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Islamic Legal Theory and the Context of Islamist Movements

Cynthia Shawamreh*

Introduction

This article will provide an overview of classical Islamic legal theory and explore the political and economic context of modern Islamist movements in the Middle East. The dramatic transformations to the political, legal, and economic systems of the Middle East in the nineteenth and twentieth century left a legacy of systematic secularization, centralization of authority, and westernization. Modern Islamist political movements raise broad calls for change that currently resonate with large portions of widely discontent Middle Eastern populations. Once in power these diverse movements are faced with political, legal, and economic institutions that are thoroughly entrenched in this legacy. Islamists calling generally for a return to Shari’a must, when governing, resolve a myriad of questions defining how to actually implement Shari’a in the current political and economic context.

Islamic Legal Theory

Islamic legal theory posits that law is divine in nature and in substance, and that there is a “right” answer for every imaginable question that is contained in the Shari’a. The Shari’a, however, as divine law, is transcendent and essentially unknowable. The human effort to determine the content of the Shari’a is known in Islamic legal theory as “fiqh.” Classical Sunni legal theory crystallized around the tenth century CE with the emergence of four distinct

* Cynthia Shawamreh is a Lecturer in Law at The University of Chicago Law School. She is also Senior Counsel at the City of Chicago Department of Law, Finance and Economic Development Division.

1 All references to dates in this article will be according to the Common Era meanings.
schools of orthodox Sunni jurisprudence. These four schools are commonly referred as Hanafi, Maliki, Shafi’i, and Hanbali, after the name of the founding scholar attributed to each. These schools, called “madhhah,” today generally tend to be spread geographically across the Muslim world. Shi’i legal theory developed distinctly from Sunni theory, although it followed generally similar patterns and methodologies. While each school differs from one another in the details of both legal methodology and content, certain broad parameters of thought are held in common. Classical Sunni legal theory is known as “usul-i-fiqh,” translated roughly as the fundamental principles of jurisprudence.

Usul-i-fiqh posits that there are four basic sources of Islamic law. These sources are the Qur’an, Hadith, consensus (ijma), and ‘ijtihad. The text of the Qur’an is the first of these four sources. Qur’anic text, revealed by God to the Prophet Muhammad, contains around 6,200 verses, of which approximately 500 verses include specifically legal content. There is widespread consensus among Muslims about the text of the Qur’an, which was standardized and codified during the reign of the third Sunni Caliph, Uthman (r. 644-656 CE). During the formative period of Islamic history, a distinct class of scholars emerged, who meticulously studied religious text and grappled with its meaning for governing human society. If a legal situation was covered by explicit Qur’anic text, the result was relatively straightforward. However, even in these relatively clear cases, these early scholars wrestled with questions of interpretation. For example, a well-known Qur’anic verse

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4 See Moojan Momen, An Introduction to Shi’i Islam 184–85 (1985). Twelver Shi’ism roughly followed most of the legal and juristic forms of the Sunni model, with a delay of approximately two centuries. The scope and content of the Hadith differs, however, as for Twelver Shi’i the Traditions of the Twelve Imams who succeeded to the authority of the Prophet Muhammad are considered infallible. Discussion of the branches of Shi’ism other than Twelver Shi’ism is beyond the scope of this article.
6 See Wael B. Hallaq, Islamic Legal Theories: An Introduction to Sunni Usul Al-Fiqh I (1997). The second two sources of law, consensus and ‘ijtihad, are derived through the text of the first two sources, Qur’an and Hadith.
7 Id. at 3; see also Vikor, supra note 5 at 33 for an alternative estimate of 350 verses with specifically legal content.
8 See Hugh Kennedy, The Prophet and the Age of the Caliphates: The Islamic Near East from the Sixth to the Eleventh Century 70 (2d ed. 2004); The Cambridge Companion to the Qur’an (Jane Dammen McAuliffe, ed., 2006) (discussing of the compilation of the Uthmanic codex) [hereinafter Cambridge Companion].
9 See Weiss, supra note 5, at 88–112.
commands that the hand of the thief be cut off. The verse reads: “As to the thief, male (al-sariq) or female (al-sariqa), cut off his or her hands.”

Early scholars debated the precise meaning of the word “hand” (yad). Does “yad” refer to the space from the fingertips to the wrist, the fingertips to the elbow, or the fingertips to the shoulder? The gender is clear in this particular verse to include both male and female thieves, but many verses are ambiguous as to gender. The definite article “al” (the) is used before the word “thief,” but does this refer to a particular individual thief? Is the reference to all thieves, or certain particular thieves? If the reference is to thieves generally, does that include all thieves for all time, or only the thieves living at the time of revelation? Is the text referring to both hands or to a single hand? If it means a single hand, is it the right hand or the left hand?

What is the meaning of “iqta’u” (cut off)? Scholars debated if the hand should be severed or instead merely lacerated. The imperative form of the verb “iqta’u” is used. Does this mean God has commanded all Muslims to carry out this command or only the ruler of the Muslims? Does the imperative form grammatically imply that cutting off the hand of the thief is required as a duty, or is it merely an exhortation or an expression of permission? In addition to these complex grammatical questions, this verse cannot be read in isolation. The very next verse reads: “But if the thief repents after his crime, and amends his conduct, Allah turneth to him in forgiveness; for Allah is Oft-Forgiving, Most Merciful.”

In addition to the specific Qur’anic text, scholars had to consider Hadith which clarified that punishment for theft should not be applied in cases where the value of what was stolen was de minimus. Scholars also determined numerous qualifications and rules around application of penalties for theft, including elevated evidentiary standards associated with the “hudud” crimes, of which theft was one. The category of “hudud” crimes is a very limited set of crimes, for which text specifies both the crime and the punishment. The implementation of these particular punishments is subject to very high evidentiary procedural safeguards.

To better analyze text, complex study of the rules of Arabic grammar developed. The choices individual scholars made regarding linguistic analysis were applied consistently to different portions of Qur’anic text, making selection of those choices extremely important. Different scholars came to different conclusions about the meaning of the same text through different

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11 See WEISS, supra note 5, at 101–11.

12 Qur’an 5:39.


14 See generally RUDOLPH PETERS, CRIME AND PUNISHMENT IN ISLAMIC LAW: THEORY AND PRACTICE FROM THE SIXTEENTH TO THE TWENTY-FIRST CENTURY (2005). See also VIKOR, supra note 5, at 282–96. Hudud crimes are generally considered to be 1) theft, 2) banditry (or highway robbery), 3) unlawful sexual intercourse, 4) an unfounded accusation of unlawful sexual intercourse, 5) drinking alcohol, and according to some schools, 6) apostasy.
linguistic assumptions. For example, if a scholar determined that use of the imperative verb form in a text implied a binding command from God rather than an exhortation, that determination would have implications in other textual examples. Grammatical analysis helped in the evaluation of several types of linguistic ambiguity in the text. Certain verses were considered to be “clear” in meaning while others contained meaning that was “hidden.” Some verses were considered to be “general” (“’amm”) while others were considered “specific” (“khass”). Certain Arabic words in Qur’anic text had fallen out of common usage or had multiple possible meanings, like the word “eye” or “bank” in English. The “eye” of a storm obviously has a different meaning than the “eye” on a face. The words “I went to the bank today” would have a completely different meaning when stated by an urban dweller in a monetary economy than if stated by a rural individual residing near the bank of a river.

