious (Roberts 1971, 59). Of course, though there is no reward or penalty for praiseworthy and blameable acts, legal consequences still obtain. The emancipated slave is free, obviously. A wife remains validly divorced whose husband pronounces a triple *talak* or renunciation against her, even though such a form of divorce is counted as a sin against the husband (Fyzee, A. 1964, 147).[4]

The Shari'a, then, speaks in detail about most aspects of a Muslim's life. There are variations both among and within the four major legal schools of Sunni Islam (Maliki, Hanafi, Shafi'i and Hanbali) and many other variants among the Shi'ites. Notwithstanding the differences, the Shari'a remains the point of departure for the political programs of most Muslims, whether it is to enforce it uncompromisingly, to use it in modified form, to meld it with the

values of other legal systems, to reject it for a modern ideology, or to redevelop it from its recognized sources.

According to the classical theory of Islamic law, for all its complexity and sophistication, the Shari'a is only a refinement of the will of God. Even the traditional picture of the development of the Shari'a admits that it did not spring full-blown upon the establishment of Islam. The classical version asserts that even though the Qur'an and the remembered examples of Mohammed (later known as the Traditions of the Prophet) had established the basic principles of the law, it took nearly two centuries of development before the full implications were worked out by the jurists. First through the device of "independent reasoning" (*ra'y*) that was later rejected, but soon afterwards by the logical mechanism of analogy, by discerning the true traditions from the false, by collecting those that were valid, and by resolving disputes among scholars through the authority of consensus, the Shari'a was developed through four variant schools all equally legitimate in Sunni Islam. In its essence, therefore, the Shari'a is ahistorical. Supposedly, the jurists worked out the details in utter intellectual disregard for the actual legal practices of the empire. In fact, the idealized image of the autonomous corpus of the law is so strong that Islamic juristic history is strikingly thin on studies or interest in how the law was actually applied. Early on, it was a common attitude among jurists that to be appointed a judge (qadi) by the caliph with the responsibility to resolve actual disputes and apply the law was about the worst fate that could befall a jurist (Coulson 1964, 126). For one thing, the qadis were appointed by secular authority and the jurists did not wish to have their independence compromised. In addition, the qadi (quite contrary to the mythology in the West) in Islam was supposed to apply the jurists' law without question, deviation, or innovation. His function was not legal reasoning, but legal application. The extent to which the qadis applied the Shari'a over, say, custom in any given area remains a rich area of inquiry. That, for the most part, is still to be explored. In historical fact, many great jurists did become qadis, and many legal experts have for centuries given advisory opinions (*fatwas*) on actual issues before the court. But the idea that the court, in facing disputes, was a lawmaking body or even a law interpreting body has never been accepted.[5]

By the end of the tenth century A.D., even the intellectual development of the Shari'a as practiced by the jurists slowed virtually to a halt. Instead of the approved practice of *ijtihad* (legal and juristic reasoning), the value of *taqlid* (following the example of pious men) became dominant. Although there would be many important codifiers and commentators to come, the bulk of the Shari'a was fixed. The Shari'a was then an "ideal" legal system. The law had been formed—it came to be believed—outside of history, without a need to know actual legal practice, and it follows, without any consensus on the way it ought to be implemented save for the general belief that the Shari'a should be actualized in one form or another.

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The true development of Islamic law was, of course, far more historical than the later jurists admit, but the actual history shows even more that although the substance of the Shari'a came to be accepted as ideal, the manner of its implementation was never agreed upon between the jurists and the state.

The contested but still dominant theory of the development of Islamic law was formulated by Professor Joseph Schacht (1950).[6] It is his thesis that during the first century of Islam, the applicable law was a mixture of limited Qur'anic precepts, a large amount of surviving pre-Islamic custom in Arabia, and imperial bureaucratic regulation in the conquered provinces. Not only did the Islamic empire of the Umayyads (661–750 A.D.) formulate the regulations for the conquered peoples, but it also appointed the qadis to administer them. Although beholden to the empire, the qadis soon coalesced with other scholars in various sectors of the empire to form legal schools whose doctrines became a mix of administrative practice and local custom developed through their own practice of independent legal reasoning.

Soon, a religiously inspired movement to Islamicize the empire took hold. By means of fabricating traditions that were ascribed to the prophet, the reformers were able to impregnate the law with their particular beliefs. The schools of law accepted the tactic of using the authority of the Traditions of the Prophet to support their own views, they partly accepted some of the reformers' substantive principles, and they further developed the law through analogy. By the time the Abbasids (749–1258 A.D.) supplanted the Umayyads and took power on an explicit Islamicization platform, the Shari'a was already beginning to solidify and the process was completed and systematized through the work of some exceptional jurists, particularly Muhammad Ibn-Idris ash-Shafi'i (767–820 A.D.). Although the recognized sources of Islamic law came to be the Qur'an, the Traditions of the Prophet (referred to generically as the Sunna), analogical reasoning (*qiyas*), and consensus of the scholars (*ijma*), Schacht holds that in fact the actual substance of the Shari'a is a mixture of Qur'anic norms, pre-Arabian custom, Umayyad regulations (perhaps the largest source), the developed doctrines of the schools of law, provincial custom, some foreign influences, and some views of the religious reformers.

