The Death of Islamic Law
Haider Ala Hamoudi

The entire system of government and administration, together with the necessary laws, lies ready for you... [I]f laws are needed, Islam has established them all. There is no need for you, after establishing a government, to sit down and draw up laws, or like rulers who worship foreigners and are infatuated with the West, run after others to borrow their laws. Everything is ready and waiting.

Ayatollah Ruhollah Khomeini

[F]inding out what judges say is but the beginning of your task. You will have to take what they say and compare it to what they do. You will have to see if what they say matches with what they do. You will have to be distrustful of whether they themselves know (any better than other men) the ways of their own doing and of whether they describe it accurately, even if they know it... .

Karl Llewellyn

I. Introduction

Of all the mythologies relating to the Muslim state in our times, none is more persistent than that its legitimacy, and the legitimacy of the law it pronounces, depends on the imprimatur of the shari’a—that vast body of Muslim rules and norms developed from Muslim sacred text. While there is something romantic, and almost touching, in the notion that the Muslim world is somehow different from the rest of the globe in the primacy afforded to the state in the promulgation of law, it has no basis in fact. Rather, precisely the reverse is true—the legitimacy of the shari’a in the modern Muslim state depends on state authority. When such authority is extended, the shari’a may be realized, and when taken away, as it often is, the shari’a more often than not withers and dies. It is therefore Mammon who decides when God’s Law shall be applied, and when it shall be cast aside for a favored alternative.

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3 KARL LLEWELLYN, THE BRAMBLE BUSH 4 (1930)
That lawmaking in the modern nation state is inherently in conflict with the notion of God’s Law reigning supreme is a much discussed dilemma, engaged by such giants in the field as Joseph Schacht, Bernard Weiss, Ann Elizabeth Mayer and Sherman Jackson. That the Islamist (defined for our purposes as a person who seeks a more prominent role for shari’a in the law of the state), who preaches endlessly about the importance of the sovereignty of God over man, is no less eager a participant in this state of affairs than anyone else has been less emphasized. It is nevertheless demonstrated amply by the Islamist obsession with seizing state control and enacting, selectively, shari’a as state law, rather than, as would be more logical and in keeping with the notion that God’s Law takes precedence, merely empowering a judicial class to apply and enforce shari’a in all areas of law. This will not do for the Islamist, for he acknowledges implicitly, through codification, the primacy of the state, and insists that it be the vehicle to bring shari’a. The Islamist is therefore as much a state centric legal positivist as nearly all of us in these times, and at the heart of Islamist legal thinking is a corresponding central incoherence, for these theories of law and the state sit

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4 JOSEPH SCHACHT, INTRODUCTION TO ISLAMIC LAW 101 (1966)
8 Included within this non-Islamist category, therefore, would be anyone who held to the notion that law could and should be determined on bases independent of the shari’a. It is therefore extremely important to distinguish between the Muslim, an adherent of the religion of Islam, however devout, and the Islamist, who seeks to incorporate more shari’a into the state. Thus, for example, the Muslim liberal and avowedly non-Islamist Ali Abd al-Raziq, in his well known work Islam wa usul ul-Hukm, has argued that Islam is a religion and not a state, that the Prophet was never a king or a founder of a political state, and that the Message of the Qur’an was a religious Call divorced from politics. See, e.g., CHARLES KURTZMANN, LIBERAL ISLAM 29-36 (1998) (translating portions of Abd al-Raziq’s work). More recently, Abdullahi An Naim has produced an admirable and bracing work endorsing the notion of secularism using Islamic arguments, among which are that the God’s Will is fundamentally unknowable and therefore cannot sensibly be coerced as a matter of law given the highly political manner in which law is produced. ABDULLAHI AHMED AN NAIM, ISLAM AND THE SECULAR STATE: NEGOTIATING THE FUTURE OF SHARI’A (2008). It is dangerous, and inaccurate, to dismiss such secularist ideas as being marginal among believing Muslims. Turkey’s ruling party, the Justice and Development Party, whose leadership is composed largely of devout Muslims, has proclaimed repeatedly and unambiguously that the shari’a has no role in the affairs of the state, using arguments not dissimilar, if less intellectually rigorous, than those advanced by An Naim. AKP Strives to Shrug off Islamist Image, Turkish Daily News, http://www.turkishdailynews.com.tr/vote2007/article.php?enewsid=7(last visited June 30, 2008); Susanna Dokupil, The Separation of Mosque and State: Islam and Democracy in Modern Turkey, 105 W. VA. L. REV. 53, 127 (Fall 2002); AKP Official Website, supra. (“Our Party refuses to take advantage of sacred religious values and ethnicity and to use them for political purposes.”) The conflation of secular, devout Muslims and Islamists seeking to place shari’a squarely into the affairs of the state is but another manifestation of the scholarly effort to raise the profile of shari’a as supreme Muslim law wherever practicable. See Haider Ala Hamoudi, Book Review: The Fall and Rise of the Islamic State, 2 MID. E. L. & GOV.: AN INTERDISCIPLINARY JOURNAL (forthcoming 2009) (criticizing one such effort).
9 Cf. Mayer, supra note 6 at 182-92.
10 Id. at 182.
uncomfortably with the Islamist notion that it is God and not man who is the ultimate legislator.

The curious penchant for shari’a selectivity on the part of the Islamist, while puzzling to one in search of logic in the law, provides in fact much guidance to the central theme of this article, which is to uncover precisely why the Islamist has chosen this road of incoherence, demanding that the law of man lie subservient to the Will of God on the one hand, and then gleefully adopting a state structure that makes such a notion impossible to achieve on the other. It is not enough to note, as some astute observers have, that seizing state control allows concentration of power that few are willing to relinquish to scholarly authorities.11 This alone cannot provide sufficient explanation, for in Iran, those who seized control of the state were the scholarly authorities, and they still retained codification as the means of lawmaking.12 Rather than searching for reasons relating to power dynamics, an altogether simpler answer proves more satisfactory; namely, that by leaving the state as the repository for legal authority, the Islamist may then be limited in his shari’a aims, for selective application of God’s Law is all he truly seeks.

That is, while the Islamist may say that he wishes God’s Law to be supreme over that of man, there is nothing in his actions to suggest that this rhetoric, however sincerely held, is an accurate reflection of his actual aims. The Islamist does not want God’s Law to reign supreme in areas such as corporate law and the law of business entities, where the economic consequences might be dire.13 He does not want God’s Law to obliterate a general theory of contract.14 He does not want God’s Law to replace transplanted ideas of negligence.15 On the other end lies the law of the family, where God’s Law is deemed a vital necessity, and any development, any evolution, any alteration of the rules established centuries ago when caliphs walked the earth will meet with red-faced Islamist indignation at the suggestion of such outrageous sacrilege.16 Allowing the state to control law serves the Islamist need for careful selectivity perfectly. Once the law is safely in the hands of the state, the Islamist need only bring shari’a where he wishes it (which will depend necessarily on time and place), and leave all other, largely transplanted, law, where it lies, which is to say in as authoritative a position as any shari’a derived enactment by the state.

Of course, this does create a dilemma for our Islamist, for surely he needs some sort of justification (to himself, if nobody else) as to how a state can be Islamic when God’s Will is subject to the idiosyncratic whims of an elected legislature. The recent answer has been the “repugnancy clauses” in various Muslim state constitutions, which prohibit the enactment of laws that are repugnant to the shari’a, or at least its “certain rulings”,17 its “principles”,18 its “provisions”,19 or something broadly equivalent. Under

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11 See, e.g., id. at 182-83; Jackson, supra note 7 at xvii-xviii (1996).
12 See Part III.B infra.
13 See Part III.B.1 infra.
14 Id.
15 See Part III.C.1 infra.
16 See Part III.C.3 infra.
17 IRAQ CONST. Art. 2.
this theory, the task of the judicial branch will be to ensure that all state law is in broad conformity with shari’a, and that God’s Law will thus remain generally supreme over man’s. God’s Law, under such a conception, may then be restored to its proper place in a modern nation state. Certainly our academy has taken this phenomenon of repugnancy quite seriously, devoting a great deal of time and attention to it and describing it with such portentous terms as “the Rise of the Islamic State,”20 “theocratic constitutionalism,”21 and “Islamic constitutionalism.”22

Yet what all of the very interesting scholarship fails to take into account is how fundamentally limited the role of shari’a has become under the repugnancy approach. That is, there is something inherently silly about taking two entirely different sets of laws, derived from entirely different sources and containing entirely different substantive rules, and asking whether or not they conflict. Rather than do this, the state (and not any authority responsible for determining the content of shari’a) has granted legitimacy to all law pursuant to the legislative authority of the state, including transplanted law, so long as it nowhere conflicts with a “certain ruling” or some similar standard invented by the state that has no inherent shari’a meaning.23

Moreover, repugnancy functioning through judicial review does nothing to bring the substantive rules of shari’a back into operation. The Islamist has accepted the lawmaking systems and operations of the nation state; the same constitution that gives to the courts the power to void legislation on the grounds of repugnancy also sets forth a clear separation of powers into the executive, legislative and judicial branches.24 As any schoolchild knows, the judicial power cannot itself create legislation, thereby rendering shari’a irrelevant except to the extent that it either is brought into relevance by enactment of the state, or as a means to void legislation, but only to the extent that there is some deep conflict with a “principle” of shari’a, whatever that is. For any Islamist movement in a society operating under transplanted law, as nearly all Muslim states are,25 to rely on a repugnancy clause to give shari’a its proper place is to demonstrate acquiescence to the notion that the state will select what of God’s Law shall stand, and what shall be tossed into history’s proverbial dustbin.

Some bright and enterprising scholars, challenging the traditional notion that codification of shari’a is problematic, have argued that there is some level of historical legitimacy to the repugnancy approach because law in the Muslim state, properly understood, means not simply the rules derived from sacred text, as I have defined shari’a, but rather, in addition, the rules of the state to the extent that such rules conform

18 EGYPT CONST. Art. 2 (amended 1980).
19 AFGHAN CONST. Ch.1, Art. 3.
22 Intisar Rabb, We the Jurists: Islamic Constitutionalism in Iraq, 10 U. PA. CONST. L. 527, 527-28 (2008)
23 See notes 17-19 and accompanying text.
24 See, e.g., IRAQ CONST. art. 45; AFGHAN. CONST. chs. 3-8.
to the *shari’a* and serve the public interest in various respects.26 A comprehensive and detailed review of classical theory is well beyond the scope of this Article. However, it should be said that the notion that the state can enact legislation that not only supplements, but in fact supplants, the rules derived from sacred text subject to such minimal restrictions, whatever its classical legitimacy, is absolutely not the Islamist position with respect to questions of personal status, where the rules of Revelation are assumed to be the only proper expression of God’s Law.27 More centrally, it would barely affect the thrust of this Article, as it would only signify that not only has *shari’a*, as defined herein, died, but it was never alive to begin with. The rules derived from sacred text in such an approach amount, from a legal perspective, to little more than a fanciful set of academic ideas that a lawmaker could adopt or drop at his whim.

To be clear, *shari’a*-fication in a more coherent manner is possible in a modern state; it is just not possible in a manner appealing to the Islamist. All that it would take would be to repeal all law and empower judges simply to apply *shari’a*. Such systems exist, though for the most part (not exclusively), they tend to be in devastated societies where the catastrophic results of a wholesale application of *shari’a* private law, for example, would hardly be felt given more pressing problems.28 Beyond this, Muslim states, and Islamist movements, are far too invested in their development to call for anything less than a selective application of *shari’a*, with the only real difference between the Islamist, the moderate and the secularist being precisely how much to select. Logic and coherence, in the end, has been forced to give way to the hard realities of our times, which cannot afford to Divinity the primary role in the making of law.

Part II of this Article describes various approaches to making *shari’a* reality in modern nation states, emphasizing the primacy of state processes in giving voice to the *shari’a*. Part III set forth the central reasons that Islamists have chosen to continue this state of affairs, which in large part relate to the fact that they enable Islamists then to retain important parts of the transplanted law, even as they Islamize at least in some limited fashion other areas. Part IV focuses on the repugnancy clauses and shows that, far from demonstrating the primacy of *shari’a* in the development of state law, the repugnancy clauses relegate *shari’a* to a largely inferior role and are therefore evidence of Islamist acceptance of the near global consensus that legal authority lies with the state. Part V concludes with broader implications of these considerations, specifically related to the role that *shari’a* is likely to play in Muslim nation states in the years to come, and the role it should be playing in the legal academy as it considers questions of law in contemporary Muslim states.

I. *Shari’a* and the Muslim Polities

A. On the Nature of the *Shari’a*

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27 See Section III.C.3 *infra*.
28 See Section II.A *infra*. 
Islamist notions concerning the necessity of applying shari’a in the state are summarized succinctly and articulately in the following passage, written by Ruud Peters, surveying debates in the field in the middle of the 1980’s:

Why must shari’a be enforced? . . . Because the supreme sovereignty belongs to God, man must submit to His will. . . . Since the shari’a is of divine origin, it is naturally superior to any human law. The principles of the shari’a are immutable and cannot, for that reason, become tools in the hands of despotic and tyrannical rulers. For they, like all others, have to follow the shari’a and cannot amend it at their pleasure as rulers can where there is only man-made law. . . .

