Ohio Northern University Law Review

Volume 41 | Issue 3 Article 1

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Ohio Northern University
Law Review

Carhart Memorial Symposium

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I. INTRODUCTION

A much-cited 2013 Pew poll reported that a strong majority of Muslims around the world favor making *sharia* the "official law of the land" in their countries.[1] This was alarming news for many, especially when followed by further statistics supporting things like hand amputation and stoning as criminal punishment. But does a Muslim desire for *sharia* necessarily mean "*sharia* legislation"? Does public support for *sharia* have to mean Muslim theocracy? The answer is "yes" if law *sharia* is defined as scripturally-derived religious legal doctrine. But that is a very narrow definition of religious law, and it is an especially inappropriate way to understand *sharia*. In this article, I will explain why a country that "follows *sharia*" need not—indeed, should not—be one that "legislates *sharia*." I will also show how an appreciation of this distinction—among Muslims as well as non-Muslims—will open up new solutions to the apparently intractable and politicized conflicts between Islamism and secularism in many Muslim-majority countries today.

Specifically, I will explain why *sharia* is best understood as an Islamic rule of law, rather than just the collections of Islamic doctrinal rules known as *fiqh*. Looking at pre-modern Islamic jurisprudence and Muslim history, I

*Associate Professor, University of Wisconsin Law School. I extend my appreciation to Ohio Northern University Law School for inviting me to participate in the Symposium conference and journal issue, with a special thanks to my long-time friend and colleague Professor David Pimentel for the personal welcome during my stay.

1. Pew Research Center's Forum on Religion and Public Life, The World's Muslims: Religion, Politics and Society 9, 46-47 (Apr. 30, 2013), available at http://www.pewforum.org/the-worlds-muslims-2013 [hereinafter "Pew Forum"].

show that *sharia* rule of law systems were made up of two branches: 1) *fiqh* rules extrapolated from scripture by religious legal scholars articulating right conduct for Muslims, and 2) *siyasa* laws created by temporal rulers, legitimated on service of the public good. The role of *siyasa* as the second of these two branches is especially important to understanding *sharia* as a rule of law system, but unfortunately is virtually absent in contemporary discourses. As a result, *sharia*-minded Muslims tend to advocate theocratic systems of government. That is, without an appreciation of the importance of how and why *siyasa* is part of *sharia*, average Muslims presume that *sharia* corresponds only to the doctrinal rules of *fiqh*, thus leading them to believe that state legislation of *fiqh* rules is the only way their government can follow *sharia*. In short, they understand *sharia* as a collection of rules rather than as a rule of law. This then leads to public support of *sharia* legislation in politics and in polls. The result is theocracy—government articulating and enforcing religious law upon its people. In opposition to this trend, I will show why "*sharia* legislation" efforts around the world are misguided attempts by Muslims to make their governments more Islamic. Ironically, these *sharia* legislation efforts operate from a European paradigm of the nation-state rather than pre-colonial Muslim norms of law and government,[2] and they stand in the way of deeper, more creative and authentic thinking about Islamic constitutionalism in the modern world.

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2. With colonialism, the *fiqh-siyasa* bifurcation of law and authority was destroyed in most Muslim-majority lands. With independence, these countries inherited a European nation-state structure of government that had now been woven into their economic, political, and social orders during colonialism. *See* WAEL HALLAQ, AN INTRODUCTION TO ISLAMIC LAW 85-114 (2009). Rather than rejecting the European centralized nation-state formula left to them, however, political Islamist movements in these countries instead concentrated their efforts on making that central state "Islamic." As Sherman Jackson puts it, "liberal or illiberal, pro- or anti-democratic, the basic structure of the nation-state has emerged as a veritable grundnorm of modern Muslim politics. The basic question now exercising Muslim [political] thinkers and activists is not the propriety of the nation-state as an institution but more simply—and urgently—whether and how the nation-state can or should be made Islamic." Sherman A. Jackson, *Islamic Reform Between Islamic Law and the Nation-State, in* THE OXFORD HANDBOOK OF ISLAM AND POLITICS 42 (John L. Esposito & Emad El-Din Shahin eds. 2013) (emphasis omitted). This is where the idea of "*sharia* legislation" comes from. Presuming that state lawmaking is the only location of law, political Islam focuses on ways to legislate *fiqh* (calling it "*sharia*") in the misguided belief that this is the only way for their state to follow sharia. *See* SHERMAN A. JACKSON, ISLAMIC LAW AND THE STATE: THE CONSTITUTIONAL JURISPRUDENCE OF SHIHÂB AL-DÎN AL-QARÂFÎ xiii-xiv (1996) ("Islamists are now generally content with thinking about and pursuing the means, mechanisms and substantive modifications by means of which the nation-state can be made Islamic. . . . In short, the Islamic state is a nation-state ruled by Islamic law"). Frank Vogel comments that this is apparent "when Islamic thinkers assume that to return to *sharia* one should just amend here and there the existing positive-law constitutions and statutes; or assert that a modern state is Islamic if its legislature pays respect to general Islamic legal precepts, such as bans on prostitution or gambling . . . ." FRANK VOGEL, ISLAMIC LAW AND LEGAL SYSTEM: STUDIES OF SAUDI ARABIA 219 (2000). As I will show in this article, what these movements fail to recognize is that, far from restoring *sharia*, these *sharia* legislative projects have instead devastated the two core features of *sharia* as a rule of law as it was understood in pre-modern Muslim legal systems: 1) *fiqh* pluralism and 2) non-theocratic *siyasa* rule.

II. WHAT IS *SHARIA*?

Both supporters and critics of Islamic government tend to assume that *sharia* is a set of religious rules that a Muslim government must legislate and enforce.[3] The thinking usually goes like this: Because *sharia* is divine law, the lawmaking powers of an Islamic government should be devoted to enforcing that law, probably via religious experts who are best equipped to understand divine scripture. In other words, an Islamic government is theocratic. It leaves little or no room for human lawmaking premised on the sovereignty of the people, and hence there is an inherent conflict between a *sharia*-based government and a democratic one. This way of thinking, however, represents a profoundly and destructively simplistic view of religious law, at least as far as *sharia* is concerned. To understand why, it is necessary to first understand the core epistemology of Islamic jurisprudence.[4]

A. Fiqh: Rules for Muslim Right Action

Linguistically, "*sharia*" means "way" or "road." As a legal term, "*sharia*" refers to "God's Way" or "God's Law," a divine exhortation to all

3. The recent Pew poll itself reflects this popular understanding of *sharia* as merely a collection of religious rules (most of them problematic to secular liberal values). *See* PEW FORUM, *supra* note 1. This is illustrated especially in its choice of follow-up questions to the *sharia* as "law of the land" question: "Do you favor corporal punishments for crimes such as theft," "[Should] stoning [be the] punishment for adultery," and "[Should there be a] death penalty for leaving Islam?" *Id.* at 52-56. Even beyond the *sharia*-specific chapter, the Pew poll perpetuates stereotypes by asking about these western headline-grabbing topics in particular: abortion, extramarital sex, homosexual behavior, divorce, polygamy, family planning, honor killings, women's dress, wifely obedience to husbands, women's access to divorce, and gendered inheritance rights. *Id*. at 79-96. Those reading the survey are likely to come away with an impression of *sharia* as a rather conservative, restrictive collection of rules that is largely not in step with western secular liberal values. There is no sense in the Pew Report of *sharia* as a holistic rule of law system, nor of the diversity of *fiqh* doctrines. The Pew poll thus muddied the waters of *sharia* understanding by failing to include nuances of *fiqh* and *siyasa* in their questions about a simplified "*sharia*." Thus, the responses received give us some general sense of a Muslim affinity for *sharia*, but tells us very little about the context or larger picture within which these answers could operate. Instead, the results can easily be misread to perpetuate the myth that there must inevitably be a conflict between secularism and *sharia* in Muslim majority countries.