As the Abbasid empire championed the Islamicization movement, the role of the qadi changed. No longer was he to implement bureaucratic decrees. Rather, the Shari's was his province, and he was to enforce its provisions and nothing else, certainly not his own views, The transformation of the qadi into a Shari'a judge, however, did not, as might be supposed, necessarily transform the Shari'a into the universal law of the empire. Empires have their own needs and although the Abbasid caliphs were supposedly bound to enforce the provisions of the Shari'a, the political structure, policies of ruling the empire, and the very limits of the Shari'a enabled the empire's leaders to rule outside of the Shari'a to a significant degree.

To begin with, when the Shari'a came to be regarded as a divinely inspired product of independent juristic reasoning, and thus autonomous of state or history, it failed to be concerned with the actual political mechanism of enforcement. Later jurists attempted to formulate constitutional theories of the Islamic state, but the Shari'a did not have a highly developed public law component of its own. In short, the Shari'a never described itself in constitutional terms.

The key, it turned out, was the qadi. Both the state and the jurists had deprived him of independent judicial power. A qadi was not necessarily a jurist although at various times certain famous jurists became qadis. But the position of qadi itself carried little of the jurist's authority. The qadi was to apply the Shari'a without independent interpretation. At the same time, the qadi remained an appointive office. He served at the pleasure of the caliph. Both the enforcement of his decisions, and much more critically, his very jurisdiction to hear classes of cases was dependent on the will of the state. The jurists had never established the independence of the qadi and, for all their reforms, the Abbasids were not about to give up their appointive and jurisdictional power over him. Although later Islamic thinkers railed against the failure of the political leaders to enforce the Shari'a, jurisdictional independence of the qadi never came to be generally accepted.

A number of political devices of the Abbasids outflanked the requirements of the Shari'a and continued in some form or other in later empires. To begin with, the police or *shurta* began to investigate, apprehend, try, and punish offenders independently of the Shari'a courts (Coulson 1964, 121). Penal law was one of the least developed portions of the law anyway. The Shari'a lists a number of "Qur'anic offenses" with specified punishments: adultery, false accusation of adultery, wine consumption, theft, highway robbery, apostasy. Murder is a species of intentional tort engendering compensation or retaliation. For any other offense not specified in the Shari'a but brought before a qadi, the punishment is discretionary. Such a penal "code" is clearly insufficient for the needs of a developed state.

Once the good character of the witness has been established, the substance of his testimony may not be impugned by cross-examination or other means.

Secondly, Islamic evidentiary procedure is cumbersome in terms of its truth-seeking capabilities. In both civil and criminal cases, proof may normally be completed only on the testimony of two adult competent male Muslims who were eyewitnesses to the disputed event. Once the good character of the witness has been established, the substance of his testimony may not be impugned by cross-examination or other means. On the other hand, except for cases dealing with Qur'anic offenses, if the plaintiff or accuser has insufficient witnesses, he may sometimes be permitted to complete his case by asking the qadi to offer the defendant a decisive oath. If the defendant takes the oath, the case is dismissed. If the oath is refused, sometimes the qadi can have the oath retendered to

the plaintiff, which if taken, will complete the proof for the plaintiff (1964, 125).[7]

Even in the days of greater faith, state leaders were not so sanguine about the truth of decisive oaths taken by a defendant who had much to lose. Further, although it might not be difficult to find two male Muslims of reputable character, it was often impossible to find two such men who also happened to be eyewitnesses to the crime or delict. Consequently, the Muslim caliphs not only transferred penal jurisdiction to the *shurta*, they also placed much of the civil areas of the law in other state courts.

One of the most important jurisdictions belonged to the *muhtasib* or inspector of the market who not only established regulations for the conduct of merchants and traders, but he enforced them as well. With so much of the commercial activity of the Islamic empire centered on trading, the jurisdictional power of the *muhtasib* was enormous. In fact, it soon fell to him to enforce Islamic morals (Anderson 1976, 14). Not only were social customs implemented in this way, but so also were many religious obligations and practices that would not have been punishable under the Shari'a.

Once the Shari'a had solidified and the "gate" to further juristic reasoning closed through *taqlid*, a kind of equity jurisdiction came into its own. Originally adopted by the Abbasids from an institution of conquered Persia, the *mazalim* court at first looked into complaints against office holders (including qadis). Later it developed as a forum through which qadi judgments could be executed and also as an alternative mechanism in situations in which the Shari'a courts were incapable of handling a dispute. Furthermore, as the centuries passed, the *mazalim* courts took on some jurisdiction over property law, private foundations (*waqfs*), and even some matters of personal law (Liebesny 1975, 254–257). Caliphs and sultans often simply transferred jurisdiction from the Shari'a courts to the *mazalim* tribunals.

In addition to his powers of appointing qadis and constricting their jurisdiction at will, the Islamic sovereign has always possessed an independent right of legislation. Called the *siyasa shar'iyya*, it signifies the ability of the caliph to pass "administrative regulations" to help effectuate the Shari'a. Strictly speaking, "sovereign" and "legislation" are misnomers when applied to the Islamic state. Only God is sovereign, and only He "legislates," that is, only He can literally "make law." Nonetheless, through the mechanism of *siyasa*, the Islamic state, even conservative modern states like Saudi Arabia, has been able to contend with problems in ways that are outside of, and in some ways even contradictory to, the approach of the Shari'a.