The position requires some elaboration. Certainly, it sounds sensible to insist on the supremacy of God’s Law, as set forth in Muslim sacred text (primarily the Qur’an, the Revealed Book of God to the Prophet Muhammad, and the Sunna, the actions and utterances of the Prophet Muhammad) the question nevertheless remains as to who is responsible for the determination of God’s Law. That is, whose interpretation of this sacred text is deemed to be authoritative and binding?

Had this question been answered in Muslim history with reference to an executive authority such as a Caliph, then certainly the notion of codification would be entirely consistent with adherence to God’s Law. The caliph could then simply enact a code based on his own understanding of God’s Law, and future enactments and re-enactments of codes under the authority of future Caliphs could be, at least in theory, as unproblematic as any authoritative religious institution revisiting portions of its own doctrine. Ann Elizabeth Mayer reports that precisely such a codification was proposed in early Islamic history, and ultimately rejected.

Instead, the shari’a developed into what the renowned Joseph Schacht called a “jurists’ law.” Thus, the basic materials of shari’a in the Sunni tradition are the extensive and oft conflicting rules laid out in the manuals of medieval jurists from four schools of thought, whereas within Shi’ism, the materials are similarly juristic tomes, but prepared by currently living high jurists operating from Najaf in Iraq and Qom in Iran. These rules are not in any individual sense Divine Law, as any jurist is capable of misapprehending or misinterpreting God’s Will, and even a casual look at the tomes reveals deep and significant differences of opinion between the schools on any number of

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29 Rudolph Peters, Divine Law or Man-Made Law? Egypt and the Application of the Shari’a, 3 ARAB L.Q. 231, 244 (1988)
31 Mayer, supra note 10 at 179.
32 Schacht, supra note 4 at 209.
matters.35 Nevertheless, taken as a whole, the compilations of the orthodox schools are understood to be the corpus of the shari’a.36 Importantly, the jurists are not, and never have been, appointed by the state, but rather operate within institutions independent of it, described as “guilds” by the late George Makdisi in the medieval Sunni context.37

B. Organizational Necessities

Given the rather extensive material, the most direct way for any movement to ensure that the law remains true to the body of shari’a in any geographical area would be to create a judicial class and entrust it with the task of applying these volumes of material to all disputes appearing before it. With important qualifications, this was the theoretical basis of the classical system.38 To take the simplest example, in such a system, were a party to seek compensation from another for harm done to her, she would bring her matter to the judge, and the judge would consult the relevant manuals to see if the harm was compensable based on the interpretations of sacred texts undertaken by the learned men who had developed the extensive juristic manuals. Several opinions may be present, in which case the judge may have to apply one, or perhaps the state makes clear which of the schools of thought has primacy, in which case the matter could at least in theory be more easily resolved. If the defendant were to argue that in fact it was not him, but a company in which he owned stock, that caused the damage and that therefore he could not be held personally responsible, then our judge would again consult the manuals, find nothing therein about limited liability or separate corporate personhood,39 and dismiss such a defense as inconsistent with shari’a.

This would not necessarily preclude the state from passing administrative edicts on any number of issues of interest to the executive, from a military draft to taxation to even the criminalization of some activity deleterious to the public interest. It is sensible enough that the executive could supplement the legal order of the state with such rules without offending the central notion that the shari’a, as the body of rules developed from Divine Will, is the bedrock of the legal order. However, it would have to be that the edicts of the administrator are meant to supplement, and not to replace, the ordinary reference to shari’a undertaken by the judicial class. This must remain a core judicial function if God’s Law, as laid out by the jurists, is to retain its centrality to the system. Moreover, the scope of the authority of the caliph to issue such edicts and regulations must necessarily be determined by the jurists themselves. That is, if God’s Law is to

35 Lombardi, supra note 33 at 17.
36 Id. at 16.
37 See Jackson, supra note 7 at 103-04.
38 Weiss, supra note 5 at 187; Mayer, supra note 6 at 185. This broad, traditional notion that the classical system regarded positive legislation by the state as lying in some tension with shari’a as jurists’ law has become under more sustained attack, as Section IV makes clear. In any event, as this Article concerns the relationship of shari’a to state law in the modern nation-state, extensive ruminations on classical theory and classical law lie well beyond its purview. My references to classical thought are therefore necessarily cursory and intended for illustrative purposes only.
reign supreme, then surely God’s Law must determine when man’s law is applicable, and to what extent.

We could also imagine in such a system, indeed we must imagine, that law might evolve through reconsideration of juristic rules of medieval origin, by judges applying such rules in new and creative ways or by modern jurists reevaluating the conclusions of their forebears. This already occurs, even in the current absence of *shari’a* supremacy over law. In the case of Islamic finance, classical juristic manuals are creatively read to develop theories that bear scant resemblance to anything the classical jurists could have possibly imagined.40 In the case of slavery, the overwhelming Muslim consensus, on the basis of sacred text, is that the practice is forbidden, notwithstanding extensive juristic rules clearly permitting it.41

Reinterpretation of sacred text, as opposed to applying juristic rules in a more creative fashion, might be controversial, and in some cases unnecessary, but surely if the jurists are but mortal and fallible, a matter none in the modern world would dispute, then the system may well maintain its coherence and stability through such evolution. Reverting to new and fresh interpretations of sacred text rather than relying solely on classical jurists, often described as the fabled re-opening of the doors of *ijtihad*,42 is therefore entirely consonant with the notion of *shari’a* supremacy. Shi’ism, in fact, is predicated on the principle that sacred text is supposed to be reevaluated by each generation of scholars. That sect requires individual Shi’i to follow exclusively those rules of the single *living* high jurist who that individual Shi’i has determined is the most learned; the opinions of dead men (and they are all men) are of no moment.43

42 The literature on the “closing of the doors of *ijtihad*” is extensive and difficult to summarize. Early Islamic studies scholars including Joseph Schacht and Noel Coulson advanced the notion that around the end of the first millennium C.E., a consensus was established that independent judgment to determine the meaning of sacred text was forbidden and that from that point forward, reliance was to be exclusively upon prior juristic determinations as set forth in the rules of the four Sunni schools. This led to an ossification of Islamic doctrine according to these scholars. Schacht, supra note 4 at 71; NOEL COULSON, A HISTORY OF ISLAMIC LAW 81-82 (1964). This has been challenged by later scholars, most prominently Wael Hallaq, who suggested that jurists continued to draw their own conclusions on the basis of sacred text long after the supposed closing of the doors. Wael Hallaq, *Was the Gate of *Ijihad* Closed?,* 16 INT. J. M.E. STUD. 3 (1984). Others, such as Sherman Jackson, accept the notion that *ijtihad* was far more limited following the first millennium but challenge the Schacht and Coulson position that ossification was a consequence of the closed doors. Instead, creative jurists used an alternative form of authority, medieval rules, in the place of sacred text to move the *shari’a* forward in new and interesting ways. Jackson, supra note 7 at 69-82. Despite the rich contributions of Jackson and Hallaq to the literature, the notion of the closed doors of *ijtihad*, and the supposed ossification resulting therefrom, has been a repeated bane of Muslim reformists, who have insisted on reinterpreting Islamic rules from sacred text rather than using the determinations of earlier jurists. See Lombardi, supra note 33 at 84 (describing the efforts of the Egyptian modernist Rashid Rida). The underlying point, however, is that whether or not the gates to *ijtihad* are open or closed, the same structural issues respecting the role of *shari’a* in the state will persist.
43 Hamoudi, supra note 246 at 267-68
Such a system is not only technically possible, but to some extent exists in the modern world. Saudi Arabia, for example, was formed precisely on such a basis, with administrative authority belonging to the king, and the law of the land being based on the shari’a as interpreted by a puritanical strand of one of the four orthodox Sunni schools known as Wahhabism. While over the years there have been important limitations on the model and a rise in edicts issued by the monarchy, certainly judges generally have the ability to pronounce rulings based on shari’a, and are not generally constrained from doing so on the basis of administrative edict. Hence, for example, a woman may be convicted of witchcraft under the shari’a, on the grounds that witchcraft, at least under the standards of evidence that were available to the court, constitutes a “discretionary crime” without any statutory basis.

More generally, however, models of this sort are prevalent in entirely devastated nations such as present day Somalia or Taliban Afghanistan which have suffered from the absence of civil society for decades. To use the latter example, about which there is considerably more literature, it does seem relatively clear that the Taliban officials responsible for enforcing law did at least conceive of themselves as shari’a authorities (however flawed) and did apply that version of shari’a liberally (and at times summarily) even in the absence of specific legislative code, though the law included administrative edicts from the Taliban central command as well.

Similar substate forms of quasi-law existed in Iraq when Sadrist forces managed to seize control of Basra and areas of Baghdad, and Sunni extremists took control of the Anbar. In areas under Sadrist control, doctors were brought before “judges” who would often issue allegedly shari’a punishments for them, including lashings, ostensibly for such “crimes” as treating Sunni patients in a hospital. In the Anbar, quasi judges used their own forms of shari’a to ban, among other things, the sale of cucumbers and tomatoes together because of their sexual suggestiveness. Edicts were issued requiring the placing of diapers onto goats because of their unusually large genitalia. For obvious reasons, the revert of these regions to Iraqi government control has been broadly welcomed, and the current Prime Minister has sought to take advantage of his success in reasserting control through renaming his own political movement the “Alliance for the Nation of Law.” His party was tremendously successful in the January, 2009 provincial elections running under this banner.

46 Id.
48 Feldman, supra note 20 at 139-40.
49 John Burns, Taliban Taboos: Enforcers of Islamic Social Code Create a Minefield for Afghanistan’s Women, CHICAGO TRIBUNE (NEW YORK TIMES NEWS SERVICE), Sept. 21, 1997.
50 Id.
52 Id.
53 Id.
54 Id. (Jan. 25, 2009).
55 Id. (Feb. 15, 2009).
The point of these examples, to be clear, in no way relates to the substantive applications of \textit{shari'a}, it is perfectly obvious that \textit{shari'a} is capable of far more sophistication than these various absurd applications would ever suggest, and any glance at any juristic manual of any respected jurist, Sunni or Shi'i, will reveal a depth of thought that far outstrips these imaginative idiocies. The point, rather, was that in each system of state or quasi-state organization, inherent to it was the rigorous quasi judicial application of law understood, one must assume sincerely, to be \textit{shari'a} supplemented by administrative or executive edict that could (in the case of the Taliban penal rules, for example)\textsuperscript{56} clarify \textit{shari'a} or that could (as in orders setting terms of regional governors)\textsuperscript{57} be ancillary to it but would not contradict it.

\textbf{C. Origins of Codification in the Muslim World}

The primary means of giving life to \textit{shari'a} in the modern state has been through codification.\textsuperscript{58} Yet, as Schacht realized nearly half a century ago, codification effectively renders incoherent any notion of an Islamic state on the basis of \textit{shari'a} because, if the judges no longer refer to the juristic texts but to legislative enactment, then what the legislature may enact by way of \textit{shari'a}, it may also modify, limited only by whatever political constraints may exist.\textsuperscript{59}

There is a direct connection between this notion, and the process of secularization that took place in the Muslim world in the late nineteenth and early twentieth centuries. Most accounts of the \textit{shari'a} codification phenomenon begin with the description of the \textit{Mecelle}.\textsuperscript{60} At the end of the 19\textsuperscript{th} century, in the late Ottoman period, a law commission headed by Ahmet Cevdet Pasha promulgated what was intended to be a Muslim Civil Code,\textsuperscript{61} covering nearly all areas of private law except family law\textsuperscript{62} and acting as the template for any number of nations following the dissolution of the empire.\textsuperscript{63} The ultimate effect of the enactment of the \textit{Mecelle} in weakening the powers of the juristic class is a matter much reported,\textsuperscript{64} as was its influence in paving the way for a broader codification phenomenon.\textsuperscript{65}

In point of fact, however, the \textit{Mecelle} is not terribly interesting as an exercise in the perils of codification in an Islamic state. Obviously codification can be said to distort the very basis of the \textit{shari'a} as a jurist’s law, regardless of the substance of what is

\begin{itemize}
\item \textsuperscript{56} Burns, \textit{supra} note 49.
\item \textsuperscript{57} AHMED RASHID, \textit{TALIBAN} (2001).
\item \textsuperscript{58} Jackson, \textit{supra} note 7 at xvii
\item \textsuperscript{59} Schacht, \textit{supra} note 4 at 101.
\item \textsuperscript{60} \textit{See}, \textit{e.g.}, Mayer, \textit{supra} note 6 at 182.
\item \textsuperscript{61} Seval Yildrim, \textit{Aftermath of a Revolution: A Case Study of Turkish Family Law}, 17 Pace Int. L. Rev. 347, 353 (2005)
\item \textsuperscript{62} \textit{See generally} \textit{THE MECELLE: A TRANSLATION OF MAJALLAH AL-AHKAM-I-ADLIYA AND A COMPLETE CODE OF ISLAMIC CIVIL LAW} (The Other Press 2001)[hereinafter, \textit{“Mecelle”}].
\item \textsuperscript{63} Naim, \textit{supra} note 8 at 17
\item \textsuperscript{64} \textit{See}, \textit{e.g.}, Feldman, \textit{supra} note 20 at 64.
\item \textsuperscript{65} \textit{See} \textit{e.g.} Naim, \textit{supra} note 8 at 17
\end{itemize}
enacted. However, when the rules that are ultimately enacted are themselves based on juristic thought, at least some justification can be attempted on the theory that the caliph has some discretion to select which of the conflicting rules of juristic opinion shall be followed. It could be argued that the Ottomans have done nothing more than this in their enactment of the *Mecelle*.