In the interest of full disclosure, I should note that I was a consultant on this Pew Research Center survey. I was especially discouraged by the final form of the questions because I had critiqued an earlier version precisely along these lines. Some improvements were made in the drafting process (the earlier versions of the *sharia* questions were arguably worse: the sharia as "law of the land" question was originally part of a multi-part question alongside several particularly corporal aspects of Islamic criminal law, namely the death penalty for apostasy, hand amputation for theft, and stoning for adultery), but the essential problem of narrowly characterizing *sharia* remained.

4. This is an exceedingly short summary. For a more detailed description of *sharia* and the relationship of *fiqh* and *siyasa* in *sharia*-based legal systems, *see generally* Asifa Quraishi, *The Separation of Powers in the Tradition of Muslim Governments, in* CONSTITUTIONALISM IN ISLAMIC COUNTRIES: BETWEEN UPHEAVAL AND CONTINUITY 63-73 (Rainer Grote & Tilmann J. Röder eds., 2012).

Muslims about the ideal way to behave in this world. Muslims have two tangible sources of information about this Law of God. The first is the *Quran*, which Muslims believe is the actual word of God, revealed to the last prophet, Mohammad. The second is the lived example ("sunna") of Prophet Mohammed. Muslim scholars engaged—and continue to engage—in rigorous interpretation of these sources to extrapolate detailed legal rules covering many aspects of Muslim life, from how to pray and avoid sin to making contracts and writing a will. Muslims refer to these rules every day in order to live a Muslim life. These rules are called *fiqh*.[5]

The use of the term "*fiqh*," and not "*sharia*," for these rules is significant. *Fiqh* literally means "understanding," reflecting the fundamental epistemological premise of Islamic jurisprudence: *fiqh* is fallible. That is, Muslim *fiqh* scholars undertook the work of interpreting divine texts with a conscious awareness of their own human potential to err. They thus recognized that their extrapolations of *fiqh* rules were at best only probable articulations of God's Law, and that no one could be certain to have the "right answer."[6] In other words, divine law (*sharia*) represents absolute truth, but all human attempts to understand and elaborate that truth are necessarily imperfect and potentially flawed. *Fiqh* scholars have always been acutely aware that, although the object of their work is God's Law, they do not—and cannot—speak for God.

This awareness was hardwired into the foundations of Islamic jurisprudence. The authority of *fiqh* is grounded therefore not in the correctness of its result, but rather in the sincerity of the jurisprudential reasoning that generates it. That is, as long as it is the result of sincere analysis ("*ijtihad*"), any *fiqh* conclusion qualifies as a possible—and thus legitimate—articulation of *sharia*. Because there is no way to know for sure which *fiqh* conclusions are correct, and no Muslim "church" to designate favorites, all *fiqh* rules are respected as equally valid understandings of *sharia*—even when they contradict each other. Multiplied over time, this premise ensured that a healthy Islamic legal diversity emerged, eventually coalescing into several definable schools of law each having equal legitimacy and authority for Muslims seeking to live

5. For a more detailed summary of the distinction between the terms "*fiqh*" and "*sharia*," *see* Tamir Moustafa, *Islamic Law, Women's Rights, and Popular Legal Consciousness in Malaysia*, 38 L. & SOC. INQUIRY 168, 171-74 (2013).

6. *See* KHALED ABOU EL FADL, SPEAKING IN GOD'S NAME: ISLAMIC LAW, AUTHORITY AND WOMEN 39 (2001) ("Islamic legal methodologies rarely spoke in terms of legal certainties (*yaqin* and *qat'*). The linguistic practice of the juristic culture spoke in terms of probabilities or the preponderance of evidence . . . . Muslim jurists asserted that only God possesses perfect knowledge–human knowledge is tentative . . ."). For more on this concept in the various schools of Islamic jurisprudence, *see* ARON ZYSOW, THE ECONOMY OF CERTAINTY: AN INTRODUCTION TO THE TYPOLOGY OF ISLAMIC LEGAL THEORY (2013).

by *sharia*. In short, for a Muslim, there is one Law of God (*sharia*), but there are many versions of *fiqh* articulating that Law here on earth.[7]

Fiqh rules are what people mean when they refer to things like the Islamic rules on divorce, inheritance, or adultery. Confusingly, however, these rules are often described as "*sharia*," implying that "*fiqh*" and "*sharia*" are synonymous.[8] But it should be clear now why it is important to distinguish these two terms. *Fiqh*—the product of human legal interpretation—is inherently fallible and thus open to question, whereas sharia—God's Law—is not. Using the word "*sharia*" to refer to *fiqh* rules not only creates the impression that a given rule is incontestable divine law, but also ignores the existence of other equally valid *fiqh* understandings of divine law on the same topic.[9] This blurs the line between the divine and human voices, a line that Islamic jurisprudence takes very seriously. Worse, this blurring can be used as a powerful tool of manipulation, as seen in political debates to promote legislation described as "*sharia*." Using the term "*sharia*" for legislation often causes lay Muslims to believe that questioning such legislation is tantamount to questioning divine law, without realizing that every articulation of *sharia* (i.e. *fiqh*) is human. Maintaining the conceptual distinction between *sharia* and *fiqh* thus goes a

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7. *See* HALLAQ, *supra* note 2, at 31-37. From hundreds of early *fiqh* schools, five remain prominent today: the Maliki, Hanafi, Shafi'i, Hanbali, and Ja'fari. *See id.* at 37.

8. Some scholars of Islamic law argue that distinguishing *fiqh* from *sharia* is not important. Abdullahi An-Na'im, for example, has argued that "both Shari'a and fiqh are the products of human interpretation of the Quran and Sunna . . . [, and thus, w]hether a given proposition is said to be based on shari'a or fiqh, it is subject to the same risks of human error . . . ." ABDULLAHI AHMED AN-NA'IM, ISLAM AND THE SECULAR STATE: NEGOTIATING THE FUTURE OF SHARI'A 35 (2008); *see also* Abdullahi Ahmed An-Na'im, *Shari'a in the Secular State: A Paradox of Separation and Conflation*, *in* THE LAW APPLIED: CONTEXTUALIZING THE ISLAMIC SHARI'A 321, 329 (Peri Bearman et al. eds., 2008) (arguing that the distinction is only technically useful). In other words, An-Na'im seems to be saying that because *sharia* is always known only through (fallible) *fiqh*, any claim that something is *sharia* is really no more than a claim that it is *fiqh* (a human interpretation of *sharia*), so why bother distinguishing the terms? An-Na'im seems to believe that it should be obvious to everyone that anything asserted to be *sharia* is always a fallible human interpretation. Unfortunately, the opposite seems to be true. Muslims today are largely unaware of the human element inherent in the process that created the (*fiqh*) rules that are pervasively referred to as *sharia*. *See* Moustafa, *supra* note 5, at 170 (analyzing poll results in Malaysia illustrating that "the conceptual distinction between *shari'a* and *fiqh* is not always so clear to lay Muslims without a background in Islamic legal theory"). By refusing to clearly and linguistically distinguish the divine from the human with the terms *sharia* and *fiqh*, An-Nai'm's description of *sharia* perpetuates this problem. Worse, by describing *sharia* itself as "the product of human interpretation," An-Na'im could be understood to mean that there is no divine law to which to direct our human understanding in the first place, and thus risk Muslim rejection of the more important point—that *sharia* is always known through human interpretation.