In addition to the development of grammatical analysis, scholars gathered as much historical material as possible in order to consider the context of the text. Analysis of the specific historical background in which each portion of text was revealed developed into a field known as “asbab al-nazul” (circumstances of the revelation). Historical sources were compiled, checked and cross-checked in order to place the verses in their precise context, shedding light on the nuance and possible meanings of the text. Scholars further developed a theory of “naskh” (abrogation) to reconcile portions of Qur’anic text, which were apparently in conflict with other portions of Qur’anic text. In these cases, one of the texts was determined to have repealed the other. Several factors were considered in determining which text would repeal another, including the chronological sequence of revelation. Scholars debated God’s motives for abrogation, whether Qur’anic text could abrogate Hadith, whether Hadith could abrogate later Hadith, whether Hadith could abrogate Qur’anic text, the necessity of consensus in determining abrogation, and whether only certain epistemological types of text could abrogate other text. Common examples of abrogation include the progressive nature of revelation regarding the prohibition of wine-drinking, and the command to face towards Mecca in prayer, repealing the practice of facing towards Jerusalem.

The second source of Islamic law after the Qur’an is the text of the Hadith. Hadith are the sayings and actions of the Prophet Muhammad reported by his companions. The Hadith were meticulously sorted through and analyzed by scholars in the ninth century, with many thousands of Hadith discarded as unreliable. Hadith are generally presented with two parts. The content of the Hadith (the “matn”) is preceded by a “chain of transmission”

15 See WEISS, supra note 5, at 103–06.
16 See VIKOR, supra note 5, at 34.
17 See WEISS, supra note 5, at 98.
18 See CAMBRIDGE COMPANION, supra note 8, at 184–85; VIKOR, supra note 5, at 47.
19 See CAMBRIDGE COMPANION, supra note 8, at 187. See also HALLAQ, supra note 6, at 68–74 (discussing the nuances of the theory of abrogation).
20 See VIKOR, supra note 5, at 47–52. See also HALLAQ, supra note 5, at 92–98.
known as the “isnad.” These chains of transmission identify which individual heard from which individual and so on back to a companion of the Prophet himself, who states what he or she witnessed first-hand.

Scholars vigorously examined each “isnad” and developed a system of evaluating their trustworthiness. The biographical history of each individual in the chain of transmission was explored in a process known as “′ilm al-rijal.” The individual’s character, reliability, and personal trustworthiness were evaluated. Any gaps in the chain of transmission were identified. Similarly, any spots in the chain that were improbable due to the individuals not living at the same time or in the same place were identified. The number of times the content of a particular Hadith was repeated from different sources, known as “tawatur,” was noted and impacted the weight of a Hadith’s reliability. The Hadith that remained after undergoing this analysis are contained in several well-known collections and are generally considered reliable. The remaining Hadith are divided into categories indicating their strength, as “trustworthy,” “well-known,” “good,” “weak,” and “disliked.” The relative strength or weakness of a Hadith can be taken into account in legal rulings.

The evaluation and content of the Hadith is a significant point of difference between Shi’i and Sunni legal thought. The wife of the Prophet Aisha, for example, is a major source of Hadith transmission for Sunnis. In light of Aisha’s rebellion after the Prophet’s death against the first Shi’i Imam (and fourth Sunni Caliph) ‘Ali ib ‘Abi Talib, however, Shi’i scholars would not consider her trustworthy. Sayings and actions of the twelve Shi’i Imams also have legal import in Twelver Shi’i legal theory which is absent in Sunni theory. In Twelver Shi’i legal theory, each of the twelve Imams is infallible and transmits knowledge of the law with certainty.

The third source of Islamic law is “ijma” (consensus). Early scholars debated the meaning of consensus in the context of determining binding law. Consensus refers to an agreement on the meaning of text contained in the first two sources of law, Qur’anic text and Hadith. The question of whose agreement was necessary for a consensus was critical. Most early scholars felt that it was the agreement of qualified scholars that was necessary, rather than the entire Muslim community. Even accepting the narrower definition,
pressing questions remained unanswered. What level of scholarship was necessary to be counted among the qualified scholars? Was the agreement of local scholars sufficient or did all scholars everywhere have to participate for a binding consensus to be reached? Was lack of objection the same as assent to a legal position, or did an affirmative declaration of agreement have to be obtained? Was it sufficient to consider only living scholars at a given time to declare a consensus, or were earlier scholars to be included? What about scholars not yet alive? With these difficult logical concerns, only a few matters are considered to be contained within this legal category.  

The fourth and final basic source of Islamic law is "‘ijtihad." ‘Ijtihad means to strive, to make an effort in the sense of using one’s utmost rational intellect. ‘Ijtihad developed very early in the formative period of Islamic law. “Qiyas,” or reasoning by analogy, is the most common form of ‘ijtihad in Sunni jurisprudence. The scholar Shafi’i (founder of one of the four Sunni legal schools) articulated this concept in his landmark work al-Risala around 813 CE. To illustrate the concept of ‘ijtihad,” Shafi’i used the example of the Qur’anic injunction for Muslims to pray in the direction of the Ka’ba in Mecca. What is one to do when the Ka’ba is beyond the range of vision? What if one is in a desert far away from Mecca? Shafi’i wrote that God has given humans signs in the natural world such as the stars, the mountains, the rivers, light, and darkness. From these signs, humans can strive to use their rational intellect (‘ijtihad) to determine, according to the best of their ability, the direction of Mecca. Even if one errs in this determination, having striven to the best of one’s ability to deduce the proper direction for prayer is praiseworthy in the sight of God. 

Similar to the signs of the natural world, Shafi’i argued, God has given humanity “signs” in the verses of the Qur’an. The Arabic word for Qur’anic verses, “ayat,” literally means “signs.” We must use these signs to guide us in the determination of legal results through reasoning by analogy when the text is not explicit. Although these legal results can never be absolutely certain, the use of human rational intellect to strive to reach the right result is pleasing to God. 

The historical context of Shafi’i’s work was the struggle between people who advocated using “ra’ay” (opinions) freely for legal decisions, and people who argued for strict use of explicit text. Shafi’i’s theory managed to reconcile these positions, providing legal jurisdiction in a wider context of situations that are not explicitly covered by text without abandoning text.

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30 See Vikor, supra note 5, at 74–86.  
31 See Hallaq, supra note 6, at 21.  
32 See id. at 23.  
33 See id.  
34 See id.  
35 See Hallaq, supra note 2, at 113–21. A full discussion of the political and economic context of the early development of Islamic legal theory, including the impact of the geographical expansion of Islamic civilization, is beyond the scope of this article.
entirely. By tying legal decision-making to narrow and strict analogical reasoning from text, Shafi‘i set the groundwork for the most essential parameter in the development of Sunni legal theory during the following centuries.

Reasoning by analogy is common in some form in most legal systems. In Islamic law “qiyas,” reasoning by analogy, takes several forms. Two simple examples of classical qiyas will illustrate this point. One form of qiyas is the following: Case A is like Case B; Case A results in ruling X, therefore Case B also results in ruling X. As an example, Qur’anic text prohibits the consumption of “khamr,” translated as grape-wine. The question arose in the early period whether date-wine was also prohibited. The Qur’anic text does not explicitly prohibit the consumption of date-wine, so how did scholars determine that it too, was prohibited? Case A (consumption of grape-wine is prohibited) had a ruling with explicit text. Case B (consumption of date-wine) was determined by analogy to be like Case A, and therefore the text-based ruling of Case A was transferred to Case B (drinking date-wine is prohibited because it is like drinking grape-wine).

The most important part of this process is determining the meaning of the word “like” in the above example. How is drinking date-wine “like” drinking grape-wine? Is it because both are liquids? How do we know the textual ruling prohibiting drinking grape-wine is not based on the particular appearance of grape-wine, and is therefore not transferable to date-wine? Scholars determined that the most probable reason for the prohibition of grape-wine was that it is an intoxicant, which diminishes human rationality. Since date-wine is a similar intoxicant, they reasoned by analogy that its consumption would also be forbidden. The critical point is determining the reason for the text-based ruling, known as the “‘illa” (effective cause). Finding the most appropriate probable effective cause is the key to reasoning by analogy in Islamic law. In this example, the effective cause is fairly easily determined to be the property of intoxication, which diminishes human rationality. In countless other examples over the centuries, determining the effective cause of a text-based ruling is not so simple. Scholars were very careful about not generalizing the implications of an effective cause beyond a narrow construction for a particular case.