More interesting and significant to understanding the consequences of codification to the so-called Islamic state is that the *Mecelle* is the *last* of the Ottoman legal reforms known as the *Tanzimat*, preceded as it was by a penal code, a property code, a commercial code, a commercial procedure code and a maritime code, *all modeled almost entirely on Napoleonic law*. Which is to say, that contemporaneous with codification, and indeed preceding it, was the phenomenon of secularization of the content of the law.

This in fact is inevitable. Codification not only destroys the juristic class, but by leaving the determination of law firmly in the hands of a legislative state power, it effectively renders the Islamic state, at least insofar as it is understood to be based on some form of putative adherence to the substantive rules of the *shari’a*, a virtual impossibility. For how tempting then, once the state and not God may handle the question, when faced with a legal problem that the *shari’a* is not then capable of solving, to simply alter the legislation, to transplant from Europe, to conveniently shunt aside God’s Law. Only politics prevents such a move, and political influences are not always firmly on God’s side.

As a result, divergence from traditional *shari’a* rules more than quickly followed the codification process, it preceded it. Forms of partnership and organization, rules of property and admiralty, and even criminal rules, were introduced without the slightest *shari’a* precedent, transplanted from France (and, in the case of property, Germany) even before the *Mecelle* had been enacted. It is important to note that these transplants were hardly limited or isolated statutes, but rather Continental European Codes, which do not supplement or build upon existing law but rather pre-empt it entirely as to the matters within their scope. That is to say, when a French penal code is adopted in Ottoman Turkey, it does not alter *shari’a*, it obliterates *shari’a*, removing it entirely from judicial consideration, and requiring a judge to seek an answer to any question before her by reference to the Code itself not to previously existing rules.

Unsurprisingly, as the shortcomings of *shari’a* as set forth in the juristic manuals became ever clearer, this process of secular codification only accelerated. The fate of the *Mecelle* is possibly the most interesting example. Though billed as a civil code, the

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66 See Mayer, supra note 6 at 177-78.
67 See Lombardi, supra note 33 at 50-51.
68 See [M.F., unpublished].
69 N.J. COULSON, A HISTORY OF ISLAMIC LAW 151 (1994).
70 Id.
72 See id.
Mecelle is not a Code as any civilian lawyer would understand the term. Most importantly, there is no general theory of obligation. Even a general theory of contract is absent from the Mecelle. The Mecelle instead divides the area of contract into a series of nominate forms, among them sale, hire, partnership and agency, each with its own rules, leaving one to wonder as to whether contracts that do not fall neatly into any given category will be enforceable, and if so, under which set of rules. Tort is likewise divided into categories such as destruction of property and usurpation; a general theory of negligence is absent. This form of atomistic organization effectively obliterated any hope of the Mecelle operating as a code in the manner of a Continental Civil Code, because it neither internally referenced itself, nor were its general provisions applicable in a manner that ensured internal consistency across the entire Code. There are other substantive difficulties with the Mecelle. It lacks any concept of legal personhood. Limited liability companies are not among the forms of business organization that the Mecelle suggests might be formed through contract. The partnerships it does describe dissolve upon the death of any single partner, at least as concerns the share of that partner. It is hard to conceive of any modern society being able to govern itself by such rules, and indeed the Ottomans had already incorporated French law to address some of these shortcomings, including the lack of suitable business organizations to deal in modern commerce.

It is important to note that the drafters of the Mecelle had considerable compass in determining its content from the disparate rules of the medieval jurists. While the “code” purported to draw primarily from one of four Sunni schools of thought, it consciously adopted rules from any one of the three other schools when it found them convenient. At times, when pressed, as in the nearly universal shari’a limitations on varying the nominate forms of contract, it adopted the view of a single jurist of a single school, and even then on a highly contentious reading, to the derogation of all other jurists. Yet despite this considerable latitude, in setting down the disparate rules into a single code, the drafters could seem to do no better than this.

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74 Id.
75 Id. at 439 n. 65.
76 Id.
77 Id.
78 Id.
79 See Mecelle, supra note 62 at 166-210.
80 Id.
81 Id. at 222.
82 Coulson, supra note 69 at 151.
83 Naim, supra note 8 at 17.
84 Hamoudi, supra note 34 at 446-47.
85 There has been much debate among Islamic Studies scholars as to the extent to which the shari’a, as reflected in the juristic manuals, allows for freedom of contract. Schacht and Coulson, for example, have both taken the position that there is not so much a law of contract within Islam as a law of contracts, and that while Islam may well permit freedom within the nominate forms, it cannot be said to permit a freedom to contract beyond this. N. J. COULSON, *COMMERCIAL LAW IN THE GULF STATES: THE ISLAMIC LEGAL TRADITION* 17, 27-31; Schacht, supra note 4 at 144. Other work has pointed out potential limitations on this. Baber Johansen, for example, has shown through careful studies of one school of thought that while commercial exchange was certainly never discussed as a separate book within any juristic manual, certainly
If a judicial class were responsible for the enforcement of uncodified shari’a, then these problems could only be overcome through the process of evolution of thought concerning prohibitions and permissions of the shari’a, either by the judges through clever reinterpretation of what the jurists actually meant, or by a living juristic class extending shari’a in ever more changing directions. This is obviously always a possibility, as Timur Kuran properly notes in his work on the inhibitive role that Islamic doctrine has played at times in Islamic history in developing commercial institutions and vehicles. But given that codifications had become the norm, and the state had become responsible for the creation of law, an easier route was readily available—the code could simply be changed. As a result, the Mecelle was slowly but nearly entirely eclipsed throughout the previous century. In the Arab world, for example, it was largely replaced by a Civil Code drafted by the brilliant and renowned Arab jurist Abdul Razzaq al Sanhuri. While the Islamicity of Sanhuri’s Code is and has been a matter of intense debate far too extensive and nuanced to engage here, it is fair to say that the Code is not, as the Mecelle was, an attempt to set down particular rules of the shari’a on the basis of the derivations of jurists from the four Sunni schools of thought. It was, at most, an exploration of some of the supposed fundamental principles of these medieval Sunni rules, informed heavily by Roman law and Continental European law and containing some provisions in clear derogation of shari’a, at least as understood by modern Muslims. It is moreover a Code in the civilian sense, it is internally consistent, has extensive provisions concerning obligation and contract and preempts the entire area of jurisprudence did distinguish between it and contracts that reflected social arrangements mediated through kinship, such as marriage. B. Johansen, Commercial Exchange and Social Order in Hanafite Law, in LAW IN THE ISLAMIC WORLD: PAST AND PRESENT 81-95 (C. Toll et al. eds 1995). Jeanette Wakin has done excellent work on the means through which jurists negotiated the divide between theory and practice with respect to one particularly troublesome rule within the juristic manuals, the requirement that a contract be oral and the concomitant denial of a writing as having any legal authority of any kind. JEANNETTE WAKIN, THE FUNCTION OF DOCUMENTS IN ISLAMIC LAW 6, 10-11 (1972). See also Hussein Hassan, Contracts in Islamic Law: The Principles of Commutative Justice and Liberality, 13 J. ISL. STUD. 257 (2002) (arguing that the nominate form system was not intended to and did not in fact restrict freedom to contract); PAUL POWERS, INTENT IN ISLAMIC LAW 100 (2006) (“Freedom to contract is generally supported in Islamic law, and the various rules governing contracts and commerce function to provide the parameters of this freedom.”) It is not my intention to enter into a very fascinating debate respecting the function and role of shari’a in regulating commerce in the classical era or whether it provides for or inhibits “freedom of contract” as an abstract matter. As one who approaches these texts first and foremost from the point of view of a contemporary commercial law scholar, instead I raise the rules of the juristic manuals for one purpose; to demonstrate that as written, without a general theory of contract or general rules of contract, and without any allowance for a limited liability joint stock vehicle, they cannot reasonably operate as the basis of any contemporary commercial system. Of this conclusion, I am confident.
private law beyond personal status.\textsuperscript{91} Many of its provisions are virtual translations of European codes.\textsuperscript{92}

There is no doubt that some Islamic concepts remain—the \textit{waqf}, which operates in the Civil Code largely as a land trust, is perhaps the most obvious and extensively discussed signal feature of \textit{shari’a}.\textsuperscript{93} Nevertheless, the Civil Code is a substantial and significant departure from the \textit{Mecelle}, and a turn towards Continental Europe in a manner that renders the \textit{shari’a} in large part less relevant than it had been.\textsuperscript{94}

If this is true with respect to civil codes, it is emphatically more so with respect to company laws throughout the Muslim world, which by and large endorse the notion of joint stock limited liability companies with separate personhood, notwithstanding the fact that the \textit{shari’a} never recognized such a form of commercial organization.\textsuperscript{95} Likewise criminal law, constitutional law, and financial law have all been (largely, with notable exceptions discussed below) transplanted from Western sources in a manner that preempts and obliterates previously existing laws. This can be done either through the enactment of a transplanted, comprehensive and preemptive Code, in the civil law context, or, for nations ultimately adopting common law under English influence, through the enactment of statutes and the gradual use of English common law to decide cases in civil courts.\textsuperscript{96}

Naturally, with codification, other secularization processes—the bureaucratization of state function, the extension of central authority and, most importantly, the professionalization of the judiciary—quickly followed.\textsuperscript{97} Judges as a result in nearly all Muslim states are trained in professional law schools,\textsuperscript{98} and their training is in law, of the civilian or common law variety, as the case may be, and not \textit{shari’a}.\textsuperscript{99} Certainly in my own experience in various parts of the Middle East, from Qatar to Jordan to Iraq, the interest of aspiring scholars in a foreign law degree far exceeds any interest in \textit{shari’a}.

It was therefore only time and distance that made the juristic manuals ever more obsolete, as the Muslim states enacted more and more by way of transplant, and paid less

\begin{itemize}
\item \textsuperscript{91} Hamoudi, supra note 34 at 439.
\item \textsuperscript{92} Id.
\item \textsuperscript{93} See Stigall, supra note 73 at 17-18.
\item \textsuperscript{94} Naim, supra note 8 at 18.
\item \textsuperscript{95} Kuran, supra note 86 at 45.
\item \textsuperscript{97} RUDOLPH PETERS, CRIME AND PUNISHMENT IN ISLAMIC LAW: THEORY AND PRACTICE FROM THE SIXTEENTH TO THE TWENTY FIRST CENTURY 103 (2005).
\item \textsuperscript{99} Id.
\end{itemize}
and less attention to shari’a. Vast areas of private law, for example, from the laws of partnership and agency to the rules of tort, have been so transformed as to render shari’a largely obsolete in them. This is to say nothing of the entire reorganization of criminal law along transplanted lines, with significant exceptions to be discussed below.

In fact, the only area of law in which shari’a remains both broadly and deeply influential, both in rulemaking and application, is that of personal status law, but, it is important to note, within the context of a system that acknowledges that the state as the sole repository of legal authority. That is, if one asks an Iraqi judge, as American legal advisers have in my presence, why he must order a division of property of a deceased in such a manner that a sister receive half the share of her brother, the judge, being professionally trained and operating in the context of a modern nation state where law is determined by the state, will not say “because God wants it that way” and point to a shari’a source. Rather, he will quote directly from the Personal Status Code, for it is the code, and not the shari’a on which it is modeled, that is authoritative.

Importantly, even if family law is on its own changed to be governed by uncodified shari’a (as proposed in Iraq by Shi’i Islamists), given the thoroughness with which the state has assumed control over the lawmaking process, the result will not change. In order for uncodified shari’a to be applied, something in a code (or in the constitution) must grant the judge the necessary authority. In a modern state operating on the basis of legal codes, a judge must apply the code that exists, not whatever he happens to think God’s Law is. He may only apply uncodified shari’a when codified legislation itself entitles him to do it. Were the legislation so authorizing him, as issued by the state, to change, the judge would no longer have the authority to refer to juristic manuals. Were his authority to apply uncodified shari’a extended to criminal matters, then he might well feel comfortable amputating the hand of a thief, but not address private law, unless, again, the state gave him such jurisdiction. The point, ultimately, is that the judge’s ability to apply shari’a, uncodified or codified, in whatever form, in a modern, codified state is necessarily defined and limited entirely on the authority given to him in the law of the state, he has no authority beyond that which is so granted.