9. For example, what are the "*sharia*" grounds for divorce? It depends on the school of *fiqh*. Some grounds are accepted in the Maliki school, for example, that are not legitimate grounds in the Hanafi school. *See* Leila Ahmed, *Early Islam and the Position of Women: The Problem of Interpretation*, *in* WOMEN IN MIDDLE EASTERN HISTORY: SHIFTING BOUNDARIES IN SEX AND GENDER 61 (Nikki R. Keddie & Beth Baron eds., 1991). To cite the Maliki grounds for divorce as "*sharia*," therefore, would only tell part of the story, and the picture of "*sharia*" divorce law as a whole.

long way toward untangling the knot of religious inflexibility that takes the political stage in many Muslim majority countries today.

B. Siyasa: Lawmaking for the Public Good

Fiqh is not the only type of law that existed in classical Muslim legal systems. There was also *siyasa*—laws made by Muslim rulers. *Siyasa* and *fiqh* were fundamentally different types of law, but they were interconnected to create a complete *sharia*-based system.[10] Unlike *fiqh*, *siyasa* laws were not extrapolated from scripture by religious legal scholars, but rather crafted by Muslim rulers according to their own philosophies of government and ideas about how best to maintain public order. *Siyasa* laws were typically pragmatic, governance-related laws, covering topics like taxes, security, marketplace regulation, and public safety—*i.e.*, things necessary for public order, but about which the scripture says little.[11]

It is important to recognize that the *fiqh*-*siyasa* structure of law and government in Muslim history was not theocratic. There was no merging of "church" and state because there is no Muslim "church" in the first place. But even more significant, Muslim religious legal scholars were not the rulers of Muslim governments, and Muslim rulers did not create religious law. *Fiqh* lawmaking and *siyasa* lawmaking operated in very different realms in pre-modern Muslim societies.[12] This is because, quite early in Muslim history, *fiqh* scholars fought hard against efforts by Muslim rulers to control the interpretation of Muslim scripture.[13] They eventually won this fight, resulting in a "separation of powers" in Muslim societies between those who study scripture and those who hold police power.[14]

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10. Frank Vogel describes these as "macrocosmic" and "microcosmic" law. *See* VOGEL, *supra* note 2, at 23-32. He describes their relationship to each other in this way: There are two main bodies of legislation: (1) the *fiqh* created by the *fiqh* scholars and (2) the *siyasa* created by the ruler, and the Constitution governing both is the *sharia*. *See generally id.* at 3-32. For more on *siyasa* and *fiqh* as interdependent elements of *sharia*-based systems, *see generally* KRISTEN STILT, ISLAMIC LAW IN ACTION: AUTHORITY, DISCRETION, AND EVERYDAY EXPERIENCES IN MAMLUK EGYPT 24-36 (2011); Sadiq Reza, *Torture and Islamic Law*, 8 CHI. J. INT'L L. 21, 26 (2007).

11. *See* VOGEL, *supra* note 2 at 52, 171-73; STILT, *supra* note 10 (describing the mixed *fiqh*-*siyasa* role of the *muhtasib*).

12. *See* VOGEL, *supra* note 2; STILT, *supra* note 10; NOAH FELDMAN, THE FALL AND RISE OF THE ISLAMIC STATE 27-35 (2008); *Quraishi, supra* note 4. This is true even taking into account the political-theological differences between Sunni and Shi'a doctrines about ideal government. For the bulk of Muslim history, neither Sunni nor Shi'a *fiqh* scholars sought control of the political realm of the rulers.

13. This fight was called the "*mihna*," when a series of Abbassid caliphs in the ninth century (AD) attempted to impose a particular theological belief upon the population. For more detail, *see* DUNCAN B. MACDONALD, DEVELOPMENT OF MUSLIM THEOLOGY, JURISPRUDENCE AND CONSTITUTIONAL THEORY 153-185 (1903).

14. *See* Khaled Abou El Fadl, *Islam and the Challenge of Democratic Commitment,* 27 FORDHAM INT'L L.J. 4, 26 (2003) ("Particularly after the age of *mihna* the [*fiqh* scholars] were able to establish themselves as the exclusive interpreters and articulators of the Divine law. . . . [T]he inquisition

Lawmaking by temporal holders of power came to be seen as Islamically legitimate because of the widespread consensus in Islamic jurisprudence that the ultimate purpose of *sharia* is to promote the welfare of the people (*maslaha*).[15] Because rules extrapolated from scripture cannot cover all the day-to-day public needs of civil society, *fiqh* scholars recognized that another type of law besides *fiqh* was necessary to fully serve the public good. Scriptural study cannot identify, for example, what is a safe speed limit, or what regulations will ensure food safety. The only institution capable of creating and enforcing these sorts of rules is the power that controls the use of force—that is, the *siyasa* power held by rulers. In the literature of Muslim political science that came to be known as *siyasa shariyya*, *fiqh* scholars agreed that it is fundamental to a *sharia*-based system that rulers exercise *siyasa* lawmaking power for the purpose of serving the public good.[16] (Some scholars went so far as to insist that obedience to even unjust *siyasa* rulers is obligatory because that is better for the public good than the anarchy that would otherwise result.[17]) The practical impact of *siyasa shariyya* scholarship was to confirm that the concept of *sharia* includes pragmatic considerations of good governance. This genre of Islamic legal literature solidified the idea that *sharia* as "God's Law" is meant to cover more than just the *fiqh* elaboration of scriptural rules.

Notably, *siyasa* rulers were specifically expected *not* to draw their rules from scripture, but from their own opinions of what is necessary for social

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[*mihna*] was a concerted effort by the State to control the juristic class and the method by which Shari'ah law was generated. Ultimately, however, the inquisition failed and, at least until the modern age, the jurists retained a near exclusive monopoly over the right to interpret the Divine law"). This ultimately led to the separation of *fiqh* and *siyasa* as different types of lawmaking, and it is the primary reason that there was never a merging of "church" and state in Islamic history.