The second example of how reasoning by analogy might be structured in classical qiyas is as follows: Case A has ruling X; Case B is contained within Case A and therefore also results in ruling X. An illustration of this point is the text-based prohibition on cursing one’s parents. The question then arises: does the prohibition also apply to hitting one’s parents? The Qur’anic text does not explicitly prohibit hitting one’s parents. However, it should be obvious that if an individual cannot curse his or her parents, that individual also cannot hit his or her parents. The logical reasoning here is that hitting

36 See WEISS, supra note 5, at 67.
37 See VIKÖR, supra note 5, at 54–65.
one's parents exceeds the boundaries of the prohibition of cursing one's parents and is therefore contained within it. Once again, this example illustrates an easily determined ruling. However, not all rulings which are arguably “contained within” a text-based ruling are always easily determined and transferred.38

These four sources of Islamic law (Qur'an, Hadith, consensus and 'ijtihad) provide the main outline of classical Sunni jurisprudence. Certain secondary principles are also used when these sources alone are not sufficient. “Darura” (necessity) is sometimes invoked to override a text-based result. The most common example of necessity is the permissibility of eating pork, which is textually forbidden, if one would otherwise starve. Other secondary principles include “maqasid,” looking to the purposes of the law, “istihsan,” juristic preference, and “maslaha,” rulings in the best interests of the community.39 Different schools vary in how much flexibility they permit scholars to use in the application of these secondary principles to go beyond the text.

By the fourteenth century, scholars had developed a theory of maqasid that identified five general purposes or higher objectives in the content of the law. These purposes are the protection of: 1) life, 2) the ability to practice Islam, 3) property, 4) children, and 5) human rationality.40 This theory was used to assist in the determination of the “‘illa” (effective cause) in classical reasoning by analogy. Scholars would analyze the proposed ‘illa to ensure that it promoted one of these general purposes of the law, thereby increasing its credibility as a probable effective cause whose ruling could be transferred.41 Scholars also developed five legal categories into which all human behavior can be divided: 1) prohibited, 2) discouraged, 3) neutral, 4) recommended, or 5) obligatory.42 The classification of an action by placing it within one of these categories has legal import. For example, prayer and fasting are obligatory. Consumption of pork or alcohol is prohibited. Smoking, on the other hand, is discouraged but not specifically prohibited.

Another set of categories developed by scholars to help sort through the complexity of Islamic law is the division of rules into two general categories: 1) “‘ibadat,” and 2) “mu’amalat.” ‘Ibadat concerns the rules which govern the relationship between humans and God. For example, prayer and fasting fall

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38 See WEISS, supra note 5, at 66–87. See also generally HALLAQ, supra note 6 (discussing ‘ijtihad, including examples of these two forms of classical reasoning by analogy).
41 See VIKOR, supra note 5, at 62.
42 See WEISS, supra note 5, at 18–20; VIKOR, supra note 5, at 36–37.
into this category. Mu‘amalat concerns the rules which govern the relationships among and between humans.43

Islamic legal theory over the centuries developed into a complex and sophisticated legal system. Western legal systems are generally considered to be based in common law, where judges decide cases that govern as a body of binding precedent, or codified law, where predetermined statutory legal codes serve as the basis for judicial decisions. Some legal systems, like that of the United States, present a combination of these two approaches. Islamic legal theory offers a third model, which is sometimes called juristic law. In this system, individual judges must determine the right result in each case. While previous decisions in similar cases may be informative, they are not binding, as each capable scholar is expected to engage with the text and perform their own legal analysis through ‘ijtihad.44 This has been described as a microcosmic system.45 The ideal in this system is the determination of the most probably correct result in each individual case through the use of the utmost capacity of human rational intellect. The Shari‘a, or God’s unknowable, divine and transcendent law, contains a just result for every imaginable situation. “Fiqh,” the human effort to determine what that result might be, will only ever be probable at best and can never be known with absolute certainty. This theoretical approach conceptually permits, and even favors, tolerance and pluralism.

The microcosmic system can be juxtaposed to macrocosmic systems, which are rule-based systems such as common law or codified law. In a macrocosmic system, the law is external and the rules are predetermined and broadly applied. However, in actual implementation, this theoretical approach is modified by legal principles such as equity. The limitation of macrocosmic theory is the problem of extenuating circumstances, when application of a predetermined set of rules dictates an obviously unjust result. In such cases, equity is used to modify the unjust result.

Conversely, the limitation of microcosmic theory is the risk of unpredictability associated with not knowing the rules in advance. In actual implementation, Islamic legal systems have modified this risk through the extreme deference scholars give to the work of earlier scholars. In practice, most scholars have usually followed the legal determinations contained within the various schools,46 or at most patched rulings across the schools (a controversial practice known as “talfiq”) when in theory they are charged with

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43 See VIKOR, supra note 5, at 68.
44 See generally, VIKOR, supra note 5; WEISS, supra note 5; HALLAQ, supra note 6.
46 See Wael B. Hallaq, Was the Gate of Ijtihad Closed?, INT’L J. MIDDLE EAST STUDIES, Mar. 1984, at 3–34. This deference led earlier academics to say that the “gates of ‘ijtihad” were closed in the early centuries. Hallaq has conclusively demonstrated that despite these outer forms of deference, ‘ijtihad continued in many forms both directly and indirectly.
the task of individual ‘ijtihad.\textsuperscript{47} This practical modification creates the stability and predictability of a functioning system while still allowing for flexibility, mutual tolerance and the possibility of adaptation over time and location.

**Location of the Law**

In light of the flexible nature of Islamic legal theory, the question of who interprets Islamic law becomes central. Considering the balance of power in the relationship between rulers and scholars in Islamic societies at different times and locations is a useful analytical tool. The emergence of the four Sunni schools of law in the tenth century provided an increasingly stable and predictable system of law by crystallizing the content of the law in practice, while still adapting for local conditions across the Islamic world. This stability and predictability served a useful social function during times of political uncertainty. As rulers vied for power and dynasties replaced one another, the class of scholars who emerged and interpreted the law managed to remain generally distinct from these political shifts.\textsuperscript{48} The rulers who gained power looked to these scholars to lend credibility to their reign, establishing a tenuous balance of power between scholars and rulers. This balance of power varied tremendously over time and place, tilting in favor of one side or the other, and sometimes even collapsing together entirely, as in the Islamic Republic of Iran, where the scholars in theory became the rulers. In some societies where the balance was relatively even, the power struggle between scholars and rulers served as a check and balance that helped curtail excesses in the exercise of authority.\textsuperscript{49}

Classical Islamic legal systems generally included a system of Shari’a courts dominated by scholars known as “qadis” (judges), who were appointed by rulers. In court proceedings, qadis investigate what the facts actually are, apply the law and deliver a verdict, which is then expected to be implemented. At the same time, a theoretically distinct group of scholars\textsuperscript{50} known as “muftis” issued legal opinions known as “fatwas.” Classical fatwas are legal opinions that state the law when a given set of facts are assumed. The role of the mufti, then, is to interpret the meaning of Shari’a. Qadis would routinely consult fatwas issued by muftis in the determination of their verdicts. In the classical period, while qadis were appointed by the Caliph, or ruler, the authority to deliver a fatwa was derived from the intrinsic credibility of the scholar. If people trusted the knowledge and scholarship of a particular individual, that person’s legal opinions would be highly respected and could not be easily dismissed by a ruler. According to Islamic legal theory, the source of law was not the ruler himself, but God. This meant that even the ruler was subject to

\textsuperscript{47} See VIKOR, \textit{supra} note 5, at 232–33.
\textsuperscript{49} See id.
\textsuperscript{50} See generally HALLAQ, \textit{supra} note 3. In practice qadis and muftis were often the same individuals, although the function of each remained theoretically distinct.
the law. As such, the question of who determined the content of the law would be vital.