This phenomenon is most obvious in the context of criminal law, in those states which purport to apply shari’a to the criminal law. Some of these states, for example Iran, the Sudan, and several Muslim majority provinces in northern Nigeria, explicitly permit judges to make reference to shari’a for any crime not listed within the penal code. In some of those states, judges have taken advantage of the latitude granted to them by the state’s laws to apply penalties as severe as death for particular violations of shari’a. On the other hand, other states applying shari’a, including Libya and

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100 Weiss, supra note 5 at 188.
101 Coulson, supra note 69 at 152.
102 Weiss, supra note 5 at 188.
103 Hamoudi, supra note 246 at 546.
104 Schacht, supra note 4 at 101.
105 Id.
106 Peters, supra note 97 at 176-77.
107 See, e.g., id. at 161 (Iran); 165 (Sudan).
Pakistan, permit no such reference, and judges in these jurisdictions as a result do not, and cannot apply shari’a wherever they see fit, but only where the code permits, despite the fact that in important ways, the codes diverge from the shari’a.\textsuperscript{108}

This more than anything demonstrates the extent to which Muslim states have accepted general, positivist notions of law. It is not shari’a that governs, except when the state permits, meaning that the law is no more nor no less than what the state, and not God, happens to say that it is.

III. Islamist Rule and the Secular Project

A. Islamist Acceptance

One can imagine why secularist elements within Muslim society might very well welcome broad change along such lines. More perplexing, however, is why Islamist movements have come along for this ride. For while it is apparent that Islamists are quite often unhappy with the state of the law as it exists, and seek something that purports to be based more closely on the substantive rules of the shari’a, Islamists do not seek to disturb the central principle that brought about secularization in the first place—the notion that the state, and not God, is responsible for the determination of what is or is not law. The Islamist desire, then, to sharia-fy is to change the state law to bring it closer to shari’a norms. Yet any Islamist with even the slightest degree of sophistication surely can see that what has changed by rule of the state may easily be changed back, based only on political whim of a majority of the legislature. This does not seem to prevent the Islamist, however, from pursuing the codification course even while insisting that shari’a is the only legitimate law because it is God’s, and God’s judgment is superior to humanity’s. This reveals a confounding jumble of rhetoric and reality that at first glance seems difficult to unpack.

To take a simple hypothetical example, if an Islamist Member of Parliament insists in defense of a bill on fornication that the shari’a rules of adultery are not being sufficiently respected at present, then any rhetoric respecting the Will of God is, the Islamist must know, purely political. The MP is urging passage of a state law, in the absence of which she implicitly acknowledges God’s Will is to be ignored by the well trained professional judge. That is, her difficulty is not that the judge has refused to convict anyone of fornication prior to enactment of the necessary laws, because she accepts that the judge has no authority to do any such thing in the absence of state authorization. To the extent that she complains about judicial recalcitrance, it will only be after the law is enacted, at which point quite clearly the sin in her mind is the failure to apply the state law, not shari’a, which did not change with enactment.

Thus, the notion that God’s Law, as derived by from sacred text through Muslim interpretive effort, whether contemporary jurist or medieval, is subject to and limited by the activity of the legislature hardly seems to disturb this Islamist. Yet she will, incoherently, insist in Parliament as part of her political argument that it is not for

\textsuperscript{108} Id. at 176.
humanity to judge the Law of God. Yet if that were true, the more logical course would be to repeal the codes, those vehicles through which humanity’s law is made superior to God’s, and empower judges to apply shari’a as it exists in the juristic manuals, or find some other mechanism to ensure shari’a supremacy.

Modern models do exist for such approaches. Saudi Arabia is perhaps the most notable example of a state granting wide power to a judicial class to apply shari’a. Given that Saudi Arabia has proven remarkably adept at exporting much of its Wahhabist ideology through the liberal use of petrodollars, it might come as some surprise that Islamist movements seem barely interested in replicating it, aside from the devastated society examples of Afghanistan and Somalia.

One explanation could be the relative weakness of the Islamist movements in some cases for any number of reasons. Thus, for example, while Egypt’s Islamist Muslim Brotherhood may well have considerable popular support, the movement itself is technically banned and certainly does not wield power. It could therefore be argued that given this situation, the wholesale reorientation of the state is not an option and therefore the movement is forced to compromise, at least temporarily, on its long term ambitions. The Islamists under this theory field candidates where they can and seek to maximize influence where possible.

Yet even this seems rather inconsistent. If an Islamist movement is suppressed, and has no real hope of being able to advance an Islamic agenda under a theory that shari’a, and not human law, is supreme, seemingly the more logical approach would be to disentangle from the state rather than associate with it. There is precedent for this. In Iraq, Shi’i juristic authorities have sought precisely such disengagement as a historical matter, focusing on guiding the faithful while avoiding, at least in theory, any dealing with the state to the extent possible and merely accepting it as an injustice that must be endured in this world. Shi’i jurists in Iraq have certainly taken a very similar position in the recent past as well, though the current Grand Ayatollah Sistani has a more nuanced position on the role of jurist and state.

In any event, to the extent that the Shi’i example of disaffection is unique to Shi’ism because of its historic minority status, Islamist weakness is not a useful explanation for why Islamism has chosen the path of codification. This is because even when Islamist regimes manage to acquire sole power, as in the case of Sunni Sudan or Shi’i Iran, or

109 See Section II.B supra.
111 See Section II.B supra.
112 See, e.g., Jailing 800 Activists Casts Doubt on Elections, US FEDERAL NEWS (March 30, 2008)
113 See id.
114 A. Amanat, From Ijtihad to Wilayai I Faqih: The Evolution of the Shiite Legal Authority to Political Power in SHARI’A: ISLAMIC LAW IN THE CONTEMPORARY CONTEXT 120-21 (Amanat and Griffel, eds. 2007).
115 Hamoudi, supra note 246 at 538 n. 67
when they have a friend in power, as in the case of Pakistan, the clear trend remains in favor of codification. In fact, aside from the devastated society, neither Islamist nor average Muslim seems rather enthused about the prospect of rule by shari’a. All seem to have adopted well the notion that the state determines the law, even as the Islamist insists, however incoherently, that shari’a cannot be subverted by human will.

Addressing the matter in 1990, well into the period of Islamic resurgence, the renowned Ann Elizabeth Mayer posited an explanation regarding power dynamics; namely, that if an Islamist party were to seize control of a government, that party would then be obviously reluctant to cede considerable levels of the power it had just obtained to a scholarly minded judicial class to which it might not necessarily belong. This continues to be a widely accepted explanation. While I do not dispute that there is some truth to it, the extent to which it can be relied upon to explain the complicity of Islamist movements in the codification phenomenon is fundamentally limited. This is because, as the next section shall show, even when the Islamists taking over the government are themselves the scholarly class, as was the case in Iran, the same trends towards codification are evident.

B. Understanding Selectivity: The Case of Iran

Unlike Sunnism, where the scholarly classes suffered significant reversals at the dawn of the colonial era, the juristic institutions of Shi’ism are alive and thriving. Specifically, and in brief, Shi’i doctrine requires each Shi’i to select among a certain, small group of high jurists that jurist that she considers the most learned, to follow the rules established by that jurist to the exclusion of all others, and to tithe a significant portion of her income to him. Jurists, who operate primarily from two centers, Najaf in Iraq and Qom in Iran, then compete for followers, even as they train the next class of jurists beneath them, who then become high jurists in their own right once they publish a

117 Hamoudi, supra note 8 at 16-17.
118 For specific examples in the area of criminal law, see Peters, supra note 97 at 155-69.
119 Mayer, supra note 6 at 183. Ironically, the premier voices who insist, when addressing matters of contemporary concern, on reminiscing nostalgically upon the disappearance of the scholars and the assumption of the state over all forms of legal authority lie not in Muslim societies, but within our ivory towers. Khaled Abou El Fadl’s criticisms of the colonial era marginalization of the jurists, and the rendering of hallowed seminaries as little more than “tourist attractions”, are caustic. Abou El Fadl, supra note 110 at 35. Noah Feldman associates the decline of the Muslim world to the loss of the ability of the juristic classes to meaningfully constrain the state. Feldman, supra note 20 at 59-102. Sherman Jackson points hopefully to the spread of the ideas of legal pluralism to suggest that perhaps the state does not in fact have the exclusive control over the making and enforcement of law that we think it does. Sherman Jackson, Legal Pluralism Between Islam and the Nation State: Romantic Medievalism or Pragmatic Modernity, 30 FORDHAM INT’L L. J. 158 (2006). While each of these scholars in one way or another accepts that the world has changed forever, still all of this attention being given to systems of law in which nobody seems terribly interested brings to mind that ever dwindling class of bitter and aging Brooklynites who cannot seem to come to terms with the relocation of the Dodgers half a century ago.
120 Id. at 182-83.
121 See, e.g. Jackson, supra note 7 at xvii; Feldman, supra note 20 at 109.
122 Lombardi, supra note 33 at 73.
123 Hamoudi, supra note 34 at 267-68.
124 Id.
multivolume comprehensive work known as the *risala* containing the substantive rules of *shari’a* as derived by them. Generally these compilations cover all areas of private law, from rules of purchase and sale to family law (and are quite extensive on ritual), but do not engage issues of public law. They are meant to guide the believer to live in accordance with God’s Will (which necessarily makes public law considerably less relevant), and until the rise of the Islamist movement, Shi’i elements preferred not so much to confront the state as to ignore it, waiting instead, as per Shi’i eschatological doctrine, for a lineal male descendant of the Prophet, the Mahdi, to reemerge from hiding, where he has been for over a millennium, and institute just rule.

Beginning in the 1960’s, however, two influential clerics, Muhammad Baqir al-Sadr and Ruhollah Khomeini, began to assert that such quietism was unwarranted and that the proper Islamic path was for Muslims to seize control of the state pending the reemergence of the Mahdi. Naturally, as scholars, they argued that the most logical protectors of the *shari’a* once control was seized were the jurists themselves. The idea, as coined by Khomeini in his work on the subject (though it must be said that Sadr was responsible for much of the underlying theory), was known as “Guardianship of the Jurist.” Both Sadr and Khomeini realized that the highly decentralized structure of the seminaries, where each jurist operated independently of the other, required some adjustment, and theorized a central, leading jurist, a Supreme Leader, under whose authority the state would be organized, and other jurists would exist in subsidiary positions, retaining tithing followers and training academies but with less control over law.

This would seem to make the notion of codes largely unnecessary. Perhaps for matters such as rules of traffic, some level of legislation or administrative edict is obviously necessary, as the jurists do not spend very much time in their vast compendia dealing with such matters. However, certainly the compendia had extensive rules of private law, and one would think a Civil Code could therefore be repealed. One could simply refer to the compendium already written by the jurist appointed Supreme Leader to find all necessary rules concerning, for example, contract, tort and permissible business organizations. Khomeini himself suggests as much in one of the best known compilations of his writings and speeches, *Islam and Revolution.* In one notable piece, Khomeini derides the drafters of transplanted law as wasting time and “worshiping foreigners” because *shari’a* already has the necessary answers as to “the entire system of

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125 Id. at 268-69. See also Devin J. Stewart, *The Portrayal of an Academic Rivalry: Najaf and Qum in the Writings and Speeches of Khomeini, 1964-78* in THE MOST LEARNED OF THE SHI’A: THE INSTITUTION OF MARJA’ TAQLID 216 (L. Walbridge, ed. 2001)
127 Amanat, supra note 114 at 122-23.
129 Id.
130 Id. at 59.
131 Id. at 75-76.
132 Hamoudi, supra note 126 at 110-11.
133 Khomeini, supra note 2 at 126-49.
government and administration.” 134 The severe rhetoric should not be gainsaid; Khomeini has liked the enactment of transplants (“worshiping foreigners”) to idolatry, an act described in the Qur’an as one for which no forgiveness is possible. 135

One therefore wonders why, when the 1979 Islamic Revolution took place in Iran, and Khomeini became Supreme Leader, a significant role remained for codification. 136 To be sure, the Constitution adopts a series of institutional controls to ensure that all legislation is carefully vetted by the juristic classes to ensure Islamicity, and the juristic classes as well had supervisory authority over the President, suggesting levels of executive juristic control far greater than any court exercising judicial review. 137 However, this did not prevent the continuation of a Civil Code, for example, in largely the same form it had been before the Revolution. 138 Why didn’t Khomeini simply repeal the Civil Code and ask the judiciary to apply the rules of private law as established in Khomeini’s extensive juristic work (or, for that matter, the work of any living high jurist) on the subject? A Civil Code, even a vetted one, only helps to limit the juristic role. Mayer refers obliquely to the rugged endurance of legal culture and Khomeini’s need to compromise in light of this, but the explanation seems limited and somewhat unsatisfactory in an otherwise very thought provoking article. 139 Of all things to compromise, surely “worshiping foreigners” is hardly the place to begin, if the only objection concerns legal culture. Surely the cataclysmic disruption of the Revolution would have permitted significant steps away from codification. In fact, as the perduring Civil Code shows, no such steps took place.