The tension between the state and the Shari'a resulted in no small part from the fact that the Shari'a did not develop an extensive corpus of public law, nonetheless, it is not entirely absent. The very success of the Islamic reformers in freeing the Shari'a from the state left the holy law unattuned to the legal details of governance. Western scholars have shown that the Shari'a was the result of a complex amalgam of historic forces, not least of which was the substantive regulations of the Umayyad empire. In the very act of making the Shari'a substantively independent of the empire, however, Islam also closed the gate to its further development by adopting *taqlid* as its primary value. Thus, when the state needed mechanisms to direct its rule more efficiently, solutions were yet to be developed in the Shari'a. And when the Abbasids and later empires created new institutional mechanisms of governance, the Shari'a was incapable of absorbing, refining, and harmonizing them. Consequently, in the history of the Islamic empires, it is difficult to find an Islamic state that has enforced the Shari'a totally and faithfully. Both the independence of the Shari'a and the existence of governmental institutions that ignore it have been part of the same Islamic tradition from the beginning.

Consequently, in the history of the Islamic empires, it is difficult to find an Islamic state that has enforced the Shari'a totally and faithfully.

The constitutional gap left by Shari'a was filled, in fact, by the practices of the Islamic state. Indeed, because the Shari'a separated itself from the state at an early period, and because the Shari'a never described itself in constitutional terms, the manner of its enforcement was left open. At the same time, since the Shari'a had not comprehended the law of the state, the institution of *taqlid* in the usual sense did not apply to the subject. The issue was still open for debate and development in the light of history. As a result, Islam developed a rich tradition of political theory, many of whose most famous theorists were, in fact, jurists.

The issue facing all the theorists was, of course, how to define the nature of the Islamic state. Indeed, the major differences between the Shi'ite and Sunni wings of Islam are less on matters of faith than on an issue of constitutional law. During the reign of Ali, the fourth caliph[8] to succeed Mohammed, a civil war

broke out in which the party supporting Ali and his son lost to Mu'awiya, who inaugurated the Umayyad dynasty in 661 A.D. The majority of Muslims (the Sunni) accepted the new dynasty and later its successor, the Abbasid. A minority, the Shi'ite, held that the succession of Mu'awiya was illegitimate. They held that only a person who was a descendant of the Prophet by blood or marriage could succeed to the caliphate. Since Ali was both the cousin of the Prophet, and more importantly for the Shi'ites, since he was also the husband of Fatima, daughter and last surviving offspring of Mohammed, the mantle of authority had passed to him and to his offspring.

As in Sunni Islam, the Shi'ites believe that only God is sovereign and his legislation is known through the Shari'a.

Later, the Shi'ites themselves split into a number of competing factions. The largest of these, the Ithna 'Ashari, is known as the "Twelvers." They believe that the legitimate succession to Mohammed passed through Ali, his two sons, and nine further successors. The twelfth Iman disappeared and is expected to return as the Mahdi (a Messiah-like conqueror) and restore the true caliphate over Islam.

For the Ithna 'Ashari, the legitimate successors to Mohammed were also divinely inspired and infallible and thus their words had the effect of "new law" as given to them by God (Williams 1962, 224). Thus, the Shi'ites assert that the gate to legal reasoning never closed and that the theory of *taqlid* is not valid (Coulson 1964, 108). Nonetheless, the Shi'ite Shari'a is basically similar to that espoused by the four Sunni schools of law and, if anything, the drive to apply the Shari'a in all its literal stringency is stronger in Shi'ism than in Sunni Islam.

As in Sunni Islam, the Shi'ites believe that only God is sovereign and his legislation is known through the Shari'a. Nevertheless in comparative terms, the Shi'ite belief in the divine right of succession and the inspired ability of the true Imams to be infallible guides demonstrates that the Shi'ite view of the caliphate is closer, relatively speaking, to an idea of "state sovereignty." Of course, until the hidden Imam reappears, even this limited and derivative sovereignty does not exist. For example, in the constitution of the Islamic Republic of Iran (where the Ithna 'Ashari are dominant) God alone has "exclusive sovereignty" (Blaustein and Flanz 1983, vol. 7). In addition to legislative, executive, and judicial branches, with a prime minister and a president, the Constitution established the office of the "Mandatory for the Affairs of State and the Imamate" (1983, Art. 57). Given great power, the Mandatory or "Leader" must be a cleric and he wields his authority "[u]ntil the appearance of the Saint of the Ages," (1983, Art. 5). that is until the Mahdi or hidden twelfth Imam reappears. In other words, the government of Iran regards itself as a regency.[9]

In contrast to the Shi'ites, Sunni Islam accepted the legitimacy of both the Umayyad and Abbasid caliphates and its political theory followed from this fact. The role of history in the development of Sunni political theory is far more evident than in the final Sunni formulations of the Shari'a itself. Since many of the jurists believed that the Muslim community was under the direction of God, historical developments were accepted as having some kind of divine sanction. Nonetheless, the sense of permanence, of consensus, and of universal applicability is not a hallmark of the history of Islamic political philosophy. The gate of independent reasoning never closed on this part of Islamic intellectual life.[10]

In the early years of the empire, the Sunnis attempted to reject two extremes. First, they had to find a reason for the legitimacy of the caliphate against the Shi'ite assertion of blood succession only. Second they had to oppose a party at the other extreme, the Kharijis, who said that the caliph served at the pleasure of the community, and the community could depose of him at any time.

All Sunnis originally agreed upon the necessity of the caliphate. Islam was not a personal creed. It was God's formula for right living among men. The essence of the divine revelation, the law, needed a worldly agency for enforcement, and the community of believers were in need of a visible authority. The later historian and political theorist Ibn Khaldun (1332–1406) expressed the natural Islamic sense of what a legal order requires. He argued that, although every political group needs laws, no law can help perfect man spiritually as well as materially except the revealed law of God. The caliphate is required, therefore, "to bring the whole people to conform themselves and their ordinances in all matters of this world and the next" (Schacht 1955, 13–14). Al-Ghazzali (1058–1111) had argued that the positive legal order of the Shari'a could not exist unless implemented by the state. Without the caliph or his appointees, no judgment of qadi could be enforced. Wills, marriages, and contracts would be invalid. God's people would be forced to live in sin (Lambton 1981, 113).