As the centuries passed, variations on this basic framework for the location of the law emerged. For example, during the Isma’ili Shi’i-ruled Fatimid Dynasty (909-1171 CE), each of the Sunni legal schools in Egypt co-existed in pluralistic mutual tolerance. In a single city, each school had its own chief qadi who adjudicated in accordance with the rules as interpreted by his own school. In addition, a parallel system of justice developed known as “mazalim” or “siyasih” courts, where a citizen could appeal directly to the ruler rather than go through the Shari'a courts. Other government officials such as the “muhtasib” also enforced law in medieval Islamic societies, like a chief of police or guardian of public order who was empowered to implement justice on the spot. The interpretation and implementation of Shari'a, however, remained within the jurisdiction of the muftis and qadis. The power of the Shari'a always transcended the power of the ruler in theory, even when its jurisdiction for enforcement was limited.

By the apex of the Ottoman Empire in the 1500's, the ruler began to increasingly assert direct control over the law, although the Shari'a retained its theoretical place of legal preeminence. Sultan Sulayman (d. 1566 CE), became known as “Qanuni” (lawgiver), and during his reign ruler’s edicts proliferated and were systematized. Sultan Sulayman appointed a prestigious legal scholar, Abu al-Sa’ud, as the Shaykh al-Islam, or Chief Mufti for the Ottoman Empire, an office that he held from 1545-1574 CE. Abu al-Sa’ud managed to reconcile the transcendent nature of Shari'a with the increasing centralization of law through ruler's edicts. This centralization and systemization of law was part of Sultan Sulayman's increasing assertion of his authority throughout the Ottoman Empire. Abu al-Sa’ud's ruler-appointed office of the Chief Mufti became an entrenched part of the Ottoman bureaucracy, and the issuance of fatwas became increasingly routinized. At a certain point, Abu al-Sa’ud is said to have issued 2800 fatwas in a single day. Obviously this reflects a high level of routinization, where an office staff stripped down the questions presented in the fatwas and enabled simple determinations lacking the complex legal analysis previously associated with fatwas. The independence of Shari’a scholars gradually decreased in the Ottoman Empire with the office of the Chief Mufti increasingly integrated into and subordinate to the authority of the ruler.

As the centuries passed, the Ottoman rulers routinely appointed both qadis and muftis, and the “madrassas” (schools) in which these scholars were educated became increasingly compromised. Students advanced to the highest appointments based on their associations with wealthy and influential

51 See generally Feldman, supra note 48.
52 See Vikor, supra note 5, at 198–202.
53 See id. at 195–98.
55 See Vikor, supra note 5, at 214.
personages, rather than on the intrinsic merits of their scholarship. By the beginning of the nineteenth century, the Ottoman bureaucracy included two Chief Qadis (one for Anatolia and one for the European provinces) a Chief Mufti, and an array of lesser religious officials, all in service of the Ottoman state. Higher levels of muftis in this context lost their independence and essentially became State functionaries.

**Nineteenth Century Transformations**

The beginning of the nineteenth century initiated a dramatic period of transformations in the Middle East. The collision of societies in the Middle East with the western powers during this period resulted in a complete remaking of the legal, political, and economic systems in the Middle East. These transformations happened piecemeal through a series of actions and responses that gradually left segments of traditional society disenfranchised while new elites came to prosper. When their army suffered a series of military setbacks in the wake of the Napoleonic invasion of Egypt in 1789 CE, the Ottoman government was deeply shaken. Although the French occupation of Egypt only lasted until 1801 CE, the Ottoman government began a series of reforms intended to strengthen its position, starting with changes to the traditional military system, the Janissaries.

The struggle for power between the palace and the military eventually resolved in favor of the palace, and Sultan Mahmud II crushed the Janissaries in 1826 CE. Sultan Mahmud II paved the way for the period of dramatic reform in the Ottoman Empire commonly referred to as the “Tanzimat” (reordering). After the early reforms of Sultan Mahmud II, the Tanzimat era introduced a broad series of administrative, legal and fiscal reforms that left their legacy in the institutions of the modern Middle East. Under intense European pressure and threat of force, the Ottoman Empire opened up economic trade with Europe that had devastating consequences to the local merchants and craftsmen whose interests had traditionally been protected by the Janissaries. European merchants, fueled by the Industrial Revolution, began dumping cheap products in the Ottoman markets without restriction, causing the dislocation of many traditional craftsmen. Merchants and middlemen who traded with the Europeans were often religious minorities within the Empire. They became newly rich while the power of the old elites diminished. At the same time, the Europeans put intense pressure on the

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56 See id., at 206–17.
57 See HALLAQ, supra note 3, at 83–139.
58 Sultan Selim III’s attempts to reform the Janissaries resulted in his deposition and execution in 1807 CE.
60 See generally THE MODERN MIDDLE EAST (Albert Hourani et al. eds., I.B. Tauris 2d ed. 2009).
Ottoman government to alter the legal system to change the status of these religious minorities, whose interests the Europeans now claimed to protect.  

Two central Sultanic edicts of the Tanzimat, the Hatt-i-Sharif of 1839 CE and the Hatt-i-Humayun of 1856 CE, included provisions declaring the equality of all citizens in the Empire, regardless of religion. These provisions were politically designed to stave off European pressure and address European concerns. However, they ran directly counter to the Muslim scholars’ interpretation of Shari’a provisions, which provided for protection of Christians and Jews, but not for equality with Muslims under the law. These edicts not only diminished the power of the Muslim scholars, but also dismantled the traditional Ottoman system of “millets.” The millet system allowed limited self-rule for Jews, Orthodox and Catholic Christian communities, with certain aspects of tax collection and administration of justice directly in the hands of religious leadership in those communities. Unsurprisingly, these minority community leaders vigorously opposed the new “equality” of the Tanzimat edicts that were promoted by the Europeans because their power, prestige and sources of revenue would be severely curtailed by the edicts’ implication. During the Tanzimat, religious minorities became subject to the draft for military service, causing substantial hardship in those communities. As such, the communities were vocal in their preference for the system that allowed them to pay a head tax in place of military service, according to the provisions of Islamic law.

Economic changes were not limited to industry and craftsmen. Agricultural changes were also significant, favoring cash crops that were sold to Europeans. Many farmers were impoverished and displaced, and flooded to the cities. Famine and illness spread in waves, devastating the population and straining the capacity of city infrastructure. Other infrastructure development, however, was rapid and significant. Roads, steamships, railways and telegraph lines improved communication within the Empire and linked the Empire with Europe as never before. One result of this development was an increased ability of the government in Istanbul to establish tighter controls over the provinces and the countryside. Another result of the growth of infrastructure was the increasing indebtedness of the Ottoman treasury to

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62 The text of the Hatt-i-Humayun of 1856 was drafted by the English ambassador to the Ottoman Empire, Lord Stratford, and issued under diplomatic pressure from Europe as a direct result of the Crimean War. See Roderic H. Davison, Turkish Attitudes Concerning Christian-Muslim Equality in the Nineteenth Century, in The Modern Middle East 61, 66, supra note 60. See also Roderic H. Davison, Reform in the Ottoman Empire 1856–76 (1963).  
63 See Hallaq, supra note 3, at 93–103.  
64 See generally Davison, supra note 62.  
65 See generally The Modern Middle East, supra note 60.  
66 See generally Davison, supra note 62.  
67 See generally The Modern Middle East, supra note 60.
European finance. European bondholders and banks financed the spending on infrastructure and military improvements, beginning a cycle of debt at unfavorable interest rates that eventually resulted in Ottoman bankruptcy in 1875 CE. When the Ottoman central treasury was forced into bankruptcy, European financiers pressured the Ottoman government even harder, and European advisors took control of the sensitive revenue collection and expenditure mechanisms vital to the functioning of any government.