One need look no further than the juristic rules of any high jurist, from Ali Sistani of Iraq to Ayatollah Khomeini himself, 140 to develop a reasonable explanation for why this is so. Much like the Mecelle, juristic rules are compilation and not Code, a collection of atomistic rules rather than an internally referenced and coherent body of sections that are intended to work together to govern an entire area of law. To take the simplest example, in the compendia, contracts are divided into nominate forms with separate rules governing each. 141 For the same reason that the Mecelle was ultimately discarded, this

134 Id. at 137.
135 Qur’an 4:48 (Chapter of the Women). (“And God shall not forgive the polytheizing of Him, and He forgives all but that to whom He wills, but he who has worshiped others has committed a mighty sin.”) (translation mine).
136 Mayer, supra note 6 at 190-91.
137 Mallat, supra note 128 at 80-81.
139 Mayer, supra note 6 at 190-91.
140 The compendium of Ayatollah Khomeini is available in English translation. AYATOLLAH KHOMEINI, A CLARIFICATION OF QUESTIONS: AN UNABRIDGED TRANSLATION OF THE RISALA TOWZIH AL-MASAEL (J. Borujerdi trans.1984)[hereinafter “Khomeini Risala”]. Grand Ayatollah Sistani’s compendium is widely sold in Arabic in Iraq. ALI SISTANI, MINHAJ AL-SALIHEEN (13th printing 2008)[hereinafter “Sistani Risala”]. While the two are remarkably similar, I make reference to emphasize that the primary shortcomings of the juristic rules do not vary according to the jurist in question.
141 Sistani Risala at vol.2 21-429 (dividing contracts into nominate forms, and analyzing each under separate rules); Khomeini Risala at ¶¶2051-2362.
would be difficult to use in a society with even the slightest level of economic development. If one forms a contract with another party that does not seem to fall within the nominate forms, is it enforced? If so, to what extent? Under what rules? This is unclear, and will remain so absent a general theory of contract.

The Civil Code addresses this problem, because it contains broad and general provisions concerning contract. The relevant section concerning contract validity generally, Article 190, appears to be the same now as it was in 1974, before the Revolution had taken place. It reads as follows:

For the validity of the contract, the following conditions are essential:

1. The intention and mutual consent of both parties to the contract;
2. The competence of both parties;
3. There must be a definite thing which forms the subject matter of the contract.
4. The cause of the transaction must be lawful.\(^{142}\)

This is not a juristic rule; nothing in the juristic rules attempts to address contract validity along such general lines. Instead, this is precisely the civilian standard for validity, a virtual translation of the French Code Civil.\(^{143}\)

The same exercise could well be done as concerns partnerships and corporations, where again the juristic rules do not sanction anything approaching a modern corporation. Instead, they seem to assume partnerships among natural persons that seem fairly limited in scope and duration.\(^{144}\) Yet Iran has a commercial code, enacted after the Revolution, and its first Article specifically authorizes the creation of joint stock limited liability vehicles, another obviously foreign transplant that was not present in the Islamic rules that Khomeini had insisted were entirely comprehensive.\(^{145}\)

\(^{142}\) Pre-Revolution Iran Code, supra note 138 at art. 190. The English translation of the most recent version of the Iranian Civil Code reads similarly:

For the validity of any transactions, the following conditions are essential:

1. Intent and Consent of the Parties
2. Capacity of the Parties
3. A Definite Subject Which is the Object of the Transaction
4. Legitimacy of the Purpose of the Transaction.

Post Revolution Iran Code, supra note 138 at art. 190. The differences appear to be a matter of translation.

\(^{143}\) See C. CIV. §1108:

Four requisites are essential for the validity of an agreement:

- The consent of the party who binds himself;
- His capacity to contract;
- A definite object which forms the subject-matter of the undertaking;
- A lawful cause in the obligation.

\(^{144}\) See, e.g., Sistani Risala at 161-209 (describing various forms of partnership); Khomeini Risala at ¶¶2142-2159, 2228-2250 (same, but in less detail). For a broader treatment of this in the context of Sunni classical rules, see generally Kuran, supra note 86.

Now that the jurists are in control, why has Iran continued to “worship” foreigners through such transplants? At the very least, why haven’t the institutional controls meant to assure juristic rule been deployed to prevent the enactment of such material of obviously Western origin? None of the explanations offered by leading scholars to date seem very helpful. The problems with approaches to date, it seems to me, fail to take account of Llewellyn’s well known adage to the law student to be distrustful of whether decisionmakers in fact know the relationship between what they say and what they do. Rather than simply assume that Islamists want God’s Law to reign supreme because they keep saying it, Iran seems to provide an alternative, more direct explanation, based less on rhetoric and more on substance. Islamists do not want juristic rules to govern in every instance; rather, they want, as much as anyone else, to be selective in determining which rules apply, and a positivist state structure permits them to do just that.

A brief consideration of the options available to harmonize the law of contract with the juristic rules of Shi’ism’s high scholars illustrates well the basis of the Islamist desire for selectivity.

1. The Devastated Society

The easiest way for the Islamist forces in Iran to achieve absolute consistency would be to do away with codes entirely, and thereby obliterate a general theory of contract, a joint stock limited liability commercial vehicle, and anything else that was not reflected in the juristic codes, particularly when it is of foreign origin. Alternatively, the state could simply enact Khomeini’s compendium, at least as it concerns private law, and grant Khomeini, or some class of jurists, the sole ability to change it. In the devastated society model, something along these lines might well be possible. Of all the problems Somalia faces today, the inability of a merchant to enforce a contract in court beyond the nominate forms is comparatively less important. This might help explain why devastated societies have had an easier time of abandoning codes and transplanted concepts altogether, thereby giving primacy to their own highly contested versions of shari’á.

Beyond the devastated society, however, this option hardly seems plausible. It is hard to believe that the Iranian jurists, for example, or at least some of their economic advisers, will not be concerned with the damage done by the repeal of a general theory of contract and its replacement with a rule that every contract take one of several nominate forms. The Civil Code must remain, the Commercial Code must be enacted, and thus this option, conceptually the simplest, is foreclosed.

2. The “Discovery” of Transplanted Concepts

A second option would be for the jurists to “discover”, to their amazement, that in fact sacred text has all along adopted a general theory of contract, and that its elements are, consent, capacity, cause and lawful object. The curious similarity to the civilian standard might well be explained by the allegation that the civilians must have somehow stolen it from earlier Islamic civilizations.

146 Llewellyn, supra note 3 at 4.
While I have phrased this in a manner that makes it sound silly, in fact it is more plausible than my account might well suggest. Sanhuri develops his general theory of obligation, and a general theory of contract, on the basis of a supposed careful reading of the underlying principles of the shari’a, as laid out in the four Sunni schools of thought, and ends up determining that these principles, nowhere actually discussed, are in fact Roman ideas of obligation. In addition, in far less intellectually sophisticated a fashion, books on Islam written for the layperson are replete with allegations that ideas of clearly Western origin, from democratic rule to legality in criminal matters, are in fact originally Islamic. These ideas can gain currency in the Muslim world, and far be it from me to object to such salutary developments for reasons no better than historicity.

Yet surely there are limits to the viability of a practice of this sort. Even if the civilian standard of contract validity were to be developed, would the Ayatollahs then find authority for the joint stock limited liability vehicle? Could a negligence standard be so justified? There will come a point at which the jurist’s ability to credibly adopt transplanted notions and deem them Islamic will come to an end. Indeed, it was the overwhelming influence of transplanted law in Sanhuri’s Civil Code that led to its being dismissed by many Islamists in its time as not being Islamic enough.

3. Parallel Development

A third option would be for jurists to attempt to develop on shari’a bases of a more progressive set of rules concerning not only contract, but commercial concepts generally, that would neither be transplants nor an economic disaster. Rather, they would be well functioning yet different enough to claim Islamicity, rooted as they would be in the Muslim tradition and based on values, such as social justice, with ample reference in Muslim sacred text. It was an aspiration of this sort that led to the rise of the so-called “Islamic economics” movement, led by Sadr among others in the middle of the twentieth century. It clearly sought to liberate Muslim doctrine from its hidebound past, yet locate in it an alternative form of economic and social order that was both Islamic and independent of the West. The title of Sadr’s crowning work on the subject, Our Economics, betrays this fundamental aim, contrasting as it does “Muslim economics” from its capitalist and communist competitors.

The effort never really succeeded, largely because, as Timur Kuran has indicated in any number of absorbing pieces on the subject, it was driven less by a coherent and sensible economic theory and more by the need to establish an independent Muslim

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147 Lombardi, supra note 33 at 92-99.
150 Lombardi, supra note 33 at 99.
151 Hamoudi, supra note 34 at 250-52.
152 Id.
153 Id. at 273.
An independent form of economic organization that may compete with the dominant global paradigm seems altogether even more implausible now, as commercial laws across the globe have become increasingly uniform and less tolerant of deviation.

That said, there are some limited prospects for the success of parallel development. For example, Islamic economics did manage to spawn the practice of Islamic finance, which is far more conservative and therefore compatible with global demands than its revolutionary predecessor. In essence, Islamic finance mostly replicates conventional financing techniques as closely as possible while purporting to avoid prohibitions on money interest and excessive speculation. As a result, the legal changes necessary to implement an Islamic finance system do not require wholesale reorganization of private law or even commercial law. In fact, the practice often relies on the use of New York or English law in order to ensure that agreements made in accordance with its principles are enforceable, suggesting that Islamic finance may expand for years to come without any changes at all in state law.

In this sense, Islamic finance is an interesting practical example of a theory of legal change first raised by Professor Donald Horowitz in the context of the Islamization of Malaysian family law. Horowitz showed how Malaysian courts, following a process of Islamization, not only approached the interpretation of shari’a from distinctly common law biases, but effectively syncretized common law and shari’a in a manner that brought the two legal systems together without necessarily casting doubt on the authenticity of the latter. The syncretization process, whereby the revolutionary ideas of Islamic economics were taken by persons more familiar with conventional economics and developed into an Islamic finance practice more harmonious with global expectations, seems to be at work here as well.

It is possible, indeed likely, that over the span of decades, the same process of legal change might well lead to a collapsing of shari’a notions into conventional ones, so that the shari’a would still apply, but in a manner that did not cast doubt on its authenticity through wholesale transplant. Yet the process would hardly be appealing given the rather severe consequences that would attach to Iran’s economic and commercial interests, at least in the short term. It is one thing to work through interpretations of sacred text concerning polygamy over a period of time in order to develop rules that in fact syncretize common law and shari’a. It is quite another to obliterate a Civil Code and a

155 Hamoudi, supra note 34 at 250.
156 Haider Ala Hamoudi, Muhammad’s Social Justice or Muslim Cant: Langdellianism and the Failures of Islamic Finance, 40 CORNELL INT. L. J. 89, 91 (2007).
157 Umar F. Moghul and Arshad A. Ahmed, Contractual Forms In Islamic Finance Law and Islamic Inv. Co. of the Gulf (Bahamas) Ltd. v. Symphony Gems N.V. & Ors.: A First Impression of Islamic Finance, 27 FORDHAM INTL L J 150, 189-90 (2003) (“Parties to Islamic finance transactions often assert English or New York law as the governing law relying on the probability that the contracts are more likely to be enforced as written.”).
Commercial Code and wait for jurists and judges to develop tools and techniques that will bring ideas like a general theory of contract or a limited liability commercial vehicle back into existence through reapplication of *ijtihad*. The short term consequences of such an approach would be dire, particularly given broad global expectations concerning the substance of commercial law in particular.

C. Selective Codification and its Consequences

All of the above options have been employed in one fashion or another. As we have seen, absolute rejection has been used in the devastated society, the Islamicity of transplants works well with notions like democratic rule, and Islamic finance is a good example of something like parallel development. Each, however is limited in its applicability and feasibility, leaving the Islamist with a single option (or at least a single easy option)—to dispense with trying to faithfully do what he says concerning the supremacy of God’s Law and instead simply adopt the transplanted, positivist means of lawmaking in the modern nation state. This then allows the Islamist to codify the law using some mixture of transplanted and juristic concepts, and avoid any direct justificatory efforts for the transplant.