Until the formal destruction of the Abbasid caliphate in 1258 most Sunnis argued that the caliph had to trace his lineage back to the Quraysh tribe to

which Mohammed had belonged. Looking to the example of the immediate successors of Mohammed, the jurists also listed a number of additional qualifications. The caliph must possess knowledge of the law to the level of a jurist, he must be of good character sufficient to be a witness in court, and he must have administrative and military ability (Schacht 1955, 9).

The manner of accession to office was by a form of social contract. A group of electors made up of highly regarded Muslims would signify the grant of authority to a caliph by pledging their obedience to him. How the body of electors should be made up was subject to dispute. In Sunni thinking, election was the favored form but not the most legally dominant form. A caliph could remove the electors from the nominating process by establishing his successor in his will. Alternatively, the caliph could direct a council of named persons to choose a successor upon the caliph's death. In either situation, the nomination was dispositive. The contract of accession, however, still had to be made by the electors, but they had no choice. They were obligated to agree to the testamentary or councilor nomination (Lambton 1981, 18).[11] The jurists derived each form of succession from the historical practice of the early caliphs who followed Mohammed.

Although political doctrine always insisted that "there is no obedience in sin" (1981, 14), implying a right of disobedience or even revolution, the wracking civil wars and the violent demands of the Kharajis and Shi'ites eventually led Islamic political thinkers to demand strict obedience to the caliph from the people. The problems of historical reality had made unrelenting inroads on the original theory. What should be done, for example, if the caliph turned out to have a bad character? What if he were not learned in the law? What if the caliph had come to power by armed force? What if there were more than one caliph? Very soon after the rise of the Abbasid empire, the caliphs lost their power to a series of temporal princes, though they retained the title of caliph. Did the temporal leaders have legitimacy? When the Abbasid empire finally expired and Mongols and later Turks, obviously not members of the Quraysh, assumed formal leadership as kahn or sultan, where was the legitimate authority? Finally, from the very beginning of the Abbasid dynasty, the political leaders had effectively circumvented the Shari'a through their own political institutions. How should that be treated?

The jurists and philosophers argued, disputed, and differed but generally speaking, there was a trend in which many theorists came down on the side of obedience, notwithstanding the character, lineage, or even the policies of the caliph or sultan. In its extreme form, the aphorism arose, "Sixty years of tyranny are better than an hour of civil strife" (Schacht 1955, 15). Thus, the fact that the caliph was not knowledgeable as a jurist was passed by with the advice that he ought to consult the jurists on legal matters. According to al-Ashari (d. 935), it was also improper to revolt against a leader merely because of his moral failings (1955, 15).

The fact that a leader took power by armed force was also accepted. First, al-Mawardi (d. 1058) recognized the authority of those temporal princes who came to power by force in the outlying provinces. Later al-Ghazzali found the sultans legitimate who ruled the center of the empire though they still recognized the nominal authority of the caliph. Both al-Mawardi and al-Ghazzali recognized the caliph's position as legitimate even when he failed to enforce the Shari'a. The reasons given were the impossibility of fulfillment and political necessity (Lambton 1981, 19, 20, 101).[12] By this action Islamic political philosophy had come to terms with Islamic political history. Subsequently, the sultan asserted sole temporal authority relegating the caliph to only religious leadership. This too was found legitimate (1981, 130–137).[13] When finally the Mongols destroyed the caliphate, Ibn Taymiyya (1262–1328) declared that the caliphate was only an historical event, not required by divine legislation. While calling for a return to the pure principles of Islam without the inhibitions of *taqlid*, Ibn Taymiyya held that since the beginning of the Umayyads, there were in fact only temporal princes, and that their power was legitimate (Rosenthal 1962, 44).[14] The way to make sure that the princes served Islam and the Shari'a was to have them rule in close collaboration with the *ulama* (the body of jurists) who could inform them of the requirements of the religion (1962, 23-24). Ibn Taymiyya leaves a large gap for a ruler's discretionary powers, however. Ibn Taymiyya rejected *taqlid* and argued that fresh legal reasoning (*ijtihad*) based on the Qur'an and the Sunna was legitimate. If there was disagreement among the *ulama* about what the Qur'an or Sunna required, (which would be more likely if *ijtihad* were praticed freely), the ruler could act according to his conscience (Lambton 1981, 149).

As Islam entered the modern era, its history provided it with a wide range of political alternatives and theoretical justifications.

Ibn Taymiyya also dismissed the tradition that the caliphate had to be unitary, a rule compromised even at the beginning of the Abbasid empire when a Umayyad rump faction established itself in Spain. Even Ibn Taymiyya's hope that the prince would place himself under the influence of the jurists, however, was not effectuated. Instead, other theories from a more philosophical tradition of Islam, much of it neo-Platonic, argued for a style of absolute kingship that would keep the various classes of society rigidly in place (1981, 25–26; Rosenthal 1962, 122–123). Many of these values animated the government of the Ottoman Turks. Yet in many ways the later justifications on temporal power only followed from the trend within Sunni Islam itself. As the leader became recognized as having a divine right to his position and to exact obedience from his subjects, competing centers of authority, even the *ulama* and their Shari'a, became politically disenfranchised.