The institutions that constituted Ottoman society also underwent a significant transformation during the Tanzimat. As the central government expanded control, new civil servants were trained and employed. Their educational training first happened in Europe, and then in new secular schools established along European models. A Ministry of Education was established in Istanbul in 1857 CE. This is particularly noteworthy when considering the fact that Shari’a scholars had previously monopolized the education sector. Increasing numbers of “modern” men administered hospitals, schools and government ministries. Land reform was also implemented to the detriment of the scholarly classes. The Ottoman government appropriated all “waqf” holdings, an old established form of land-tenure based on Shari’a, which allowed for inalienable donations of property for charitable purposes. While the government could not expressly overturn waqf in concept, historically Shari’a scholars had managed waqf properties as trustees. By exerting government control over the management of waqf, Shari’a scholars were deprived of a major source of revenue and economic independence. The independence of the scholars gradually eroded as they became subject to government appointment, dismissal, and reporting to a government ministry.

In addition to diminishing the power of the scholars through increasing government control of education and waqf, the legal system was finally brought under the direct control of the government at the expense of the Shari’a scholars. A Ministry of Justice was established, and secular European legal codes were translated and adopted. The jurisdiction of Shari’a courts was severely curtailed by the new system of “nizamiiye” courts established throughout the Empire. Gradually, Shari’a courts were reduced to covering matters of personal status and family law, with all other matters of law referred to the secular courts. A new legal code, the Ottoman “Majalla” was developed between 1870 and 1877 CE, and implemented in both the Shari’a and the nizamiiye courts. The Majalla claimed to codify Islamic law. Codification of the law stripped the scholars of their traditional function as interpreters of

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69 See id.
70 See generally, HALLAQ, supra note 3; VIKOR, supra note 5; ZUBAIDA, supra note 54;
CLEVELAND & BUNTON, supra note 59; and THE MODERN MIDDLE EAST, supra note 60.
71 See generally VIKOR, supra note 5.
72 See HALLAQ, supra note 3, at 101–02.
Shari’a, which held a unique answer for each individual situation.\(^7\) The status and relevance of the scholars were severely diminished with codification of the law, which allowed civil servants to look up what the law stated on any given set of facts. Elite families increasingly sent their sons to newly prestigious secular schools in lieu of being trained as classical scholars.\(^7\)

One of the most important legacies of the Tanzimat period was the increased centralization of government authority. The central government gradually took over most aspects of the state.\(^5\) The Tanzimat reforms in theory promoted democratization and representative forms of government. New legislative assemblies with elected representatives were created in the Empire. The Constitution of 1876, designed by the Ottoman statesmen Midhat Pasha, provided a significant check on the power of the Sultan.\(^6\) However, political turmoil resulted in 1876, the year of three Sultans, ending with the coming to power of Sultan Abdu’l-Hamid II. Midhat Pasha fell out of power and gradually Sultan Abdu’l-Hamid II managed to consolidate an autocratic centralization of power in his own hands.\(^7\) With each of the traditional power centers of merchants, janissaries, provincial notables and scholars devastated by the gradual reforms of the nineteenth century, Sultan Abdu’l-Hamid II emerged as an unchecked ruler.\(^8\) When he eventually fell from power, the mechanics of a centralized government remained in his wake. Ottoman intellectuals argued about the best way to strengthen the Ottoman Empire, with some advocating an Islamist revival and others arguing against it, reasoning that Islam had kept the Ottoman Empire weak and backwards compared to Europe.\(^9\) In the aftermath of World War I, the European powers carved up the Ottoman Empire, and only a small portion remained intact to become the modern nation-state of Turkey.\(^8\)

Egypt also experienced dramatic transformations in the nineteenth century. While it was formally a part of the Ottoman Empire in theory, Egypt broke away in fact under the strong, centralized rule of Muhammad Ali Pasha (d. 1849 CE) after the end of the French occupation in 1802 CE.\(^5\) Muhammad Ali Pasha increased the control of the government over the countryside, dramatically reforming both industry and agriculture.\(^8\) European trade had similar devastating consequences in Egypt, and a similar process of erosion

\(^7\) See ZUBAIDA, supra note 54, at 121–57. See also VIKOR, supra note 5, at 222–53.
\(^8\) See generally THE MODERN MIDDLE EAST, supra note 60.
\(^9\) See id.
\(^7\) See generally ZUBAIDA, supra note 54; CLEVELAND & BUNTON, supra note 59.
\(^8\) See DEVEREUX, supra note 76; DAVISON, supra note 62.
\(^9\) See Serif Mardin, Religion and Secularism in Turkey, in THE MODERN MIDDLE EAST, supra note 60, at 347–74.
\(^7\) See THE MODERN MIDDLE EAST, supra note 60.
\(^8\) See id.
gradually diminished the power of the Shari’a scholars and traditional elites over the course of the century. Production of cotton became a huge export industry to Europe, tying the well-being of Egyptian peasants to external price fluctuations. For example, during the Civil War in the United States, the trade in cotton produced in the South and sold in Europe was interrupted. Therefore, prices for cotton produced in Egypt soared. After the war, cotton trade between the U.S. and Europe resumed, and the price of cotton produced in Egypt dropped, devastating local farmers. Commerce was the driving force behind numerous changes in Egypt. European merchants established prosperous new districts in Egypt in which to live and to conduct their businesses. In 1876 CE, mixed courts were introduced to hear cases between Egyptian nationals and Europeans. These courts were staffed by European judges and were concerned with matters of commerce. Government debt to European bankers and bondholders spiraled out of control, and like the central Ottoman treasury, the government of Egypt went bankrupt. European financial advisors were brought in to take control of revenue and expenditure in 1876 CE. In 1882 CE, the British military invaded and occupied Egypt, taking direct control of the country.

Iran experienced similar, though not identical, transformations in the nineteenth century. The Qajar Dynasty was concerned with fending off the competing European powers and watched the experience of the Ottoman Empire and Egypt carefully. European commerce had a similarly transformative impact on the economy of Iran. Iranian reformers and intellectuals trended toward a more secular, centralized state. Ministries of education and justice likewise eroded the independence of the Shari’a scholars. In 1906 CE, the Constitutional Revolution in Iran challenged the power of the Shah and a power struggle ensued. After World War I, the British helped place Reza Shah Pahlavi on the throne, ending the Qajar Dynasty. Reza Shah implemented a secular, centralized form of government and ensured the flow of oil to western powers.

83 See id.; OWEN, supra note 68.
84 See THE MODERN MIDDLE EAST, supra note 60.
85 See Andre Raymond, Caire, in THE MODERN MIDDLE EAST, supra note 60, at 311–37.
87 See Charles Issawi, Middle East Economic Development, 1815–1914: the General and the Specific, in THE MODERN MIDDLE EAST, supra note 60, at 177–93; See also OWEN, supra note 68, at 122–52.
91 KEDDIE, supra note 88, at 84–88; see also JAMES L. GELVIN, THE MODERN MIDDLE EAST: A HISTORY (3d ed. 2011).
After World War II, when Reza Shah was closer to the Germans than to the Russians and British, who had threatened to carve up Iran into northern and southern zones of influence, he was deposed and his son Muhammad Reza Shah took the throne. Increasingly captive to U.S. interests during his rule, Muhammad Reza Shah continued the policies of a centralized, secular state with a western-oriented economy. When he was deposed in 1979 CE and the Islamic Republic of Iran commenced, the scholars proclaimed that they would be the rulers and that law and government would conform to Shari’a.