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

16. Frank Vogel, *Islamic Governance in the Gulf: A Framework for Analysis, Comparison, and Prediction*, *in* THE PERSIAN GULF AT THE MILLENNIUM: ESSAYS IN POLITICS, ECONOMY, SECURITY, AND RELIGION 259 (Gary G. Sick & Lawrence G. Potter eds., 1997) ("as understood by [*fiqh* scholars] the ruler possesses authority under *siyasa* doctrine to act freely to pursue the welfare of the [community] as he understands it"). Shihab al-Din al-Qarafi, for example, described *siyasa* as "that power entrusted to the government to improve society. Exercises of this power were valid insofar as they were undertaken with the purpose of enhancing the community's welfare, and did so improve it in fact." *See* Mohammad H. Fadel, *The True, the Good and the Reasonable: The Theological and Ethical Roots of Public Reason in Islamic Law,* 21 CANADIAN J. OF L. & JURISPRUDENCE 5, 54 (2008) (footnotes omitted); *see also* OVAMIR ANJUM, POLITICS, LAW, AND COMMUNITY IN ISLAMIC THOUGHT: THE TAYMIYYAN MOMENT (2012) (comparing a great number *siyasa shar'iyya* scholars on the topic of Islamic governance, including their divergent views on the reason for and nature of the *siyasa* ruler).

17. For example, Al-Ghazali famously wrote, "[W]hich is to be preferred, anarchy and the stoppage of social life for lack of a properly constituted authority, or acknowledgement of the existing power, whatever it be? Of these two alternatives, the jurist cannot but choose the latter." *See* GUSTAVE E. VON GRUNEBAUM, MEDIEVAL ISLAM: A STUDY IN CULTURAL ORIENTATION 168 (1946).

and political order.[18] The result was religious legitimacy for Muslim rulers to issue laws and "perform the duties of everyday governance and law enforcement without specific reference to, or grounding in, the sacred texts."[19] The *siyasa's* lack of direct grounding in sacred texts is important for thinking about *sharia* as an Islamic rule of law. It means that lawmaking by a government can be Islamic without looking to *fiqh* rules as its source. In other words, legislating *fiqh* is not what makes a government Islamic. Instead, lawmaking for the public good is how Muslim government actors serve God.

1. Siyasa is Not Secular

Unfortunately, it has become popular, especially among western commentators, to see *fiqh* and *siyasa* through the lens of European experiences with church and state. In other words, there is a strong tendency to describe *siyasa* as something outside of *sharia* rather than as part of it. This is apparent in terminology referring to these two types of law not as "*fiqh*" and "*siyasa*," but as "*sharia*" and "*siyasa*"—thus positioning *siyasa* lawmaking outside of *sharia* altogether. Having designated "*sharia*" and "religious law" as corresponding only to the *fiqh* realm, *siyasa* is then often described as "secular."[20] Even more jarring are descriptions of the relationship between *fiqh* and *siyasa* as a secular separation of religion and state.[21] Abdullahi Ahmed An-Na'im, author of

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18. Fadel, *supra* note 16, at 55 ("[T]his area of the law was entirely independent of theological expertise, and accordingly, legitimized rule-making for the vindication of public interests rather than the vindication of express revelatory norms"); Mohammad Fadel, *Adjudication in the Maliki Madhhab: A Study of Legal Process in Medieval Islamic Law* 99-104 (1995) (unpublished Ph.D. dissertation, University of Chicago) (describing the "political judgments" of the *siyasa* realm as not derived "directly from God's revelation, but rather . . . upon a discretionary judgment of what course of action would result in the maximum welfare of the community"). Dr. Khaled Abou El Fadl describes the different legal realms of jurists and rulers this way:

> Only the jurists were deemed to possess the requisite level of technical competence and learning that would qualify them to investigate and interpret the Divine will. . . . [T]he State was expected to play the role of enforcer, not the maker, of Divine laws. . . . State laws, on the other hand, were considered temporal, and therefore, primarily the product of functional necessities rather than an interpretation of the Divine will. However, pursuant to the powers derived from its role as the enforcer of Divine laws, the State was granted a broad range of discretion over what were considered matters of public interest (known as the field of al-siyasah al-Shar'iyyah).

Abou El Fadl*, supra* note 14, at 30-31.

19. Reza, *supra* note 10, at 27.

20. *See* STILT, *supra* note 10, at 25-27 (further explaining the inadequacy of academic descriptions of Muslim ruler activity as non-religious, political and secular).

21. *See, e.g.*, Ira M. Lapidus, *The Separation of State and Religion in Early Islamic Societies*, 6 INT'L J. MIDDLE. E. STUD. 363, 364 (1975) ("[R]eligious and political life developed distinct spheres of

Islam and the Secular State, even goes so far as to argue that secularism is "more consistent with Islamic history" than modern Islamic state movements because Islamic history was "not fundamentally different from Western societies regarding the relationship between religion and the state."[22]

This is problematic for several reasons. First, western secularism is a dangerously narrow filter through which to view law and government generally.[23] "Secular" is an anachronistically inappropriate description of Muslim rulers who ruled with self-consciously Islamic identity and purpose.[24] But more importantly, describing the political realm of *siyasa* as "secular" and non-religious creates an unnecessary conflict between human law and divine law. That is, by insisting that all human-created law is "secular," and that whatever a state does is by definition "not *sharia*," An-Na'im and others dismiss the possibility that there can be any *sharia*-based role for purely human lawmaking.[25]

If, on the other hand, we step outside of Eurocentric binaries about the religious and the secular,[26] we find that there is no need to choose between human law and God's Law if we understand *sharia* as a holistic rule of law system. As described above, *sharia* as a holistic rule of law includes human-lawmaking for the public good (*siyasa*) *as* an essential part of—not outside of—the legal system. In other words, the Muslim concept of God as

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experience, with independent values, leaders, and organizations. From the middle of the tenth century . . . [g]overnments in Islamic lands were henceforth secular regimes - Sultanates - in theory authorized by the Caliphs, but actually legitimized by the need for public order. Henceforth Muslim states were fully differentiated political bodies without any intrinsic religious character, though they were officially loyal to Islam and committed to its defense.").

22. AN-NA'IM, *supra* note 8, at 45.

23. The literature critiquing secularism and the concept of the secular is far too vast to document here, but for a good example, *see* TALAL ASAD, FORMATIONS OF THE SECULAR: CHRISTIANITY, ISLAM, MODERNITY 191-92 (2003) ("The concept of 'the secular' today is part of a doctrine called secularism. . . . Secularism builds on a particular conception of the world ('natural' and 'social') and of the problems generated by that world."); *see also* AFTER SECULAR LAW (Winnifred Fallers Sullivan et al. eds., 2011) (featuring articles focusing the secular critique on law, specifically, "how did law become secular, what are the phenomenology and social and individual experience of legal secularism, and what are the challenges that taking into account religious formations poses for modern law's self-understanding?").

24. *See, e.g.,* ANJUM, *supra* note 16, at 38-42 (critiquing characterizations by Lapidus and others of "classical caliphate theory" as conceiving of the state as a "secularization").

25. Thus, Frank Vogel explains that using the "*sharia-siyasa*" designation "prejudices such crucial issues as whether (or when) *siyasa* should not be understood as part of *shari'a*, alongside *fiqh*; or how '*ulama*' [*fiqh* scholars] and *qadis* [judges] may legitimately exercise some of the powers of *siyasa* themselves, within a venture larger than the *fiqh* of their books . . . ." VOGEL, *supra* note 2, at 172. Similarly, Mohammad Fadel finds the characterization of state law as non-religious law to obscure the realities of "Islamic public law" and Islamic jurisprudential work on the notion of public officials as agents of a Muslim public. Mohammad Fadel, *Islamic Law Reform: Between Reinterpretation and Democracy*, 18 Y.B. OF ISLAMIC AND MIDDLE E. L. (forthcoming 2015) (draft on file with author).