As Islam entered the modern era, its history provided it with a wide range of political alternatives and theoretical justifications. Foremost of all, the rich tradition of Islam produced the law, the Shari'a, which is the core and singular product of the culture and of the faith. The tradition also produced a developing and flexible political theory that adjusted its constitutional requirements to the realities of history and of state authority. Finally, the same tradition produced, nearly from its very beginning, recognized political practices by which the Shari'a was more or less enforced or suspended as the needs of Muslim society required.

tion of the Shari'a; it can seek to modify the Shari'a; it may attempt to meld it with the values of other legal systems; it may seek a fresh revision of the Shari'a based on the Qur'an and the Sunna; or it may decide to reject the Shari'a altogether. Most of the alternatives to a strict application of the Shari'a have their precedents in Islamic history through the actual independence of the temporal order, but where the line should be drawn between the Shari'a and the other perceived needs of society is still the issue.

There have, for example, always been Muslims who have called upon the state to forsake every value, every law, and every regulation that is contrary to what is found in the Shari'a. Ibn Taymiyya is one classical instance. Even though this Hanbali jurist had recognized the legitimacy of the temporal leaders, he nonetheless preached vehemently against the way the political authorities of his day temporized and failed to apply the Shari'a in all its rigor. He was frequently imprisoned for the stridency of his advocacy.

Both in the past and today, fundamentalist points of view have so conflicted with the political state of affairs that violence and civil war have ensued. In the eighteenth century, the Wahabi movement in the Arabian peninsula sought to expunge all accretions to Islamic practice that had occurred after about 1000 A.D. Twice successful and twice defeated, the Wahabis triumphed a third time in the twentieth century under the Saud family. Modern Saudi Arabia is not, however, as fundamentalist as

As conservative and respectful of the Shari'a as Saudi Arabia may be, the government does not insist on a strict and literal application of the ancient Shari'a in all its details.

It should be clear, therefore, that there is no single Islamic political tradition, either in theory or in practice. Of course, Muslims who hold to one or another of the variants argue that their particular point of view is the valid one, just as Christian sects make claims of rightful doctrine against one another. But the issue among the Islamic peoples has been the same for the past millennium: what is the proper Islamic state and what should it do about the Shari'a? The answers offered by Islamic history have been varied. Today the same kinds of choices remain for an Islamic state. It may opt for the stringent applica-

were the original Wahabis. A number of modifications have taken place even in that legal system. As conservative and respectful of the Shari'a as Saudi Arabia may be, the government does not insist on a strict and literal application of the ancient Shari'a in all its details.

In the twentieth century, fundamentalist groups have become more active. One such party has taken power in Iran, while others have conspired or revolted against the leadership in Saudi Arabia and in Egypt. In 1928 in Egypt, the Muslim Brotherhood was founded under the slogan, "The Qur'an is our

constitution'' (Blaustein and Flanz 1983, 5:6). Immediately after World War II it became the largest party in that country but waned after the assassination of its leader. In 1954, following the ouster of the monarchy, the group was dissolved by the government and has led a violent resistance to those in power since. But the pressure for a return to Islamic ''purity'' is not limited to the Muslim Brotherhood and the assassins of President Sadat and their religious leader who were animated by the same motive (20/20 1982, 2-7). A few years before President Sadat's death, his intervention along with the vehement protests of the Coptic church prevented the Egyptian parliament from enacting the Qur'anic penalty of death for apostasy from Islam (*New York Times* 5 Sept. 1977, 31; 8 Sept. 1977, 8; 15 Sept. 1977, 15). Sadat, however, later supported a plebiscite vote that, along with allowing him to remain president indefinitely, also amended the Constitution to make the Shari'a ''the principal source'' of law (*New York Times* 23 May 1980, 3; 24 May 1980, 5). Nonetheless, there is little evidence to date that the provision has had any significant effect on positive law.

For thirty years Pakistan has had constant internal debate and turmoil over the degree to which fundamental rules of the Shari'a can be implemented (Rosenthal 1965, 181-286). The country came into existence with a mixture of common law and Islamic legal principles handed down from the British. Where it should go from there has caused the nation no little anguish. The cycle of constitutional enactment, military coup, constitutional suspension, and constitutional reestablishment has been repeated with unhappy regularity. Yet all through the turmoil and the bloodshed, Pakistan's search for its Muslim identity has not abated (Esposito 1980, 139-162). Part of that search has included uncertain steps towards reestablishing the Shari'a. The 1973 Constitution is still nominally in effect, although the military rule of President Zia has supplanted or amended it according to his will. The Constitution proclaims that ''sovereignty over the entire universe belongs to Allah alone,'' yet somehow the authority to rule has been granted to the ''people of Pakistan'' (Blaustein and Flanz 1983, vol. 12).[15] The charter also declares that Islam is the state religion (1983, Art. 2), and that the state should make it a policy for Muslims to live out their lives ''as set out in the Holy Qur'an and Sunnah (1983, Preamble, Art. 31). By leaving out two other classical sources of the Shari'a, namely, analogy and consensus, the Constitution takes into account the disparate Islamic schools and sects within Pakistan, and also, in a formal sense at least, permits new reasoning or *Ijtihad*. There is also an Islamic Council to advise on the ways the Qur'an and the Sunna can be implemented (1983, Art 230), and a provision requiring that ''all laws [be] brought into conformity with the Holy Qur'an and Sunnah'' (1983, Art. 227).