The theory of “vilayet-i-faqih” (guardianship of the jurist) articulated by Ayatollah Khomeini was a significant departure from traditional Shi’i legal theory. In Twelver Shi’i theory, the rightful leadership of the Muslim community belongs to the line of Imams descended from the Prophet Muhammad through his daughter Fatimah and her husband ‘Ali ibn Abi Talib (the cousin and son-in-law of the Prophet, first Imam and fourth Caliph). This line of descendants had spiritual as well as temporal authority over the community, but the twelfth Imam, known as the Mahdi, disappeared from the community in the lesser occultation in 874 CE. During the lesser occultation, he continued to guide his community through a series of four individuals called “gates,” who would communicate with the Imam and then tell the community of his guidance. In the year 941 CE, this communication ceased and the community was cut off from the direct guidance of the Imam.

Shi’i theory, however, holds that Imam Mahdi did not die, but remains alive and hidden from the community. In time he will reappear to guide the community and take his rightful place as both the spiritual and temporal leader. Over the centuries, Shi’i theory evolved to accommodate the absence of the hidden Imam’s direct guidance. In the early period after his occultation, Shi’i scholars thought that the functions of the Imam had lapsed in his absence. These functions included judgments on points of law, imposition of legal penalties, collection of religious tax, and leadership in Friday prayers and jihad. This served the Shi’i community well, as the theory facilitated a politically quietist position in the context of the Sunni government’s domination and persecution. For Shi’i, this stance led to a disdain for government which was, in the view of many scholars, an intrinsically corrupt usurpation in the absence of the true ruler, the hidden Imam.

In order to accommodate the practical needs of the community, the scholars’ theoretical position evolved as the centuries passed, allowing them to

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92 KEDDIE, supra note 88, at 103; GELVIN, supra note 91.
93 KEDDIE, supra note 88, at 245; FELDMAN, supra note 48, at 134–36; ZUBAIDA, supra note 54.
94 KEDDIE, supra note 88, at 7–8. See also MOMEN, supra note 4, at 23–75. This is known as the greater occultation.
95 See MOMEN, supra note 4, at 189.
96 Id.
97 See MOMEN, supra note 4, at 191–94.
take on some of the functions of the Imam in his absence.98 They took on these functions gradually, and only as the deputy of the hidden Imam. The scholars progressively asserted a more active social role, giving legal judgments in a gradually increasing jurisdictional scope.99 When Shi’ism was established as the state religion under the Safavid Dynasty in Iran, the scholars were incorporated into the state apparatus much like their Sunni counterparts in the Ottoman Empire.100 In 1722 CE when the Safavid Dynasty collapsed, many Iranian scholars fled the chaos and resettled in the holy shrine cities of Najaf and Karbila in neighboring Iraq, which was in Ottoman territory.101 There, these scholars developed a vibrant intellectual community with a delicate relationship to the Shi’i Qajar Dynasty, which subsequently came to power in Iran. They remained outside the territorial jurisdiction of the Qajar Shahs, who looked to these scholars for credibility. The Shi’i scholars of Iraq had tremendous influence among the people of Iran during the Qajar period, which in turn gave rise to a politically significant role for these scholars.102

A theoretical dispute arose among the Shi’i scholars during the end of the Safavid period with important implications for the development of modern Shi’ism. As the scholars gradually assumed more functions of the hidden Imam, some held to the idea that they could act in this capacity only where explicit textual guidance was directly applicable.103 These scholars were called “Akhbaris.”104 Other scholars, called “Usulis,” were willing to use rational thought, or ‘ijtihad, to reason like their Sunni counterparts, which enabled them to deliver fatwas on a wider range of issues.105 This debate was protracted and bitter, with bloodshed over the rivalry. At the beginning of the nineteenth century the Usulis prevailed, and Shi’i scholars were able to gradually increase their influence and the scope of their legal jurisdiction.106 Outside the political territory of the Qajar rulers and economically independent from the government, the Shi’i scholars developed an increasingly centralized hierarchy with a widening scope of authority.107

In the middle of the nineteenth century, the concept of a sole “marja’ al-taqlid” (source of imitation) developed.108 The marja’ became the sole

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99 MOMEN, supra note 4, at 184–207. Shi’i jurisprudential theory developed to contain four sources of law much like Sunni usul-i-fiqh: Qur’ān, Hadith (akhbar), consensus, and ‘aql (rational intellect).
100 KEDDIE, supra note 88, at 10–11.
101 MOMEN, supra note 4, at 124–30.
102 KEDDIE, supra note 88, at 19.
103 MOMEN, supra note 4, at 222–25.
104 Id. See also HALLAQ, supra note 5, at 116-24. “Akhbar” is the Shi’i term for reports of the sayings or doings of the Prophet or the Imams.
105 MOMEN, supra note 4, at 222–25.
106 HALLAQ, supra note 5, at 166–24.
107 MOMEN, supra note 4, at 203–06.
authority on legal questions among the Twelver Shi‘i and his determinations were followed by everyone else. This authority was derived from credibility of the individual’s scholarship, and the marja’ was considered the most learned of the Shi‘i scholars by his peers and by the public. He was not appointed by any ruler, and pronouncements from a marja’ could trump the power of the ruler. For example, in 1890 CE Nasir-i-Din Shah, the Qajar ruler of Iran, granted a monopoly on the production and distribution of tobacco to British interests. This economic concession threatened the livelihood of Iranian farmers and merchants. When the marja’ Mirza-i-Shirazi (d. 1896 CE) issued a fatwa in 1891 CE that the consumption of tobacco under such circumstances violated the Shari‘a, a tobacco boycott ensued that ruined the value of the concession. It is said that even the Shah’s own wives refused to consume tobacco, much to his consternation. Nasir-i-Din Shah was forced to cancel the concession in 1892 CE at a financial loss.

After this period no single individual was considered the sole marja’ in the Shi‘i world, but a few top scholars were considered equally prominent. During the Pahlavi Dynasty, centralized secularization significantly and systematically reduced the power of the scholars, but the centers of scholarship in Najaf and Karbila continued to train young people in classical Islamic legal methodology. Khomeini, exiled from Iran under the Pahlavis, developed the new theory that in the absence of the hidden Imam, the most learned scholar should take on even more of the lapsed functions and actually rule in his place. By allowing ‘ijtihad, Usuli thought dramatically increased the theoretical scope of jurisdiction for Shari‘a scholars. Khomeini’s thought built on this theoretical foundation, taking it even further by allowing for direct rule as the Imam’s deputy.

When the Iranian revolution succeeded, however, and Khomeini actually came to power, a host of practical issues collided with the theory. A new Constitution was adopted and Iran had an elected legislative assembly. The laws previously enacted by the parliament, however, were not all immediately discarded. The theory provided that all laws had to conform to the Shari‘a, and religious scholars were to vet the Islamicity of laws passed by parliament. However, thousands of laws were in force that seemed to have little to do with the Shari‘a. While it was easy to repeal laws in obvious contradiction to traditional interpretations of Shari‘a, many laws inherited by the Islamic Republic were neutral.