26. As Talal Asad reminds us, "The genealogy of secularism has to be traced through the concept of the secular—in part to the Renaissance doctrine of humanism, in part to the Enlightenment concept of nature, and in part to Hegel's philosophy of history." ASAD, *supra* note 23, at 192.

Lawgiver does not prohibit people from making logistical arrangements among themselves to keep their society running smoothly. To the contrary, as understood in Islamic legal theory, God as Lawgiver *anticipates* these very arrangements. That is what the realm of *siyasa* is for. Following this understanding, generations of *fiqh* scholars have recognized the important role that *siyasa* law plays, parallel to and interdependent with *fiqh* rules, to create a fully formed *sharia*-based system of law and government. The separation of *fiqh* and *siyasa* is thus not a separation of religion and state, but rather, of two types of law—two separate branches of a *sharia* rule of law system.

By recognizing that *siyasa* (human-made law for the public good) is *part* of a *sharia* rule of law, it becomes clear how a Muslim government can be religious, but not theocratic. *Sharia* as a holistic rule of law presents no inherent conflict between human law and God's Law because human lawmaking for the public good is an essential component—the *siyasa* component—of a *sharia* rule of law system. Including *siyasa* as part of *sharia* means that good governance is itself part of God's vision of a just society. It is precisely *how* a Muslim government fulfills its responsibility to uphold *sharia*.[27]

This is why language is so important. Insisting that the terms *sharia* and *fiqh* not be collapsed together is not just a matter of semantics. Seeing *sharia* as bigger than *fiqh*, that it encompasses *siyasa* too, makes it possible for a Muslim public to treat as Islamic their government's lawmaking for the public good—from zoning to speed limits to international treaties. This establishes the conceptual foundation that makes it possible to build a system of government that is neither theocratic nor secular, yet still identifiably Islamic. *Siyasa* lawmaking is thus not a "secular," non-religious thing just because it is not made by *fiqh* scholars, but rather, it is an essential component of what makes a government *Islamic*. Simply put, serving the public good is the *Islamic* duty of a Muslim government.

III. WHAT WOULD A SHARIA-BASED RULE OF LAW LOOK LIKE TODAY?

Applying all this to Muslim-majority countries today, what should be the lessons for those seeking to create an Islamic government? The first is that "*sharia* legislation" as such is impossible. Given that there are many equally valid *fiqh* understandings of *sharia*, and the impossibility of

27. The religious value of good governance was emphasized by numerous *siyasa shar'iyya* scholars, including the famous Ibn al-Qayyim al-Jawziyya who stated: "God sent His message and His Books to lead people with justice . . . . Therefore, if a just leadership is established, through any means, then therein is the Way of God." Khaled Abou El Fadl, *Constitutionalism and the Islamic Sunni Legacy*, 1 UCLA J. ISLAMIC & NEAR E.L. 67, 77 (2002) (quoting 4 Shams al-Din Abu Bakr Ibn Qayyim al-Jawziyya, *I'lam al-Muwaqqi'in an Rabb al-Alamin* 452 (Abd al-Rahman al-Wakil ed., n.d.)).

knowing which one is correct, it is impossible for any government to "enact" *sharia* (God's Law). The most one could do, would be to select its preferred *fiqh*, but in doing so, it cannot claim these to "be *sharia*."[28] That is because no *fiqh* rule can claim with certainty to be the correct understanding of *sharia*. As explained above, the epistemology of Islamic jurisprudence insists that all *fiqh* rules are fallible—though still valid—human interpretations of God's Law. So-called "*sharia* legislation," therefore does not really legislate God's Law at all, but instead merely

28. Lest my point be confused with a similar one made by Abdullahi An-Na'im, let me clarify the difference between our two positions. We both begin from the fact that every *fiqh* understanding of *sharia* is equally valid, and hence any "*sharia* legislation" is really based on the political preferences of the state enacting it. In An-Nai'im's words:

> The wide diversity of opinions among Muslim scholars and schools of [*fiqh*] in practice means that state institutions would have to select among competing views that are equally legitimate from . . . Islamic view . . . . Since there are no generally agreed-upon standards . . . for adjudicating among these competing views, whatever is imposed by the organs of the state as official policy or formal legislation will necessarily be based on the human judgment of those who control those institutions.

AN-NA'IM, *supra* note 8, at 6-7; *see also id.* at 18 ("Sharia principles cannot be enacted or enforced as the positive law of any country without being subjected to selection among competing interpretations, which are all deemed to be legitimate by the traditional Shari'a doctrine."). But from here, we diverge. An-Na'im takes the fact of human/political lawmaking as support for his larger argument for secularism: "In other words, whatever the state enforces in the name of Shari'a will necessarily be secular and the product of coercive political power and not superior Islamic authority . . . ." *Id.* at 7; *see also id.* at 191 ("From my perspective, all law or legislation that is enforced through state institutions is secular, even when drawn from or based on Shari'a principles."). An-Na'im emphasizes the unknowability of God's Law (*sharia*) and the human nature of political decision-making, and from there jumps directly to secularism. I do not. By insisting that all state action is by definition "secular," An-Na'im leaves no room for a role for human decision-making as *part* of *sharia*, whereas I do. An-Na'im and I both agree that "some form of political organization is clearly necessary for keeping the peace and organizing the affairs of the community" and that "[t]his idea can be supported and legitimated from an Islamic perspective," but he characterizes this political organization as "secular" simply because it is humanly-created, and then argues that Islam supports this secular arrangement. *Id.* at 267. To me, this is a strange, unnecessary, and unhelpful jump. For me, the fact that human codification cannot represent the divine ideal only begs the question of whether there *is* a place for human lawmaking in a *sharia*-based system, and if so, where, why, and how does it work? An-Na'im dismisses this line of thought altogether, opting instead to seek to convince Muslims to support a secular state—though, notably, not a "secularized society." His argument has found some enthusiastic supporters, (mostly among Muslims in the west), but, by his own admission, has not gained much traction among Muslim-majority populations. I suspect that his approach will continue to be resisted by most Muslim-majority audiences, and especially by those with a desire for *sharia* to be the "official law of the land." My approach, on the other hand, is specifically designed with these audiences in mind. I argue that we should understand that all state lawmaking is an exercise of *siyasa* power, and that *siyasa* itself is part of *sharia* as a rule of law. This gives Muslim audiences a mechanism for internalizing the purely political choices of their governments as part of a *sharia* rule of law system without having to become secularists. This approach is not possible in An-Na'im's worldview because he insists on collapsing the terms *fiqh* and *sharia*. In other words, by insisting whatever the state does is by definition "not *sharia*," An-Na'im dismisses the possibility that there can be any *sharia*-based role for purely human lawmaking. I insist that such a role does exist, and that it is a very different type of lawmaking than the *fiqh* that is commonly presumed to be the full gamut of "*sharia* law."

legislates one—or several—among many *fiqh* possibilities of God's Law. Thus, a government selecting one *fiqh* rule over another must do so on some ground other than it is in fact divine law.