In 1981 President Zia moved the country closer towards fundamentalist goals by establishing a Shari'a court system to which any citizen or the federal government or any provincial government may bring an action challenging the validity of any law in light of the Qur'an and Sunna (1983, Arts. 203A-203J).[16] Although appeal is not a part of the classical Islamic court structure, there is also a Shari'a appeals court and a special section of the Supreme Court to deal with these affairs. Zia boasts that he has reestablished the Qur'anic penalties for four penal offenses: alcohol consumption, adultery, theft, and imputation of adultery (Donohue and Esposito 1982, 272, 276-277). It is not known how far these reforms have taken hold, although the Shari'a rules relating to personal law have all along been enforced. Nonetheless, in other areas of civil law, it is still fair to say that the legal system of Pakistan remains heavily based on the English common law and, as the traditional sultan in Islam, authority is centered in the person of President Zia (Taylor 1983, 181, 194).

As prevalent as the fundamentalist movements may seem today, Islam has also had a long tradition of modifying the provisions of the Shari'a. . . .

As prevalent as the fundamentalist movements may seem today, Islam has also had a long tradition of modifying the provisions of the Shari'a, or of taking advantage of the state's right of *siyasa shar'iyya* to meet social and political problems. One of the most famous examples of modification occurred during the so-called Tanzimat, or legal reform period, of the Ottoman empire during the nineteenth century. Part of the Tanzimat lay in setting aside the Shari'a in favor of Western inspired codes: Commercial, Penal, Maritime Commerce and Commercial Procedure codes. But by far the most interesting and influential effort of the Tanzimat was the Majallah, a code incorporating much of the Islamic law of contract, tort, property, and some procedure. It was a code based on the Shari'a and systematized in a way the classical jurists had never conceived. Furthermore, the substance of the Majallah's content did not come solely from the majority opinions within

the Hanafi school dominant in Turkey, but was a mixture of rules and provisions, eclectically brought together from all the Hanafi writers who had reached the result thought to be most desirable (Anderson 1976, 17).

The device of selecting desirable opinions from many jurists spread. The Turks had left family law to the jurisdiction of the Shari'a courts (a practice followed by other Islamic states), but through imperial edicts in 1915 and a family code in 1917 the government reformed some of the aspects of Hanafi law that were particularly harsh towards the legal position of wives. Not only did the reformers find more acceptable views among minority Hanafi jurists, but they also eclectically chose the most useful opinions among all of the four Sunni schools (Liebesny 1975, 70). Soon legislators in Egypt were formulating codes that took portions from any of the Sunni schools, some extinct schools and some independent reformers. They did not even hesitate to use a Shi'ite rule when necessary (Liebesny 1975, 137). This picking-and-choosing device was, of course, improper under classical Islam, but it represented a way of finding flexibility in Islamic law while still remaining faithful to the Shari'a. The technique went so far as to merge opinions from different jurists arriving at a result that could not be found in any of the jurists of any schools (Coulson 1964, 199). The tactic, however, was limited to personal status law.

Islam reformulate the laws of Islam in view of the demands of modern life. *Ijtihad*, he said, was an "imperative necessity" (Facts on File 1983. 489-490). If ever acted upon, this innovation would move Saudi Arabia from merely modifying the Shari'a to a much more dramatic redevelopment of the law. Third, they added an appeal structure to the Shari'a court system (Shapiro 1980, 68:350).[17] Fourth, the Saudi government taking advantage of the right of *siyasa shar'iyya*, established a number of arbitral and appeals boards to deal with labor, commerce and certain tort disputes outside of the Shari'a courts. The government also enacted tax, labor, motor vehicle, commercial and other regulations that are designed to meet the needs of modern commercial relations (Liebesny 1975, 107-108). Finally, it established a Board of Grievances with title and powers directly traceable to the *mazalim* courts of the Islamic empires (Long 1973, 27: 71, 72).[18] Saudi Arabia, therefore, followed the example of previous Islamic states in modifying the Shari'a, enacting "administrative" regulations as needed, and establishing *mazalim* jurisdiction outside of, and above, the Shari'a court system.

The most common practice among modern Islamic states, however, is to set aside the Shari'a where necessary, and to adopt Westernized codes in its stead. Like caliphs of old, they ignore the Shari'a in certain areas, particularly in crime, commerce,

The typical Islamic state today is a mixture, and to some extent a melding, of Shari'a norms and Western law.

When modern Islamic states faced the problem of reforming the civil and criminal law, they turned to Western codes for guidance.

Even the regime in Saudi Arabia, likely the most conservative in Sunni Islam, has also chosen the tactic of Shari'a modification as a way of avoiding the literal application of the classical law. There is no constitution in Saudi Arabia, the Qur'an is regarded as the fundamental charter, and the Shari'a court system staffed by qadis remains rather fully in force. Nonetheless, the regime has adopted a number of modifications. First, in 1966 it decreed that qadis were not bound to apply the opinions of the Hanbali school alone, but could make use of the views of any Sunni schools (Ali 12 April 1979). Second, in 1983, King Fahd declared that the gate to *ijtihad* was once again open and he asked that scholars everywhere in

contract, property and procedure, but retain much more of it in personal law areas, such as family law and the law of succession. Also like the Umayyad and Abbasid caliphs and the sultans of the later Turkish empires, they make use of political theories and institutions of non-Islamic traditions. Virtually every Islamic state in North Africa and the Near East has chosen this option.