109 CLEVELAND & BUNTON, supra note 59, at 115.
110 See KEDDIE, supra note 88.
111 CLEVELAND & BUNTON, supra note 59, at 115. See also KEDDIE, supra note 88.
112 See generally MOMEN, supra note 4.
113 See id., at 197.
114 Id.
116 See GELVIN, supra note 91, at 294–306.
118 See id., at 202–10.
Economic issues such as inflation and high unemployment have continued to trouble Iran during the years since the revolution.\textsuperscript{119} “Foundations,” which are quasi-public sector entities, developed as a significant part of the Iranian economy,\textsuperscript{120} which remains dominated by oil exports and therefore vulnerable to the global economy. Economic concerns play an important role in current politics, with President Ahmadinejad traditionally said to derive most of his popularity among the poor of south Tehran’s slums and the economically disenfranchised rural areas, where he has been instrumental in bringing cash and development projects.\textsuperscript{121} His political rivals, favored by the west, are generally considered more likely to represent middle and upper-class interests. The Revolutionary Guards, with close ties to President Ahmadinejad, emerged as a major player in Iran’s economy, holding interests in government construction and engineering contracts estimated at $12 billion.\textsuperscript{122} The recent rift between the Supreme Leader Ayatollah Khamenei and President Ahmadinejad resulted in the possibility that the President would be called before the Parliament for a hearing on his handling of the economy, amid criticism that he has inflicted higher inflation by slashing food and fuel subsidies.\textsuperscript{123} Currency fluctuations, rising inflation and the declining value of the rial cause continuing economic hardship in connection with sanctions against Iran as part of the nuclear program standoff with the U.S.\textsuperscript{124} There has been no easy way to conform the many practical challenges of governing to the lofty ideal of implementing Shari’a. For example, Khomeini is reported to have once dismissed an aide worried about inflation, saying that “this revolution was not about the price of watermelons.”\textsuperscript{125}

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\item[{119}] See THE ECONOMY OF IRAN: THE DILEMMA OF AN ISLAMIC STATE (ed. Parvin Alizadeh, 2000).
\item[{120}] See Suzanne Maloney, Agents or Obstacles? Parastatal Foundations and Challenges for Iranian Development, in THE ECONOMY OF IRAN: THE DILEMMA OF AN ISLAMIC STATE, supra note 119.
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MODERN ISLAMIST MOVEMENTS

Modern Islamist political movements are marked by tremendous diversity.126 Some have adopted violence as a method to take power, while some are non-violent. Some want to participate in elections while others do not. Some Islamist movements call for immediate implementation of Shari’a, while others want a gradual process. While most Islamist movements employ implementation of Shari’a as a political platform, it is not always clear exactly what that platform would mean in practical application.127 The appeal of Islamist movements is also diverse. The rule of law that Shari’a represented in the classical period, serving as an effective check on the power of the ruler, may be part of the appeal of calls for Shari’a.128 The idea that a modern government can implement Shari’a, however, raises challenging questions. With the gradual subordination of law to the state since the nineteenth century, how can the law be extricated from the state by means of a modern state apparatus implementing Shari’a?

The twentieth century saw a wave of modern secular nationalism as the dominant political and intellectual paradigm in the Middle East.129 Each nation has distinct specific circumstances and experiences, and there are important exceptions to this dominant paradigm such as the experience of Saudi Arabia and the Gulf States.130 However, the trend represented prominently by the experience of Turkey, Egypt, and Iran is important in understanding the current geopolitical context of the rise of Islamist politics. As the “reordering” of the nineteenth century gave way to the violent convulsions of World War I and World War II, the modern Middle East splintered into multiple modern nation-states following western political models.131 The twentieth century was characterized by increasingly dominant central governments ruling in close step with the military.132 The major influential figures of Mustafa Kemal Ataturk, the father of modern Turkey, Reza Shah Pahlavi in Iran, and Gamal ‘Abd al-Nasser in Egypt all came from a military background.133 Whether allied with the West or the Soviet Union in the Cold War, society was secularized. The power and authority of traditional

128 See generally FELDMAN, supra note 48.
129 See Mary C. Wilson, Introduction, in THE MODERN MIDDLE EAST, supra note 60, at 341–45; GELVIN, supra note 91, at 69–70; CLEVELAND & BUNTON, supra note 59, at 273–74.
130 See generally CLEVELAND & BUNTON, supra note 59.
131 See generally GELVIN, supra note 91; THE MODERN MIDDLE EAST, supra note 60; CLEVELAND & BUNTON, supra note 59.
132 See CLEVELAND & BUNTON, supra note 59, at 274.
133 See id.; KEDDIE, supra note 88; GELVIN, supra note 91; THE MODERN MIDDLE EAST, supra note 60.
elites, including Shari’a scholars, was systematically eroded. The economic systems were increasingly integrated with western interests and thus became vulnerable to the “world economy.” What remained in the aftermath of the nineteenth and twentieth century were completely reordered economic, legal, and political systems and institutions in the Middle East. 

The widespread discontent left by the legacy of the nineteenth and twentieth century transformations has increasingly found expression in the popularity of Islamist political movements. Like a pendulum swing, secular nationalism is increasingly being replaced as the dominant intellectual paradigm in the Middle East by the emergence of Islamist political thought. This can seem extremely threatening to the portions of the populations in the Middle East that are rooted in the secularized systems that prevailed in the past century. Critics worry about the status of women, religious freedom and human rights. Until recently, many Islamist politicians have done little to reduce this threat, choosing to emphasize the aspects of Shari’a that are most provocative to westerners and westernized Middle Easterners. In a reductionist way, Shari’a is sometimes represented by politicians (both for and against its implementation) as a call to stone adulterers and apostates, cut off the hands of thieves, and repress women without context or regard for the progressive, tolerant nature of Islamic law in both theory and in historical implementation. The embrace of this conception of Shari’a “others” the west and acts as a clear cultural marker to push back against the experience of western domination during the past two centuries.

The appeal of this approach channels popular resentment and anger in combination with the positive Islamist record of providing charitable social services to the poor. Islamist parties have generally enjoyed good reputations for their lack of corruption delivering these services, particularly in comparison to their secular

134 See generally ROGER O WEN & SEVKET P AMUK: A HISTORY OF MIDDLE EAST ECONOMIES IN THE TWENTIETH CENTURY 105 (1999); RICHARDS & WATERBURY, supra note 127; CLEMENT MOORE HENRY & ROBERT SPRINGBORG, GLOBALIZATION AND THE POLITICS OF DEVELOPMENT IN THE MIDDLE EAST (2d ed. 2010).
135 See RICHARDS & WATERBURY, supra note 127, at 362–84.
137 See HALLAQ, supra note 3, at 140–62.
139 See HALLAQ, supra note 5.
nationalist political rivals. The Islamist popular slogan “Islam is the Solution” can inspire hope where disillusion is widespread.

Islamist political movements have gradually developed as an alternative to the politics of the rulers. The Muslim Brotherhood in Egypt, for example, was sharply repressed under Nasser. When his successor Sadat needed to develop a distinct power base and distance himself from Nasser’s pro-Soviet policies, he carefully cultivated the Islamists with the help of Saudi Arabia, which was allied to the United States. When Sadat pushed through reforms advancing the status of women in the 1970’s, he felt the need to assert their compatibility with Shari’a. He cultivated Al-Azhar scholars, persuading them to issue fatwas endorsing the reforms. The Constitution of Egypt was amended in 1971 CE to state that the “principles of Shari’a are a principal source of legislation.” In 1980 CE it was amended again to state that the principles of Shari’a are the principal source of legislation in Egypt. How can this provision be implemented in a meaningful way when the legislative, judicial, and executive branches of government remain institutional forms derived from the legacy of the nineteenth and twentieth century?

The Egyptian legal scholar ‘Abd al Razzaq Al-Sanhuri drafted the Egyptian Civil Code of 1948 with the intent of merging western civil codes with the Shari’a, similar to the example of the Ottoman Majalla. Sanhuri was forced into retirement by Nasser, and went on to help draft similar codes for several other Middle Eastern states. The problems inherently presented by attempting to codify Shari’a are serious, as codification not only transforms the theoretical ideal that Shari’a contains a perfect answer for each individual situation, but also raises the practical question of which school’s interpretations to codify.