Under this approach, the Islamist does not need to actually try to demonstrate where the general theory of contract comes from in any detail, and the difficulties of parallel development or transplant discovery do not present themselves. Instead, the state may operate, rhetorically, as “Islamic” but in fact through the establishment of a separation between the institutions that proclaim the *shari‘a* (the juristic academies, past and present) and those that proclaim the law (the state), the Islamist may select what of God’s Law he happens to like, and codify only that. This section outlines the vast realm within which Islamist selectivity along these lines operates beyond the single question of Iran and the Civil Code.

1. The Obsolence of *Shari‘a* Private Law

In the area of private law (other than personal status), *shari‘a* has become largely obsolete. In the Arab nations, for example, the Sanhuri Civil Code has not only managed to survive several decades, but spread and develop such deep and lasting legitimacy that it is no longer seriously questioned, even by Islamists. While some very small number of provisions might well be subject to attack from time to time (among them, provisions permitting the taking of interest on a loan), the basic elements of the Civil Code, its general theories of obligation, contract and negligence, for example, are not subject to dispute.

Thus, in Iraq, where Islamists have managed to secure a clear majority of voters (even if they are divided among Sunni and Shi’a parties), the notion that the Civil Code needs amendment has yet to be raised in any capacity in which I, as an adviser on Iraqi constitutional and legislative process, am aware. No jurist has been able to explain to my

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159 Peters, supra note 29 at 234-35 (describing objections to interest in Egypt).
160 Id. at 237-38 (noting Islamist proposed adoption of commercial code that is not based on *shari‘a*).
satisfaction how Sanhuri’s Code, in force in Iraq,\textsuperscript{161} can possibly be reconciled with juristic rules, nor have they even attempted to do so. The division between law, as product of the state, and \textit{shari’a}, as product of the jurist, allows them to avoid the question.

Likewise, the Sudan adopted its 1984 Civil Transactions Code a year before its Islamic coup, and yet despite the enactment of other, Islamic laws (to which I shall turn soon) the Code remains in force, largely based on Sanhuri’s Code, complete with recognition of legal personality for companies,\textsuperscript{162} a general theory of contract,\textsuperscript{163} and broad general provisions reminiscent far more of Continental Europe than the \textit{Mecelle}.\textsuperscript{164}

Beyond the Arab world and the influence of Sanhuri, Pakistan was subject to Islamist coup when General Zia ul-Haq assumed power in 1977, killing the democratically elected Zulfiqar Ali Bhutto in the process. Though legislative changes discussed below did take place, Bhutto did not alter private law rules (aside from the law of the family). The Contract Act of 1872 remained, and remains, in full effect, despite its having been enacted when Pakistan was still a British colony.\textsuperscript{165} Any one of my American law students will recognize in it instantly the common law system of contract, with its requirements of offer, acceptance and, most peculiarly to the common law, with no civilian or Islamic counterpart, consideration.\textsuperscript{166}

\textbf{2. The Near Universal Transplantation of Company Law}

If this is the case with private law generally, it is emphatically more so with commercial law. Professor Kuran notes that the idea of a limited liability joint stock vehicle has no antecedents in \textit{shari’a}.\textsuperscript{167} I find this interesting, and even more so, that no Muslim nation and no Islamist movement to my knowledge (again, excluding devastated societies) has sought to alter the transplant. Even in the most thoroughly Islamized nations, the trend is precisely the reverse, against \textit{shari’a} and in favor of transplant.

Iran’s Commercial Code permits the creation of joint stock companies of limited liability,\textsuperscript{168} as does the Sudan.\textsuperscript{169} Even Saudi Arabia, which continues to allow its judges, graduates of \textit{shari’a} seminaries and thoroughly versed in the Wahhabist strain of \textit{shari’a}, to decide matters according to uncodified \textit{shari’a},\textsuperscript{170} has been forced to adjust this traditionalist \textit{shari’a} system, and take a step in favor of the measured incoherence of the

\begin{itemize}
\item \textsuperscript{161} Stigall, supra note 73 at 13.
\item \textsuperscript{163} Id. at art. 33.
\item \textsuperscript{164} Id.
\item \textsuperscript{165} Jared Lee, \textit{Pakistan’s Political Upheaval: The Demise of a Nuclear Democracy}, 17 J. TRANS. L. & POL. 177 (2007) (indicating Pakistan became independent of Great Britain in 1947)
\item \textsuperscript{166} Contract Act of 1872, Ch.2, art. 10.
\item \textsuperscript{167} Kuran, supra note 39.
\item \textsuperscript{168} Iran Commercial Code, supra note 145 at art.1
\item \textsuperscript{169} Qanun Al Sharakat li Sanat 1925 [Company Law of 1925], art. 4 [hereinafter “Sudan Company Law”]
\item \textsuperscript{170} Vogel supra note 45 at xiv
\end{itemize}
broader Islamist movements in the Muslim world to accommodate a transplanted commercial system. The settlement of commercial disputes in the Kingdom are not undertaken by the shari‘a judiciary, but by a professionalized commission acting under the authority of the King, not the clerics, applying largely Royal Regulation in place of shari‘a. The state is thereby seeking to limit the role of shari‘a, avoiding the justificatory exercise of explaining conformity to shari‘a by allowing alternative resolution fora for their determination.

More important than the actual substance of the law, however, is the trend, precisely in the opposite direction of shari‘afication in this area, even when Islamist groups are in charge. To the extent that the Sanhuri Civil Code might contain some shari‘a influence, and to the extent that Saudi Arabia remains largely an isolated, and limited, exception to the broader rule respecting obsolescence of shari‘a in private law, the more important point is that no Islamic movement, including the Sunni Islamists who control the Sudan, the Shi‘i Islamists who control Iran, or the Islamists, Sunni and Shi‘i, who have become leading voices in Iraq following the fall of Saddam Hussein, seek the Islamization of private law and the withdrawal of developments such as the Sanhuri Civil Code. Nothing along these lines has been seriously put forward by influential Islamists in other nations as well, such as Egypt, suggesting that even as interest in Islam has consistently risen across the Muslim world since the 1979 Islamic Revolution in Iran, interest in Muslim private law has waned considerably. It is not on the agenda of the movements, which simply would not be possible had the movements been forced to take seriously their rhetorical claim that the shari‘a must reign supreme in Muslim land.

3. The Obsession of Personal Status

While most of shari‘a private law seems well on its way to obsolescence, such is not the case with personal status law (composed primarily of law of the family and inheritance), where Islamists insist that the rules must be based entirely on shari‘a, with any reform being dismissed as some sort of unacceptable deviation. Any number of examples may be brought, from the storm of protest that followed the relatively modest reforms in Egypt known as Jehan’s Law to the severe objections to the 1974 Marriage Law in largely secular Indonesia.

To offer a stark, recent example from Iraq, Shi‘i Islamists sought to repeal almost immediately after the removal of Saddam from power the Personal Status Code and

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171 Id. at 304.
172 Sudan Company Law, supra note 169 at art. 4.
173 Iran Commercial Code, supra 145 at art.1
174 Peters, supra note 29 at 237-38.
175 Lombardi, supra note 33 at 169. Among other things, Jihan’s Law entitled a woman to a divorce if her husband took a second wife, granted a woman a right to two years’ alimony beyond the three months required by shari‘a, and increased rights of custody for women. See generally Dawoud S. Al-Elami, Law No. 100 of 1985: Amending Certain Provisions of Egypt’s Personal Status Laws, 1 ISL. L. & SOC. 116 (1994).
replace it with uncodified *shari’a*. Though widely publicized as returning women to second class status while they had enjoyed near equality under Saddam’s Code, in fact the Personal Status Code was already based largely on *shari’a*. Nevertheless, for reasons probably relating to a juristic assertion of power, Iraq’s Islamists immediately sought to bring law into conformity with *shari’a* through code repeal, and then specific statutory authorization to permit judges to apply *shari’a* alone. As Iraq was not even sovereign at the time but rather under U.S. control, the effort quickly fizzled. However, nerves were frayed to the point where one prominent Shi’i Islamist led a Shi’i walkout of a meeting of the body of Iraqis advising the U.S., known as the Governing Council, in protest of a planned attempt to overrule a former recommendation of repeal. The attempt to repeal the Personal Status Code, at least for those who wish to be governed by *shari’a*, remains a top legislative priority for the Islamists with whom I speak regularly, as well as the jurists in Najaf.

By contrast, the notion of repealing Sanhuri’s Civil Code has not been mentioned once, even though its changes from *shari’a* are far more significant. Moreover, the fact that the Iranian Civil Code has remained largely intact even following the Revolution suggests that the Shi’a Islamists are hardly interested in such a move. Even measures that are far more controversial among Islamists elsewhere, such as the paying of interest on a loan, hardly seem to garner Islamist attention. The same Islamist who led the walkout in protest of the personal status issue, Adel Abdul Mahdi, successfully negotiated a considerable reduction of Iraq’s debt with the Paris Club, which led to an agreement by Iraq to obligate itself to a diminished, but very real, continued payment of interest.

4. Islamic Criminal Law

The Islamist agenda in criminal law lies somewhere between the near entire neglect of commercial law and the obsessions of personal status. Libya, Pakistan, the Sudan, Iran and some Muslim dominated regions of northern Nigeria, among others, give some role to *shari’a* in their criminal law. Nearly all of these codes address the issue of fornication, and it is of little surprise that religious conservatives in the Muslim world are as curiously fixated on illicit sex as their counterparts nearly everywhere. Beyond this, however, there is considerable variation, both in scope of application and emphasis. In a nation such as Libya, where a professional judiciary schooled in transplanted law has been left to apply those Islamic crimes that have been codified, there has been little if any actual enforcement of the criminal codes respecting *shari’a*. In Pakistan, much the same is true except for enforcement of blasphemy laws that are designed to target a

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177 Hamoudi, supra note 246 at 544.
178 Id. at 545.
179 Id. at 546.
182 Hamoudi, supra note 246 at 535 n.56.
183 See Peters, supra note 97 at 142-85
184 Id. at 150 (Saudi Arabia), 154 (Libya), 156 (Pakistan), 162 (Iran), 166 (Sudan), 171 (Northern Nigeria).
185 Id. at 155.
religious minority that is a particular bane of the Pakistani Islamists—the Ahmadiyya, who claim to be Muslim but also believe that there is an Apostle after Muhammad.\textsuperscript{186} Government corruption seems to have been a higher priority in the Sudan, where \textit{shari’a} rules of theft are extended so far as to encompass acts of embezzlement.\textsuperscript{187} In Iran, the first focus of attention following the Revolution was political crimes, tried under \textit{shari’a}.\textsuperscript{188}

The case of criminal law also demonstrates amply that selectivity of \textit{shari’a}fication by Islamist forces spans not only areas of law, but also geography. The role of \textit{shari’a} in the area of criminal law in fact depends not only on the relative strength of Islamist forces, but also on the relative priorities of their respective selective legislative agendas. The Islamists of Pakistan, Iran and the Sudan have seemed rather aggressive and broad in their approaches, seeking a prominent role for \textit{shari’a} in any number of areas. By comparison, and perhaps on the other extreme, Iraq’s Islamists, dependent as they are on American rule, limited as they must be in their aims given their own divisions along Sunni-Shi’a lines, to say nothing of the generally secular Kurds, have, it seems relatively clear from my discussions with them, comparatively little on their public legislative agenda in terms of \textit{shari’a} beyond personal status, save, at least for the Shi’a Islamists, ensuring seats on the Federal Supreme Court for the jurists of Najaf.\textsuperscript{189} Certainly criminal law has not been mentioned by them at all in any prominent capacity. Hamas seems likewise relatively unconcerned with a broad legislative agenda as well.\textsuperscript{190} Regional Islamist parties in Indonesia probably lie somewhere between these two poles, more committed to aspects of \textit{shari’a} than Iraq’s Islamists, but also limited in the amount of \textit{shari’a} they wish to, or can, adopt.\textsuperscript{191}

\section*{IV. The Incoherence of Repugnancy}

\subsection*{A. The Theory of Repugnancy}

The wholesale jettisoning of private and company law, however, does require some level of justification, to the Islamist himself as well as the broader public. We cannot fairly assume that the Islamist is consciously dissembling in adopting selectivity, and in any event, even if he were, unlikely as that may seem, still he needs popular support for his Islamization plans, however selective. He cannot very well admit to his adversaries, for example Muslim feminists, that God’s Law must rule as concerns a woman’s obligation to obey her husband by not leaving the home without his permission\textsuperscript{192} but is best ignored as it concerns the requirements for purchase and sale. Surely he needs a theory to explain this beyond ideological preference. Yet how can an

\begin{footnotes}
\item[186] Id. at 158.
\item[187] Id. at 166.
\item[188] Id. at 160-61.
\item[189] Islamic Law in Our Times, \url{http://muslimlawprof.org} (Sept. 29, 2008).
\item[192] See, e.g., Khomeini Risala, supra note 140 at ¶2412.
\end{footnotes}
approach that both declares God’s Law to be supreme and then ignores it where desirable possibly be brought into coherence?