What, then, should be the basis of lawmaking by an Islamic government today? The answer is "the public good." As explained above, the public good was the historical *raison d'etre* of *siyasa* authority in *sharia* rule of law systems. Because today's equivalent of *siyasa* authority is the modern state,[29] the proper job of the state in a modern *sharia* rule of law system would be to serve the public good. Thus, the second lesson for modern Muslims seeking to create an Islamic government is that all state law and state action must be justified in terms of how it serves the public good.

This is a very different focus for political Islamic activism than that typically found in Muslim countries today. Most Islamic political advocacy focuses on the legislation and enforcement of selected *fiqh* rules (often calling them "*sharia*"), usually with special attention to criminal, family, and sometimes economic law. But this advocacy dangerously veers towards theocracy—using state power to enforce particular religious doctrines upon the public. Worse, it falsely presents as divine (*sharia*) what is in fact human (*fiqh*). Lawmaking for the public good, on the other hand, honors the core premise of Islamic jurisprudence: *fiqh* fallibility. In other words, serving the public good is the only way to justify the use of government force in a system that takes seriously the concept that we cannot know with certainty which *fiqh* rule is the correct understanding of God's Law. There has to be some other justification for the state to coerce action—that justification, as articulated in classical Islamic jurisprudence, is the public good. Thus, lawmaking that seeks the public good is how a Muslim government honors *sharia* as its primary directive but at the same time not

29. To be more precise, today's legal-political systems in Muslim-majority countries are virtually all *siyasa*. The *fiqh*-*siyasa* separation of legal authority that was a central feature of centuries of Muslim legal systems ended with the colonial era. *See* MARSHALL G.S. HODGSON, THE VENTURE OF ISLAM, CONSCIENCE AND HISTORY IN A WORLD CIVILIZATION 3: THE GUNPOWDER EMPIRES AND MODERN TIMES 163-409 (1974); VOGEL, *supra* note 22 at 211-15 (describing codification movement after dismantling of classical Muslim legal system); Wael B. Hallaq, *"Muslim Rage" and Islamic Law*, 54 HASTINGS L.J. 1705 (2003) (summarizing this history with reference to its implications for the contemporary world); KHALED ABOU EL FADL, *supra* note 6, at 16 ("[T]he epistemology, structure, and dynamics that supported the evolving process of [*fiqh*] law are now largely dead."). The era of colonialism not only displaced *sharia* itself as the basis for the general rule of law, but it also introduced a European-style structure of government in which the state holds all legal authority. Under this legal centralism, "all law is and should be State-sponsored law, [which is] uniform . . . [and] equally applied across all social groups, and emphatically superior to, if not exclusive of, any and all other systems or repositories of law." Sherman A. Jackson, *Legal Pluralism Between Islam and the Nation-State: Romantic Medievalism or Pragmatic Modernity?*, 30 FORDHAM INT'L L.J. 158, 160 (2007). In other words, colonialism essentially replaced the dual legal system of *fiqh* and *siyasa* with a single system of just (colonially-created) *siyasa*. *Fiqh* scholars survived, but now mostly in background academic discourses, and often flying under state radar. *See* MUHAMMAD QASIM ZAMAN, THE ULAMA IN CONTEMPORARY ISLAM: CUSTODIANS OF CHANGE (2002).

making the impossible claim that the specifics of its laws are divinely commanded.

This does not mean that lawmaking in a modern Muslim country cannot be in any way inspired by *fiqh* doctrine; it only changes the basis upon such *fiqh* rules should be legislated as the law of the land. Rather than claiming such laws to be incontestable divine law, advocates of these laws would now have to justify them in terms of their service of the public good. For example, if an individual or political party would like to legislate, say, the usury rules of the Maliki school of *fiqh*, it would not be sufficient to simply cite Maliki *fiqh* to support such legislation. Rather, proponents must also be able to convince everyone, Maliki and non-Maliki alike, that these Maliki rules would be better for the economy and the public good than, for example, the Hanafi or Shafi'i or Ja'fari *fiqh* on usury.[30] In this way, it is possible that particular Maliki *fiqh* could become the law of the land in a modern *sharia* rule of law system, but only if they are enacted because they serve the public good, not because they are *fiqh*.[31]

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30. This description of lawmaking for the public good may seem similar to An-Nai'm's description of 'civic reason' as the currency of public policy discourse in his proposed vision of a secular Islamic state, but there is a significant qualitative difference. In An'Nai'm's proposed secular state, "Muslims are of course free to personally observe the ban on *riba* or organize *zakat* through civil society associations . . . . But if they wish to involve state institutions . . . then they must provide civic reasons through a civic reasoning process in which all citizens can participate without reference to religion." AN-NA'IM, *supra* note 8, at 93. In my scheme for a *sharia* rule of law, the *siyasa* discourse about the public good is also open to all citizens, but not in order to create a secular public law environment "without reference to religion." *See id*. An-Na'im proposes a secular separation of Islam and state, and his argument for civic reason is one of the safeguards of this separation. *Id.* at 94-95. My goal is very different. I insist on state lawmaking for the public good *because of* Islam, not to separate from it. An-Na'im's civic reason and my public good may well end up producing the same sorts of laws, but my approach has the added benefit of giving Muslim populations an Islamic reason for supporting them. In other words, my approach gives Muslims a way to see "civic reason" itself as part of *sharia*—but in a non-theocratic way. An-Naim's approach takes a purely secular rationale for why a Muslim population should make laws based on civic reason. I give them a *sharia*-based reason to do so.

31. It should be noted that the principle that the public good be the primary justification for all *siyasa* lawmaking means that state laws might even conflict with established *fiqh* rules. This should not be cause for alarm, even among *sharia*-minded Muslims. Every *fiqh* rule is, after all, fallible, so there is nothing inherently wrong with making a *siyasa* law that disagrees with any of them. In fact, given the diversity of *fiqh* rules on so many topics, it would be virtually impossible to make a law that does not conflict with *any* existing *fiqh* rule. For example, if the Hanafi rules of divorce were enacted as the law of the land, that would conflict with the Maliki rules of divorce, and vice versa. Once we get away from the collapsing of *fiqh* and *sharia*, and realize that *siyasa* lawmaking for the public good is part of a *sharia* system independent of *fiqh* doctrine, then it is clear that existing *fiqh* rules should not be the ground or limit for *siyasa* public lawmaking. In a modern *sharia* rule of law system, the state is the *siyasa* power responsible for maintaining public order and welfare, and how it determines the laws needed to do so may or may not overlap with existing rules of *fiqh*, which are primarily concerned with the spiritual status of individual human action. That is, a Muslim population can acknowledge that something is spiritually permitted in the *fiqh*, but that does not negate the need for that population to ask whether it is good for their public to practice it. Put another way, just because something is not prohibited by the *fiqh* (*e.g.*, driving over 65 miles an hour) does not mean that individuals should have an absolute right to it in all circumstances, especially if the state has reason to think that it will harm the public good.