Codification leaves something in its place which may resemble Shari’a, but cannot really be called Shari’a in the classical sense. If modern Islamists decide to approach implementation of Shari’a through legislative codification, they first have to resolve basic practical questions. Is a legislative system theoretically compatible with Shari’a at all, since it presumes that law can be derived from popular will rather than originating with God? If a legislative system is acceptable, how will the Islamicity of laws be determined? Who will be qualified to vet the Islamicity of laws? How will those individuals be selected? How will they be educated and trained? Who will they answer to?

140 See Richards & Waterbury, supra note 127, at 362–84.
141 See id.
142 See Zubaida, supra note 54, at 165.
143 See id. at 166.
144 See id. at 171. Al-Azhar, located in Cairo, is one of the most prominent institutions of Sunni learning in the world.
145 See id. at 166. The drafters of the Constitutions of Iraq and Afghanistan have struggled with similar provisions in the reconstructions subsequent to the U.S. invasions.
147 See Brown, supra note 86, at 155.
148 See Hallaq, supra note 5, at 367–70.
Will all laws from the previous regime by immediately thrown out? Will a procedure be put into place to vet new laws only? Will the existing laws be gradually vetted over time and thrown out only if determined to conflict with Shari‘a? Will there be a category of laws that are determined to be neutral with respect to Shari‘a (like Khomeini’s statement on the price of watermelon)?

In Egypt, the legal profession is firmly entrenched, politically active, and trained in western-oriented educational institutions. Lawyers and judges may be devout Muslims and some may be Islamists, but they are not typically classically trained in Islamic law. There tends to be a tension generally between the current classically trained scholars and the Islamist politicians. Some Islamist politicians see some of the classically trained scholars as no longer credible, having become captive to oppressive governments. This criticism asserts that these captive scholars offered “fatwas for sale,” having been willing to issue legal opinions to justify the policies of the rulers even as those policies changed. Some traditional scholars, on the other hand, look disdainfully at Islamist politicians, who speak in the name of Shari‘a but have no training in the classical methods of Islamic law. In Egypt, the constitutional provisions declaring the principles of the Shari‘a to be the principal source of legislation created the odd result of having the theoretically secular judiciary deliver verdicts on the Islamicity of laws. In classical Islamic legal systems, there were no lawyers in the modern sense. If the judicial system remains in place as it is currently constituted under an Islamist government, how will this tension be resolved? Will future judges be trained in the methods of the classical scholars?

In the Middle East, political, legal, and economic institutions were thoroughly transformed by the experience of the nineteenth and twentieth centuries. Modern Islamists are increasingly coming to power through elections in the wake of the Arab Spring of 2011. The Arab Spring swept aside the rulers of Tunisia, Egypt and Libya in popular uprisings calling for democratic change. Modern Islamist parties willing to participate in parliamentary elections have won majorities in both Tunisia and Egypt, where such elections have been held. These Islamist parties, along with many other

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149 See Brown, supra note 86, at 122.
150 See Zubaïda, supra note 54, at 164.
151 See generally, Brown, supra note 86.
153 See generally Lisa Anderson, Demystifying the Arab Spring–Parsing the Differences Between Tunisia, Egypt and Libya, Foreign Affs, May-Jun. 2011 (describing the Arab Spring).
Islamists, are rapidly negotiating change in Middle East political systems. They are accommodating their agendas to the reality of the political, legal, and economic systems they now stand to inherit.

One striking point is the potential of Islamic finance to play a significant bridging role. Respected by both classical scholars and modern Islamists, Islamic finance institutions and practitioners have remained decidedly non-political as they have grown into an industry worth hundreds of billions of dollars spread all over the globe. Islamic finance prohibits the use of *riba* (unjustified increase) and *gharar* (excessive speculation), and promotes profit-and-loss sharing, *halal* (legally permissible) economic activity, and economic justice. Islamist politicians call for Shari’a-compliant finance, notably expressing their intent to prohibit interest on debt. This confirms the cultural marker that was attractive to their constituents about earlier forms of Islamist politics, without seriously provoking the West, which has substantial economic interests in the Islamic finance industry. Even calls for Islamic finance have been careful not to seem too radical. Ennahda, the newly elected Islamist party in Tunisia, recently took care to emphasize that Islamic finance would be only one economic option among many, and that the basic economic and constitutional systems would remain intact and secular.

If Islamic finance can move beyond its current limitations, it might serve as one tool for governments to meaningfully impact the alleviation of poverty and promote economic and social justice. There will be no simple answers, however, to the systemic social and economic issues that confront the Middle East today. The radical transformations in the economic and political institutions of the Middle East over the last two centuries have been

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156 See Warde, supra note 155, at 5. The prohibition of *riba* is commonly conflated with the prohibition of interest on debt. Interest on debt is one, but not the only, form of *riba*.


accompanied by explosions in population and literacy, along with widespread
demographic shifts from rural to urban centers.\footnote{See generally THE MODERN MIDDLE EAST, supra note 60.} For example, a rough
estimate of the Iranian population in 1850 was 10 million.\footnote{Id. at 179.} The population
of Iran is estimated in 2012 around 78.8 million.\footnote{See Iran, CIA–THE WORLD FACTBOOK, https://www.cia.gov/library/publications/the-world-factbook/geos/ir.html.} A rough estimate of the
population of Egypt in 1800 was 3 million.\footnote{See THE MODERN MIDDLE EAST, supra note 60, at 179.} The population of Egypt in
2012 is estimated around 83.6 million.\footnote{See Egypt, CIA–THE WORLD FACTBOOK, https://www.cia.gov/library/publications/the-world-factbook/geos/eg.html.} The population of Cairo in 1798 CE
was estimated at 263,000.\footnote{See THE MODERN MIDDLE EAST, supra note 60, at 313.} The population of Cairo in 2009 was estimated
around 10.9 million.\footnote{See Egypt, THE WORLD BANK, http://data.worldbank.org/country/egypt-arab-republic.} Egypt’s literacy rate in 1907 was estimated at just 7 percent.\footnote{See THE MODERN MIDDLE EAST, supra note 60, at 186.} The literacy rate in Egypt estimated by the World Bank in 2006 was 66 percent.\footnote{See Turkey, THE WORLD BANK, http://data.worldbank.org/country/turkey.} The literacy rate among Turks in 1927 was estimated at 8 percent.\footnote{See NAOMI SAKR, ARAB TELEVISION TODAY (2007); ARAB MEDIA AND POLITICAL RENEWAL: COMMUNITY, LEGITIMACY AND PUBLIC LIFE (Naomi Sakr, ed.,2009).} Revolutionary communications technology advances
provide unparalleled information access across the Middle East through the
media, cell phones and the internet.\footnote{See Demographics of Arab Protests: An Interview with Ragui Assaad, FOREIGN AFFS., May-Jun. 2011 (regarding the impact of the demographic youth bulge on the Arab Spring).} Youths in the Middle East are a
well-educated. Yet the gap between the rich and the poor continues to increase

These social and economic issues are at the core of the worst (though
not the only) discontent in the Middle East, as evidenced by the patterns
around unemployment and high commodity prices that unfolded during the
Arab Spring. The prominent Tunisian Islamist Rashid Gannouchi has stated
his desire to achieve a prosperous, democratic Muslim state led by a religious
party which protects individual liberties, modeled after the Turkish Justice and
Development Party led by Prime Minister Recep Tayyip Erdogan. This trend among modern Islamists is spreading, leading some commentators to call it “post-Islamist.” How the societies and institutions of the “post-Islamist” Middle East emerge and develop in this context will remain to be seen. Newly elected Islamist governments in Egypt and Tunisia have inherited an economic recession and high unemployment levels along with the high expectations unleashed by the Arab Spring. Significant rivalries and distinctions remain among Islamist parties, both in and out of power, and a variety of approaches are possible to address the concerns they face. The challenges of negotiating meaningful, positive social and economic change in the context of the legacy of the nineteenth and twentieth century transformations are formidable.


176 Id.