The supposed salvation often comes in the repugnancy clause. This clause, either as enacted or as subsequently interpreted by the judiciary, requires that all law conform to something equivalent to the core tenets of the shari’a. Egypt’s Supreme Constitutional Court has declared that a 1980 Amendment to the Constitution indicating that the principles of the shari’a are the main source of legislation has this effect, and the constitutions of both Afghanistan and Iraq have more explicit provisions requiring conformity. Iraq’s Article 2 prohibits legislation that conflicts with the “certain rulings” of Islam, the rights granted in the Constitution, and the principles of democracy. Afghanistan’s Constitution goes further, voiding legislation that conflicts with the “beliefs and provisions” of Islam.

With this, some form of Islamicity is assumed to return to state structure. Under this approach, the juristic manuals may well reflect shari’a, yet the law is permitted to grow from that, and even adopt transplanted law, so long as it does not create some sort of irreconcilable conflict with shari’a. Certainly scholars in our legal academy seem to think that this trend towards repugnancy clauses portends increased focus on shari’a in the Muslim state. Rabb and Lombardi offer nuanced and careful portrayals of the phenomenon they call, respectively, “Islamic constitutionalism” and “constitutional Islamization” in the specific contexts of Iraq and Egypt, but leave no doubt that these trends signify something important about the increasing role of Islam in the state. Larry Backer has also commented on the rise in “theocratic constitutionalism”, using repugnancy as one example of this broader epiphenomenon.

Moreover, some scholars have begun to challenge the traditional notion that codification is inherently in conflict with shari’a as pronounced by the jurists, arguing that this fact, when combined with repugnancy, might not render the Islamic nation state as incoherent a concept in terms of its lawmaking as I have suggested. One scholar, for example, has pointed to the seeming acceptance by juristic authorities of the enactment of the Mecelle, on the grounds that the caliph may select the applicable law among competing orthodox schools of thought, as evidence that shari’a is not hostile to codification. The same scholar has suggested that wide compass was granted to the caliph under classical constitutional theory to enact legislation so long as it conformed to particular notions of the public interest and did not violate consensus determinations of the jurists. Lombardi has raised similar ideas in his work on the Supreme Constitutional Court in Egypt. Finally, Qureishi suggests in her work an interplay

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193 Lombardi, supra note 33 at 167.
194 IRAQ CONST. art. 2
195 AFGHAN CONST. ch. 1 art. 3
196 Rabb, supra note 22 at 528-29; Lombardi, supra note 33 at 1.
198 [M.F., unpublished]
199 Id.
200 Lombardi, supra note 33 at 50-54.
between caliphal determination and shari’a that expands the possibilities of transplanted legislation considerably, again so long as certain public interest indicia and consistency with broad notions of shari’a are met.\(^{201}\)

Might then the Islamist project be resurrected on the basis of such ideas? Not likely, for the reasons provided below.

**B. The Scope of Repugnancy**

Perhaps the most important point to make about the repugnancy clauses is that the extent to which they can be used to give life to God’s Law in the state depends on the state, not the shari’a. While there is ample classical authority to suggest that a state authority such as a caliph may issue edicts so long as those edicts do not conflict with shari’a, the doctrine so establishing the caliph’s authority is set by the jurists themselves.\(^{202}\) God’s Law, that is, determines when the law of the caliph may apply, and its proper scope. Here, quite clearly, the scope of the judicial ability is set not by the jurists, but by the state through its constitution, often in a manner that clearly derogates from anything any jurist could ever have said. Iraq provides the best example of this. Article 2 reads in relevant part:

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\begin{align*}
&\text{A. No law that contradicts the established rulings of Islam may be enacted.} \\
&\text{B. No law that contradicts the principles of democracy may be enacted.} \\
&\text{C. No law that contradicts the rights and basic freedoms stipulated in this constitution may be enacted.} \quad \text{\(^{203}\)}
\end{align*}
\]

It is hard to see how any theory in which God’s Law is supposed to be supreme could be reconciled with a clause that puts God’s Law, when sufficiently established, on equal status with rights and freedoms established by man’s law, let alone principles of democracy. Obviously this did not come from any shari’a based theory on executive authority to issue edicts developed by Ibn Taymiyya, or any other classical jurist, or, more precisely, to the extent that it did, it was obviously freely amended by the drafters of the Constitution to suit their needs, yet another example of the use of selectivity in determining scope of shari’a.

Other clauses seem to give Islam a more prominent role. In Afghanistan, the repugnancy clause is more robust, forbidding legislation that conflicts with the “beliefs and provisions of the sacred religion of Islam”\(^{204}\) while in Egypt, it arises from a provision making the principles of shari’a “the main source of legislation.”\(^{205}\) But

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\(^{201}\) See Qureishi, supra note 26 at 174.  
\(^{202}\) See Lombardi, supra note 33 at 51-54.  
\(^{203}\) IRAQ CONST. art. 2  
\(^{204}\) AFGHAN. CONST. ch.1 art. 3  
\(^{205}\) EGYPT CONST. art. 2
however the clause is phrased, the ultimate point is that the scope of the judicial authority is being carefully limited by the state itself, through the language in its constitutional grant. In the case of Iraq, God’s Law is equal to the constitutional right to learn Aramaic in public school, which is a separate constitutional right.206 In Egypt, the grant seems somewhat greater, and in Afghanistan, greater still. Yet in all cases there are substantial limitations on when the shari’a shall apply, and the determination of those limits remains firmly in the hands of state actors, not religious authorities purporting to use God’s Law.

This is further reinforced by the fact that none of the key terms used in the constitutional grant of authority—“principles”, “provisions”, “certain rulings”—mean anything in the shari’a itself, seemingly a deliberate choice.207 Thus, the state has forced the Court to engage in an act of statutory interpretation, not interpretation of the shari’a, to even understand the scope of its authority. The state, in other words, is not only deciding how much shari’a belongs in the state; it is also doing so largely without reference to the shari’a at all. God’s Law is, with or without repugnancy, nothing more or less than a creature of the state, relevant only to the extent that the state grants to it a voice.

C. The Limits of Repugnancy

This only makes sense, for otherwise the whole process of determining repugnancy would be difficult to fathom in our times, when virtually no law beyond Personal Status is the enactment of shari’a to begin with. It is hard to imagine a more ridiculous legal exercise than reading through the extensive juristic rules on commerce, with its contracts divided into nominate forms so that whether or not there is even a such thing as a “law of contract” is arguable208 comparing it to a modern Civil Code with a broad and general theory of obligation209 and asking whether they conflict and where. They have very little to do with each other; they conflict in the same way that this Article conflicts with Milton’s poetry. Rather than even attempt such a thing, the state limits the shari’a inquiry through the language of the repugnancy clause; everything in the law is presumptively valid, absent a “clear ruling” or a “provision” that renders it invalid.

As noted above, according to our scholarship, this seems to be a reflection of some classical notion that the state may enact rules so long as they serve broad public interest goals and do not violate clear rulings of shari’a on which there is no dispute. Thus, because Ibn Taymiyya never explicitly prohibited a joint stock limited liability company, or, for a court more willing to look directly to sacred text and ignore medieval jurists, because nothing in the Qur’an or the Sunna suggests that joint stock limited liability companies are prohibited, they are then valid. This is only reinforced by considerations of the public interest, which patently demand such business forms. On the other hand, because the jurists do uniformly prohibit the consumption of wine, or (again for a court less willing to look to jurists and more willing to undertake its own

206 IRAQ CONST. art. 4.
207 Stilt, supra note 180 at 723.
208 For a more extensive discussion on this, see footnote 85 supra.
209 Hamoudi, supra note 126 at 105.
interpretive inquiry), because the Qur’an and the Sunna unambiguously prohibit the consumption of wine, a law permitting alcohol sale would be void. I leave to others the considerations of public interest in favor or against wine drinking, noting only that I hope all would agree it is not as essential to a free and prosperous society as the corporate form.

Two points bear mentioning. First, under this approach, God’s Law has been reduced from the lengthy and extensive rules in virtually all areas of law into a series of prohibitions and grants of permission unrelated to one another that operate against a separate, transplanted legal system in very limited instances. This is, to say the least, a considerable retreat for God’s Law in the modern state. I do not wish to enter the fray and voice any opinion in these few lines on whether the classical system actually countenanced something akin to this—namely, the right of the caliph to obliterate shari’a entirely, preventing resort to it unless expressly permitted by the caliph’s legislation, subject only to some vague notion of public interest as well as absolute prohibitions contained in shari’a, whatever those may be. I will only say that if this is actually a classical theory, then it would perhaps be a mistake to suggest, as I have, that shari’a died as a form of law with the advent of the colonial era. Perhaps more accurate would be to state that the shari’a never lived at all, as its relevance in the actual legal order seems remarkably small.

More importantly, whether or not the state, with transplanted codes and repugnancy as so understood, is consistent with classical norms, it is entirely inconsistent with the demands of Islamists, who demand considerably more shari’a conformity in certain areas. One need look no further than to the vociferous Islamist objection to Jihan’s Law, advocated by Egypt’s former president Sadat as a means to advance women’s rights in Egypt. One of the provisions to which there was so much objection was the obligation of a man to provide alimony for his wife for a period of two years following a divorce. Yet no jurist has suggested that a man cannot support his wife for two years, only that the shari’a obligation terminates after three months. To be sure this law constitutes a wealth transfer from one private party to another beyond that contemplated by the shari’a, but then so is a transplanted law of negligence that imposes upon a party an obligation to pay for a damage that she may well have not been required to pay under shari’a. To the extent that repugnancy is supposed to provide a place for God’s Law, however limited, it is on far too consistent a basis than an Islamist would find acceptable. How could it be concluded that juristic silence on the obligation of a man to pay alimony beyond three months creates an unambiguous requirement on the part of the state to impose nothing further, yet juristic silence on the right of a party to recover for negligent harm is interpreted as an area where the state may do as it pleases? The Islamist, it seems, uses selectivity as much in his understanding of repugnancy as he does anywhere else.

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210 Lombardi, supra note 33 at 169. El Alami, supra note 175 at 119.
211 Id.
212 See JOHN ESPOSITO, WOMEN IN MUSLIM FAMILY LAW 20 (1982)
Once one leaves aside the absolute prohibitions on which I have generally focused and begins to consider issues such as public interest or goals of the Islamic society, the analysis becomes even more inescapably and hopelessly selective. The Supreme Constitutional Court of Egypt, for example, looks for policy goals and underlying purposes to the shari’a in order to undertake its analysis under the repugnancy clause. I offer only one case by way of illustration of the highly selective nature of its methodology, that of Case No. 6, Judicial Year 9, decided on March 18, 1995. In that case, which (unusually) involved repugnancy and was not related to personal status, a landlord challenged a state law that prohibited him from evicting a relative of a tenant who wanted to continue a lease after the tenant left. The Court declared the law to be unconstitutional because it conflicted with verse 57:7 of the Qur’an, which reads as follows:

Believe in Allah and His Messenger, and spend out of what He has made you to be successors of; for those of you who believe and spend shall have a great reward.

Needless to say, other interpretations of this verse are possible that do not suggest that it relates to the right of a landlord to cancel the lease of a squatting tenant. Repugnancy, it seems, has hardly rendered any notion of the state logically coherent. Rather, it has added another voice to the state centered squabble over how much of God’s Law deserves incorporation into the state.

D. The Structure of Repugnancy

It should also be noted that, far from resurrecting any notion of God’s Law as brooding omnipresence to which the judge may refer, the structure of judicial review in the modern state only fortifies the positivist conclusions made above. For while judicial review may be used to void legislation, it hardly seems to be a means through which shari’a may be positively enacted. An excellent example of this limitation lies in the case of the Egyptian professor Nasr Abu Zayd, whom Islamist groups accused of being an apostate for holding some number of unorthodox beliefs. The case, however, was brought in the personal status courts, and not in the criminal courts, the issue being that an apostate may not remain married to a Muslim and therefore the court had to issue an order of divorce, the objections of his wife to any such divorce notwithstanding. Though the Islamists were successful in obtaining a court ordered divorce of a man unrelated to them, thereby forcing him to flee, with his wife, to the Netherlands, no criminal case was or could be brought against him. There is no law punishing apostasy in the Egyptian Penal Code, no authorization granted to judges to apply shari’a in the penal area, and nothing in Article 2 permits courts to enact law, only to void law already

213 I rely herein on the excellent recounting of Professor Lombardi.
214 Lombardi, supra note 33 at 236.
215 Qur’an 57:7 (Shakir trans.).
216 ANN ELIZABETH MAYER, ISLAM AND HUMAN RIGHTS 174 (2007)
217 Id. at 175.
218 Id.
219 Peters, supra note 29 at 141.
enacted. To emphasize the primacy of the state in the delineation of God’s role further, while the Islamists were successful in hounding the hapless professor out of the country, the Islamist ability to wreak havoc in other families was put to an end in 1996, by a law denying standing to members of the public to raise such matters in Personal Status Court.