A. Transforming Muslim Political Discourse

Unfortunately, this conception of Islamic government is missing in most Muslim political discourse today. Because state lawmaking in the public good is not clearly understood as part of a *sharia* rule of law system, Muslims desiring *sharia* to be the law of the land turn to "*sharia* legislation" to make their governments Islamic. Thus, it is common to see laws promoted solely on the assertion that they are "*sharia*," with public support bolstered by a belief that questioning such laws would be questioning God.[32] The prevalence of this phenomenon throughout the Muslim world indicates that an incomplete understanding of *sharia, fiqh* pluralism, and *siyasa* is pervasive in Muslim populations today.[33] This incomplete understanding lies behind the results of the 2013 Pew poll, among others.[34] In short, Muslims want *sharia*, but they do not fully know what *sharia* means, so they support so-called *sharia* legislation.

With so much automatic buy-in by Muslim majorities for nearly anything promoted as "*sharia*," criticism of *sharia* legislation is left largely to secularists who reject any formal relationship between *sharia* and the state altogether. This often creates fierce "Islam" vs. " secularism" political fights that are hard to dislodge. Contemporary political discourse in Muslim-majority countries is thus dominated by arguments for and against religious law, leaving very little room for creative thinking about alternative Islamic government models that are neither secular nor theocratic.

But such alternatives are possible. In this article, I have explained how *sharia* can be the law of the land, but not through "*sharia* legislation." With an understanding of *sharia* as a rule of law system, *sharia*-minded Muslims would have reason to oppose "*sharia* legislation" on Islamic grounds. That is, Muslim majorities could come to see that passing a law based on nothing more than an assertion that "it is *sharia*," is an Islamically illegitimate use of the state's *siyasa* power. With an internalized appreciation that it is impossible to say with certainty that anything is in fact God's Law, and that the only basis for *siyasa* power is service of the public good, Muslims would see clearly that any assertion that something is *sharia* should lend no weight to its legitimacy as the law of the land. And they would be doing so

32. As documented by Tamir Moustafa's research on Malaysia, for example, "[w]hen women's rights organizations push for the reform of family law codes, . . . they almost invariably encounter stiff resistance due to the widespread but mistaken understanding that Muslim family laws, as they are codified and applied in Muslim-majority countries, represent direct commandments from God that must be carried out by the state." Moustafa, *supra* note 5, at 169.

33. *See id.* (showing, based on recent polling data, lay Muslim ignorance of core epistemological commitments in Islamic legal theory, such as its commitment to pluralism and the centrality of human agency in *fiqh* lawmaking).

34. *See supra* Part I and accompanying text.

as part of an argument *for sharia* rule of law, not as a secular argument against it.

Along with this argument goes a new demand upon Islamic governments: service of the public good. With a new appreciation of *sharia* as a rule of law system, and especially the proper *siyasa* role of the state in such a system, *sharia*-minded Muslims would demand attention to the public good as the primary *sharia*-serving responsibility of their Islamic government. This is the role that is expected of human lawmaking in a *sharia* rule of law system. Moreover, with an appreciation that their state will be following *sharia* simply by legislating for the public good, *sharia*-minded Muslims could let go of the fixation with so-called "*sharia* legislation" as their only expression of Muslim political identity.

Simply put, I emphasize the importance of lawmaking for the public good not as a way to *avoid* religion, but rather precisely *because* of religion. It is because lawmaking for the public good is *part* of *sharia* that makes it so important to my framework. This is what can enable Muslim populations to embrace the idea that basic public service lawmaking *is* an Islamic, *sharia*-mindful thing for their governments to do. It also shows that the whole project of "*sharia* legislation" is a misguided focus for Islamic political movements. In the *sharia*-as-rule-of-law scheme presented here, a Muslim government is religious/Islamic—but not theocratic—when it is following its *sharia* responsibility to create laws for the public good. This sort of understanding of *sharia* means that not just secularists, but Muslims themselves should oppose "*sharia* legislation"—not to remove Islam from the government, but rather, as a way to demand that their government respects *sharia* itself.

If it is appreciated—as an *Islamic* matter—that the government should not be selectively enforcing its preferred religious doctrine but instead should be seeking to serve the public good, this could cause a revolutionary change in political discourse in Muslim-majority countries. Rather than debating "should we have religious law or not?" the people would be asking "what serves our public good?" Not only does this open up the public conversation to everyone regardless of religious credentials, but it also may lessen the tensions of identity politics as a feature of "*sharia* politics" in these countries.[35] After all, if the goal of lawmaking of an Islamic

35. Some have observed that support for *sharia* legislation is often fueled by identity politics such that it has come to symbolize what it is to be a religious Muslim, as against secularism as an extension of cultural imperialism and the politics of Christians. *See* Anver E. Emon, *The limits of constitutionalism in the Muslim world: History and identity in Islamic law, in* CONSTITUTIONAL DESIGN FOR DIVIDED SOCIETIES: INTEGRATION OR ACCOMMODATION? 258, 259-60 (Sujit Choudhry ed., 2008) ("The determinacy of [Islamic rules of law] provides an anchor or reference point for creating a thick sense of identity against the perceived anemia of the liberal, atomistic individual."). Colonialism systematically dismantled the legal and political institutions that had organized Muslim legal and

government is the public good, then citizens of all religions and no religion can participate in this conversation with equal relevance and credibility. Public discourse would focus on practical evaluations of social need rather than oppositional arguments about the role of Islam and Islamic law. To borrow the words of Mohammad Fadel, "Muslims should not ask whether the human rights standard is the same as that under Islamic law, but only whether the human rights standard represents a legitimate act of government."[36] Moreover, *sharia*-minded Muslims should support this shift as the proper role for the state in a *sharia* rule of law system, rather than as a concession to secularism or international pressure.[37]

This shift is also the key to solving the purported conflict between Islam and democracy.[38] Democratic decision-making is, after all, one method by which a society decides what is in the public good. Likewise, a *sharia*-based rule of law system could choose to use democracy as its mechanism for determining the public good.[39] Keeping this in mind can help explain to

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political power for centuries. *See supra* note 29. One way of reclaiming this has been to fixate on the *fiqh* rules themselves. It should also be noted that this Islamic-inspired lawmaking activity cannot be explained away by simply pointing to an increased Muslim religiosity in these countries. Other factors include: ethnic identity politics (including residual influences of colonial favoritism), Christian missionary efforts and evangelism, official corruption and the idea that Islam can check these injustices, the political power of religious rhetoric in general, socio-economic alliances, the association of secularism with European/Western imperialism, and more. *See, e.g.*, Rhoda E. Howard-Hassmann, *The flogging of Bariya Magazu: Nigerian Politics, Canadian Pressures, and Women's and Children's Rights*, 3 J. HUMAN RIGHTS 3, 12 (2004) (noting that Christian-Muslim conflicts in hitherto religiously tolerant Nigeria began in the 1980s, resulted in part from "the historic ethnic and regional splits in Nigeria, a federation created by British *fiat* at the time of decolonization[,]" and that "the current religio-political conflict in Nigeria . . . is in part a result of British colonial policies[,]" and "[t]o many Islamic activists, the secular basis of the Nigerian state is yet more evidence of cultural imperialism. Secularism, to them, is a 'Christian' belief. The Constitution represents imposed British law, hence Christian law, hence secularism.").