The typical Islamic state today is a mixture, and to some extent a melding, of Shari'a norms and Western law. Egypt, despite the recent constitutional amendment making the Shari'a the principle source of law, has a legal system that is mostly European. The Penal, Commercial, Evidentiary, Civil Procedure, and Criminal Procedure Codes are primarily French based. The important Civil Code of 1949 is also primarily of the European type, but has

many elements of the Shari'a within it. Article 1 of the Code permits a judge to decide on the basis of the Shari'a only if the code or custom does not cover the case before him (Liebesny 1975, 95).

Personal status law in Egypt remains fundamentally Islamic although most of the provisions have been codified into positive law. The Shari'a courts, however, were abolished in 1955 and jurisdiction was transferred to the national court system (1975, 101). Syria, Iraq, Kuwait, the Gulf Emirates, Lebanon, Jordan, and Israel still maintain a dual court system whereas Morocco, Tunisia, and Algeria have unified their judicial structures. Although under pressure from Islamic fundamentalists, the Egyptian legal system is still a mixed variety, with European forms dominating outside of personal status issues. Virtually every other Arab state follows the Egyptian example.

There has been considerable debate among Muslims as to whether socialism can be melded with Islam. Before Anwar Sadat came to power in Egypt and encouraged economic investment, President Nasser championed the institution of a socialist state. Algeria also asserted a link between Islam and socialism, particularly in the period immediately following independence from France. Colonel Qaddafi of Libya adheres to the same proposition. In Libya's Declaration on the Establishment of the Authority of the People, a document which passes for a basic charter in that country, Article II states: "The Holy Kuran is the constitution of the Socialist People's Libyan Arab Jamahiriya" (Blaustein and Flanz 1983, Vol. 9. 1981 Supplement). Qaddafi has also reinstituted the Qur'anic categories of certain crimes, but the evidence is that he did so more to legitimize his takeover than as a part of a serious program of Islamicization (Mayer 1980, 28:287). Pakistan has had a consistent constitutional tradition asserting the fundamental compatibility of Islam and socialism.

Other Muslims, however, insist that Islam and Marxism are incompatible (Piscatori 1983, 5; Donohoe and Esposito 1982, 137, 155). In fact there is evidence that Pakistani Marxists have been disappointed in the regime's concessions to the fundamentalists (Rahman 1974, 192). Following Anwar Sadat's open door policy to foreign investment, *fatwas* were issued by a Shari'a expert declaring communism a sin and finding private property an essential right under Islam (Piscatori 1983, 14–15). Putting to one side the intellectual arguments of many Islamic thinkers who admire socialism, it may be that many of the authoritarian leaders in Islamic states have embraced the proposition as a means of increasing state control.

Following Anwar Sadat's open door policy to foreign investment, *fatwas* were issued by a Shari'a expert declaring Communism a sin and finding private property an essential right under Islam.

A fourth option of the Islamic state is to reject the Shari'a altogether. Some Marxists accept this point of view and the manner in which the Soviet Union rules its Muslim republics places it in this category. Nonetheless, the only Islamic state with a Muslim majority to reject the Shari'a altogether has been Turkey, which after the rise of Ataturk adopted the Swiss code as its model. In fact, the Turkish Directorate for Religious Affairs works to lessen, not increase, religious influence over governmental policy (Ansay and Wallace 1978, 2d ed. 32).

Finally, perhaps the most interesting response of modern Muslim thinkers to the historic Islamic dilemma has been to accept the Shari'a but to redevelop it from its sources. These thinkers wish to dispense with *taqlid* and open anew the gate to *ijtihad*. They contend that the reasoning applied to the sources of the law might have been useful in the third Islamic century, but that today without rejecting the fundamental divine sources of the Qur'an and the Sunna, new solutions can be found. Such thinkers have included Mohammed 'Abduh and Rashid Rida of nineteenth century Egypt (Rosenthal 1965, 66–67), the poet Iqbal of Muslim India (Iqbal 1934), the theorists Maududi and Fyzee of modern Pakistan (Maududi 1960; Fyzee 1963), and even the twelfth century jurist, Ibn Taymiyya. One of the greatest of Muslim jurisprudes of this century, Subhi Mahmasani, put it this way:

> In fact, the closure of *ijtihad* violates the provisions and concepts of Islamic jurisprudence and condemns all Muslims to permanent stagnation in jurisprudence and

> exclusion from the application of the laws of evolution. . . . The door of *ijtihad* should be thrown wide open for anyone juristically qualified. The error, all the error, lies in blind limitation and restraint of thought. (Donohue and Esposito 1982, 181, 182)

Most of these theorists wish for a full imposition of the Shari'a but not the Shari'a with all the human details worked out by the ancient jurists. Rather, by a vigorous reinterpretation of the original sources, the Shari'a can emerge, they argue, as fully applicable to modern times, but at the same time, as fully Islamic.

The call for a new *ijtihad* has been as prevalent a trend in modern Islam as has been the urgings of atavistic fundamentalism, even though news reports in the West pay more attention to the latter. For some Muslims, however, fundamentalism and *ijtihad* are not in contradiction.[19] They have an image of the first thirty years after the death of Mohammed as the historically "ideal" Muslim era. Similar to fundamentalist Protestants who wish to revive a notion of "primitive" Christiantiy, some Muslims want a new *ijtihad* not to open the door to modern values, but to retreat from even the developed Shari'a to a more pristine structure of Islamic society.