While it is true that Egypt is less an example of an Islamist legal structure than one that was designed to placate Islamist movements, the underlying point concerning the structural inadequacy of judicial review to achieve conformity to *shari’a* given its limited tools seems inevitable even in a state where Islamists have a much larger voice. Far from ensuring *shari’a* supremacy, instead judges have only been granted the means to use God’s Law, selectively, like the legislature, to advance particular agendas. Selectivity has therefore been enhanced, not restricted.

Of course, it would be possible to design a state wherein the powers of judicial review were considerably broader, and included the right of judges not only to void all law to the extent that it conflicted with *shari’a* as laid out in the juristic manuals or otherwise, but also to apply *shari’a* in its place. Unsurprisingly, however, no repugnancy clause, and no constitution containing such a clause, grants such powers, and it seems unlikely that any will be forthcoming.

V. Law and Experience in the Broader Muslim World

A. The Future of *Shari’a*

That there is an incoherence to the Islamist view of the role of *shari’a* in the state does not preclude considerations of future paths to the *shari’a*. Inconsistency in logic is fundamentally different from idiosyncratic unpredictability, and given the obvious and durable preference for selectivity, one might well be able to make some prognostications for the relationship of *shari’a* to law in the Muslim world in the years to come.

*First,* it seems relatively obvious that the broad divergence in *shari’a* adoption across both subject matter and geographical location in various Muslim states will only increase with time. It is perfectly clear, for example, that even as Iran adopts a post–Revolution Commercial Code that relies heavily on transplanted ideas, and even as Saudi Arabia manages to wrestle commercial disputes out of the hands of religious authorities, the

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220 Interestingly, Peters does point out that some lower Egyptian courts did try to use Article 2 as a basis not only for voiding legislation, but for applying their own *shari’a* alternative. See Peters, supra note 29 at 242-43. Unsurprisingly, as Peters notes, these cases have never been successful on appeal, and seem to reflect more the individual religious zeal of particular judges than anything relating to a rebalancing of the respective roles of God and the state in determining law. Id.

221 Mayer, supra note 221 at 175.

222 Lombardi, supra note 33 at129-30.

223 Iran Commercial Code, supra note 145.

224 Vogel, supra note 45 at 304
trend in personal status in Iraq appears to be in the other direction. Iraq’s Shi’i Islamists continue to agitate for Personal Status Code repeal.225

Likewise, the broad diversity of agendas that selectivity permits Islamist movements to bear will likewise continue, or even increase. When Islamists are able to succeed by coup or revolution, as in the Sudan226 or Iran,227 they have a freer hand in operations and tend to implement considerably more. Yet for every Sudan and Iran, there is a Hamas, popular, violent, inspiring to the Muslim imagination because of its association with resistance to colonialism, of which Zionism is seen in much of the Muslim world as a premier example,228 but severely limited in its legislative agenda given the primacy attached to conflict with Israel, the continuing political and military competition with Mahmoud Abbas and his more secular Fatah movement and a substantial secular (not to mention Christian) population.229 The use of the shari’a as vehicle to resistance against the West and its perceived client Israel serves Hamas well, but a proposal to stone adulterers would not.

Second, the selective adoption of shari’a in a manner that both confronts the West in spectacle while remaining broadly faithful to global expectations respecting commerce in particular is only likely to continue. The trend of resistance to perceived Western imperialism, and the anger induced thereby, extends far beyond the simple question of Israel. The term muqawama, or resistance, has become something of a mantra for various revivalist groups notwithstanding the fact that the term has no Islamic pedigree.230 The notion that the shari’a can provide an independent form of order, thereby enabling Muslims to establish an authentic and legitimate alternative to the hegemonic West runs strong.231 While few movements would in fact cause significant economic damage to themselves by taking such rhetoric seriously, other, largely symbolic acts of resistance are likely to continue. Homosexuality, for example, is likely to remain deeply repressed, as might be anything suggesting of sexual freedom commonly associated with the West, whether that be the veil, interactions between the genders, or coeducation. The stoning of adulterers may be the most dramatic means of expressing an identitarian distinction from the supposed decadent and licentious West, but it is hardly the only one.

Finally, diversity in the manner in which shari’a is applicable extends well beyond what may be enacted as state law. The main role that shari’a plays in the lives of ordinary Muslims is through the extensive rules on ritual and worship, none of which receive very much recognition by way of state law.232 In addition, Islamic finance thrives

226 Hamoudi, supra note 8 at __.
227 See Part III.B supra.
228 Hamoudi, supra note 149 at 464-65.
229 Fisher, supra note 190 at A12.
230 Hamoudi, supra note 149 at 463-64
231 Hamoudi, supra note 34 at 251.
232 For an extensive treatment of such rules in the Shi’i tradition, see generally Sistani Risala, supra note 140 at vol. 1.
most often through the use of legal systems that claim no adherence to the *shari’a* of any kind.\(^{233}\) The practice has continued to expand unabated.\(^{234}\) Aside from Islamic finance, other merchant communities will likely continue to rely on their own informal rules, derived largely from *shari’a*, in regulating their own commercial practices.\(^{235}\) It is one thing to suggest that the wholesale adoption of *shari’a* private and commercial law would be disastrous for a national economy, another to suggest that small, insular merchant communities will not be able to engage in their own self-policing beyond state regulation in a manner that relies more heavily, though not exclusively, on *shari’a*.

It is, in the end, quite difficult to know with any degree of reliability precisely how important *shari’a* will be in the Muslim states in the years to come, but one thing has become absolutely clear. The idea that God must legitimize the state, that the law of the state can only be deemed acceptable if somehow in conformity with God’s Law, as reflected, however imperfectly, in the juristic manuals, is a notion of the past. While *shari’a* continues to play a role in the modern Muslim state, it is but one of many influences, but one of many players in the tumultuous, politicized, state driven process through which law is made. The idea that its role should be anything more prominent than this, that it should, in other words, be the standard by which the state operates, exclusively or even primarily, is, in practice even if not in rhetoric, dead. Some may lament its passing, others may celebrate it, but as scholars, more than anything else, we must recognize it.

**B. Shari’a in Our Scholarship—The Brooding Omnipresence**

The notion here presented, that logic does not give life to the law, and that there is a distinction that can be discerned between the actions of decisionmakers and their words, is of course hardly unique to the Muslim world. In fact, for all the criticisms that might be made of Islamic movements, it is not a failing of Islamists that their legal theory is fundamentally incoherent, as no other choice avails itself. They can neither demand the significant retraction of the state’s transplanted law over *shari’a*, in light of the many areas where the *shari’a* is simply unequipped to deal with current political and economic conditions, nor would they want to support some form of complete separation of *shari’a* from law. The inconsistency, born of hard experience, is fundamentally a necessity. Nevertheless, the search for logic and consistency dies hard, and many scholars resist the broader notion that even Islamists implicitly and willingly accept that the state and not Islam proclaims and enforces all law. Assumptions respecting the ubiquity of *shari’a* appear with some frequency in our scholarship as a result, presumably on the basis of the demonstrably rising interest in Islam throughout the Muslim world over the past several decades.

After all, anyone can see that the number of veils on a street in Cairo or Baghdad is much higher than it was, say, four decades ago, and surely, one might be led to assume, this must mean that *shari’a* is poised to return as the supreme law of the land. Seemingly

\(^{233}\) Moghul and Ahmed, supra note 157 at 189-90.
\(^{234}\) IBRAHIM WARDE, ISLAMIC FINANCE IN THE GLOBAL ECONOMY 1 (2000).
\(^{235}\) See generally Hamoudi, supra note 126 at 116-22.
on the basis of such assumptions, *shari’a*, as an all encompassing, comprehensive legal system, begins to creep into scholarly ruminations of the law, as if once the veil is adopted, then the commitment to Islam, and to *shari’a*, as supreme and sole law is absolute. Religion then begins to take on an outsized role relative to its importance in particular areas of law. The trial of Osama Bin Laden under rules of *shari’a* has been a recurring curiosity of mine, whether raised as a theoretical exercise in an essay in a prestigious law journal\(^{236}\) or as a policy to be considered by the United States at the Annual Meeting of the American Society of Comparative Law,\(^{237}\) at least partially on the assumption, it seems, that such a trial would be viewed as more legitimate to the world’s Muslims. In an area far closer to my area of expertise, suggestions have appeared in scholarship to suggest that Iraq be urged to adopt something akin to Article 9 of our Uniform Commercial Code, concerning the taking of security on a debt, through a justificatory exercise relying on *shari’a*, and Islamic finance in particular.\(^{238}\)

There is something coherent and logical in suggesting that once one accepts part of the *shari’a* as God’s Law, then there is no choice but to accept all of it, in all areas encompassed by it, as absolutely sovereign,. Yet the actualities of law in the Muslim state hardly seem to give credence to the constructed mythology of an exotic *shari’a* acting as invisible puppet master, pulling the requisite strings as law is developed in the state, ensuring broad conformity with the Will of God. The overwhelming majority of Muslim lawyers in the world, of widely varying levels of religiosity, would be as perplexed as any American lawyer in applying Islamic criminal law to a trial of Bin Laden, because they have operated under entirely different, and largely transplanted, legal systems for nearly a century.\(^{239}\) The idea that most of them would not accept a trial of Bin Laden under the same transplanted principles of criminal justice to which they are themselves subject seems difficult to understand or accept. If this was the case, why have not these laws changed?

The popular mantra of more reductive accounts is that this can generally be explained by a lack of democracy; that, in other words, Muslims are overwhelmingly committed to the *shari’a* and view it as the touchstone of all legal legitimacy, but that institutions of power prevent their exercising this preference in a manner that will lead to substantive change.\(^{240}\) This is far too simplistic an explanation, and is in any event generally outdated. Any number of democracies now exist in the Muslim world, including in nations like Indonesia\(^{241}\) and Iraq\(^{242}\) which have endured their share of terrorist violence,\(^{243}\) and yet in these two countries in particular, there are no calls to deal

\(^{239}\) See Abu Odeh, supra note 98 at 791.
\(^{240}\) Feldman, supra note 20 at 144-45.
\(^{241}\) Hamoudi, supra note 8 at ___.
\(^{242}\) I was a witness and indeed a participant in Iraq’s first democratic election, held in January of 2005.
with this violence through the reinstitution of *shari’a* criminal law. In Iraq, Grand Ayatollah Ali Sistani has repeatedly asked the state to ensure the security of the Shi’i Holy Sites, and surely he is aware that they will not be using *shari’a* methods to enforce the criminal laws when they provide this protection. 244 In Indonesia, calls for *shari’a* in the criminal law are generally localized in regions such as Aceh.245

With respect to the question of *shari’a* financing in Iraq, the situation is even starker. Professor Sundahl has provided careful and comprehensive information on the relationship of Islamic finance to questions of obtaining security over a loan, and for this he deserves commendation. It is only when Iraq is included that one is left perplexed. Merchants in Iraq have lived for decades without Islamic finance and even Islamist parties appear relatively unconcerned with the practice.246 In the area of finance, in Iraq, *shari’a* is simply not part of the conversation. What then is the justification for discussing all of this in the context of Iraq? Professor Sundahl provides only one—the enactment of Iraq Constitution, complete with its repugnancy clause.247 Once a nation expresses its commitment to *shari’a*, the logic seems to run, it must be complete and entire.

It is not unusual to hear scholars lament the broad Western hostility to entertain or consider *shari’a* as a potential source of law, whether that be reluctance to engage in *shari’a* financing248 or unwillingness to allow Islamist control of states.249 Certainly it is true that the broad and largely unreflective demonization of *shari’a* is not helpful to understanding the region, but I am concerned about a different phenomenon, one grounded not in American unwillingness to countenance *shari’a*, but rather in what my colleague Lama Abu Odeh refers to as “The Politics of (Mis)recognition”250—the notion that the Muslim world must somehow be understood solely through the lens of *shari’a*, that legitimacy in law cannot be achieved without it. I defer to nobody in my distaste for American efforts to fail to grapple with the realities of *shari’a* in the Muslim state and instead seek to minimize its impact in the hopes that one day it might disappear. Still, there are different manners of hegemony in the world, and they can run in opposing directions. Personally, as one intimately connected to law in one Middle Eastern country, Iraq, I can think of nothing more insulting to the millions of Muslim lawyers, judges and law professors, some secular, some devout, many devoted to the rule of law, than to dismiss the work to which they have dedicated their lives as somehow illegitimate, inauthentic or fantastical in the eyes of their fellow citizens. There is simply no evidence to sustain such a proposition.

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244 Edward Wong and Robert F. Worth, *Shi’ite Fury Explodes in Iraq*, INT. HER. TRIB., Feb. 24, 2006 at 1R.
245 Ichwan, supra note 191 at 211.
246 Hamoudi, supra note 225 at 535 n. 56
247 Sundahl, supra note 238 at 1302-03.
248 Id. at 1306.
249 Feldman, supra note 20 at 145.
250 Abu Odeh, supra note 239.