Whether the call for a new jurisprudence is at the behest of fundamentalists or of modern reformers, it has been a constant thread in the fabric of modern Islamic political and legal thought. Virtually the entire debate among Pakistani political theorists since before independence has centered on what the content of a new *ijtihad* would be. (Rosenthal 1965, 236–43). It has been observed that in developing the Islamic law relating to personnel matters the Pakistani court system practices *ijtihad* (Liebesny 1975, 125), as does the legislature (Rosenthal 1965, 334).

In Saudi Arabia, the government has maintained the vigor of the Shari'a, supplemented with needed modifications. Yet is was King Fahd, it will be recalled, who said that *ijtihad* was "imperative" for the entire Islamic world (Facts on File 1983, 489–490). The gate to *ijtihad* has in fact been open to the Saudi legal scholars for many decades (Ali 1979, 2). The Hanbali school itself, which is the official legal school of Saudi Arabia, has always had relatively more room for *ijtihad* even after *taqlid* had become the accepted doctrine (Piscatori 1983, 56, 62). Since most contemporary Islamic states have adopted comprehensive legal codes from the West, they have, for the most part, left the principles of the Shari'a applicable only to personal status matters. It is here where the practice of a new *ijtihad* has had a practical effect. Particularly in regard to polygamy and a woman's ability to sue for divorce, family law in Egypt, Syria, and Tunisia has been reformed as an exercise of *ijtihad* (Coulson 1964, 206–211).

In every Islamic state, there are groups who champion one or another of the political alternatives we have discussed. Today's political controversies are something Islam has always known in one form or another. Fundamentalists and secularists vie with one another and with those who advocate a modification of the Shari'a, or a melding of it with other legal systems, or a reworking of it through *ijtihad*. The secularists dominate in Turkey, the fundamentalists in Iran. The modification option is prevalent in Saudi Arabia, whereas the practice of *ijtihad* occurs in turbulent Pakistan and to a lesser extent elsewhere.

For most of the Islamic world, a melding of legal systems is the chosen way. It is an alternative that has strong precedent in Islamic imperial history. Though the Shari'a does not recognize the independent law making power of the state, in fact the temporal rulers of Islam have exercised great independence. They have all along borrowed foreign laws and institutions to serve their needs, and they have not hesitated to use their jurisdictional powers and their right of "administrative regulation" to confine the purview of the Shari'a when it was thought necessary.

We can thus see that Islamic tradition has recognized the venerability of the Shari'a but that the same tradition has historically given the state the means to work around the limits of the Shari'a. How far it should go has always been debated in Islam. The debate and the alternative theories all stem from the fact that the Shari'a never developed a constitutional basis for itself due to its history and the notion of law as simply the refinement of divine command. The competing views of the Shari'a's proper place have jousted with one another for a thousand years. They will continue to do so.

NOTES

1. For an analysis of when the "hidden" ecclesiastical structure does surface see Jansen 1979.
2. This is the rule in the Maliki school of law.
3. This is the Shafi'i rule.
4. In Hanafi law, the triple *talak* Is Valid Though Sinful, but in *Ithna 'Ashari* law (Shi'ite) such an act is impermisible and hence invalid. See Fyzee 1964.
5. One exception might be the development of Maliki law in the area of North Africa.
6. I have analyzed the debate between Schacht and his critics in may article, Islamic Law: The Impact of Joseph Schacht. See Forte 1975.
7. In some limited cases a plaintiff with one witness could take an oath to supplement his proof. In many civil cases, two women could be substituted for one of the male witnesses.
8. Mohammed died in 632 A.D. The succeeding caliphs were Abu-Bakr (d. 634), Umar (d. 644), and Uthman (d. 656). Throughout Islam, the terms "caliph" and "imam" are generally interchangeable, the former denoting "successor" and the latter "religious leader." Since the caliphs were regarded as successors of Mohammed and as leaders of the community of be-

lievers, both terms are appropriate. Of course, there are other imams or religious leaders throughout the Islamic world who fulfill ordinary or exalted religious functions as the case may be.

9. Classical Sunni belief also holds that the caliphate was a vice-regency but of the Prophet, not of the hidden Imam.

10. Professor Farhat Ziadeh suggests that the acceptance of the divine guidance over history led to "an expanded understanding *taqlid*," rather than to the continuing practice of *ijtihad*. Letter to author 17 February 1984.

11. Even after election, there was to be a separate contractual act of acceptance of rule by the caliph and an obligation to obedience by the faithful.

12. In acknowledging the actual and legitimate temporal political power of the princes, al-Ghazzali wrote, "These concessions which we make are involuntary, but necessities make allowable even what is prohibited." See Schacht 1955. In Islamic law, duress may in many circumstances move an action from the ethically prohibited category to the permissible category.

It is interesting to note that by retaining the nominal supremacy of the caliph along with his religious leadership, al-Ghazzali was able to keep the legal fiction that the Shari'a was still supreme even though it was not effectuated by the real holders of power. See Schacht 1955.

13. The jurist-philosopher Fakhr al-Din Razi (d. 1209) championed that point of view. See Lambton 1981.

14. The jurist Ibn Jama'a (1241–1333) had already asserted that succession by force was legitimate. See Rosenthal 1962.

15. See the important critical essay on the 1973 Constitution by Fazlur Rahman 1974.

16. The amendments were part of President Zia'a Islamicization program begun in 1978.

17. An appeal structure was not known in classical Islam, but is used by modern regimes to centralize power. See Shapiro 1980.

18. The Board of Grievances, however, has been careful thus far not to usurp the jurisdiction of the Shari'a courts. See Long 1973.

19. I am indebted to A. Fahad, third-year Student at Yale Law School, for this insight.

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