36. Mohammad Fadel, *The Challenge of Human Rights*, SEASONS: THE JOURNAL OF THE ZAYTUNA INSTITUTE 59, 69 (2008).

37. It is important to note that this shift is not possible if it is insisted that all lawmaking that is not directly derived from scripture is "secular." Although *siyasa* lawmaking is not based on scripture, it is still "religious" in that it is part of a divinely-directed *sharia* system that includes a role for human lawmaking. Rather than presuming that the human nature of state lawmaking leaves no role for God's Law, the idea of sharia as a rule of law system described here presumes a role for non-scriptural human lawmaking as an essential part of the overall structure.

38. Many scholars have written on the compatibility of Islam and democracy, some even pointing to Islamic history as the (lost) building blocks for such a system. There are far too many to quote here, but two compelling—though different—expositions are: ANJUM, *supra* note 16, at 40-41 (discussing Islamic political thought with a focus on the concept of the Muslim *umma* (community) instead of a Greek "polis"), and Fadel, *supra* note 25 (describing the concepts of public agency as part of Sunni *siyasa* public law theory).

39. Many have been unable to untangle the apparent knot between divine law and democracy for Muslims because they collapse *sharia* and *fiqh*, thus obscuring the idea of *sharia* as a holistic rule of law that includes human *siyasa* lawmaking, and thus the appropriate place for democratic lawmaking. An example is Khaled Abou El Fadl's essay, *Islam and the Challenge of Democracy,* where he struggles over which should prevail: popular sovereignty or divine sovereignty. KHALED ABOU EL FADL, ISLAM AND THE CHALLENGE OF DEMOCRACY: A "BOSTON REVIEW" BOOK 3 (2004) (publishing Abou El

western observers why Muslim affinity for both democracy and *sharia* is not an oxymoron. Statistics showing that a large majority of Muslims around the world are pro-democracy and also support *sharia* are confusing only if we insist on limiting the meaning of *sharia* to *fiqh* rules.[40] However, once we recognize that *sharia* is larger than *fiqh*—that it also encompasses as *siyasa* the realm of state lawmaking based on the public good—the paradox disappears.[41]

If laws made by democratic legislatures are recognized as modern versions of ruler-made *siyasa*, then a whole range of important lawmaking for the social good could gain credibility as the *siyasa* arm of an Islamic government. Laws on things that are usually described as purely "secular"—such as environmental protection, city zoning, traffic, health care, labor, antitrust, public education, criminal procedure, and individual rights—all would be considered part of an Islamic government's *sharia*-mindful responsibility. Thus, for Muslim populations wanting to see *sharia* as a guide to their government's actions, understanding *siyasa* as part of a *sharia* rule of law system enables them to proudly look at these most basic state administrations of important social services as Islamic efforts to follow

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Fadl's original Boston Review essay with scholarly responses). Mohammad Fadel aptly identifies the mistaken premise that leads Abou El Fadl into this dilemma:

> Th[e] concern – that a state's claim to be applying Islamic law is metaphysically untenable and thus at bottom a misappropriation of divine prerogative – and the concern that statutory law lacks Islamic integrity because it is not a product of authentic Islamic legal reasoning – are a result of the . . . [erroneous] belief that a modern state applying Islamic law is essentially acting as a master-jurist (*mujtahid*), charged with the task of finding the correct interpretation of divine law, with the difference that it has the necessary coercive resources at its disposal to compel compliance with its views regarding the correct conception of divine law.

Fadel, *supra* note 25. Instead, Mohammad Fadel "understands positive law as expressions of the public will that meet Islamic conditions of validity and not interpretations of divine will; [this] offers a different understanding of law-making in a modern Muslim-majority polity, one that places political deliberation about the public good at the center of law-making rather than scriptural interpretation." *Id.* Fadel's point quite similar to the one I make here (although with different terminology), namely, that *sharia* contemplates an equal and important sphere of lawmaking where political authority (*siyasa*) makes laws based on something other than interpreting scripture—namely, the public good. I argue that realizing that *sharia* as a rule of law system includes a prominent role for *siyasa* lawmaking for the public good means that democratic lawmaking can be a mechanism for finding the public good in an Islamic government.

40. *See* JOHN L. ESPOSITO & DALIA MOGAHED, WHO SPEAKS FOR ISLAM? WHAT A BILLION MUSLIMS REALLY THINK 35 (2008) (documenting that large majorities of Muslims around the world support democracy and also support *sharia*).

41. This also explains why popular commentary on the problem of Islamic concepts of "Gods Sovereignty" in the modern world as incompatible with democracy is distractingly unhelpful. This approach incompletely appreciates the constitutional nuances that *sharia* supremacy can mean for Muslims, perpetuating the religion-secular-opposition paradigm rather than looking past it for real solutions for today.

sharia. Moreover, public support for such programs would be bolstered by the same religious passion that currently supports *sharia* legislation, because it would now be understood that government service of the public good is itself part of God's Law.

It is important to note that in a modern *sharia* rule of law system of the sort described here, core rights protections will ultimately depend not on the state's interpretation of scripture, but on how well the democratic discourse engages and works out its policy decisions about the public good. That is, protection of individual rights and any other constitutional values will come down to—as it does in all democracies—how well the population understands their own public good, and how it decides to protect it.[42] In this way, regardless of Islamic law reform in the realm of *fiqh*, a particular practice can simply fall out of use through public distaste and a deterioration of public support.

Slavery is a good example of this phenomenon: Although as a *fiqh* matter slavery is allowable, it has drastically fallen out of practice and indeed outlawed in many Muslim countries (*i.e.*, as a "*siyasa"* matter), reflecting a dramatic shift in public attitudes about slavery. This phenomenon supports the idea that a great deal of important change happens outside of the *fiqh* realm. In order for such changes to have Islamic credibility, it is crucial to provide Muslims a way to embrace these changes as consistent with *sharia*. This is possible only if *sharia* is understood as a rule of law system stretching beyond *fiqh* rules to include *siyasa* state lawmaking for the public good. It would not be hard for Muslims to abolish slavery as a *siyasa* matter in such a *sharia* rule of law system because, in order to do so, the primary question to be asked and answered is simply whether or not slavery serves the public good.[43]

IV. CONCLUSION

As Noah Feldman has commented, "[o]ne reason for the divergence between Western and Muslim views of Shariah is that we are not all using the word to mean the same thing."[44] This disconnect is evident in western

42. This is why Sadiq Reza concludes, in his article on torture and Islamic law: "What then governs the future of investigative torture in Muslim countries, if Islamic law is not enough to decide that future? *Domestic* accountability in Muslim countries, and thus democratic government, would appear to be the answer." Reza, *supra* note 10, at 40.

43. I should note here that the primary question is not the only question. After it is decided what is in the public good, there must be a second inquiry to make sure that such laws are not contrary to Islam altogether. For example, in a *sharia* rule of law system, could the *siyasa* authority ban public prayer? This is answered by thinking about what constitutional checks there should be on state power in a *sharia* rule of law system. In my longer work describing a three-part template for modern Islamic constitutionalism, I address that issue in detail.

44. Noah Feldman, *Why Shariah?*, N.Y. TIMES MAGAZINE (Mar. 16, 2008), http://www.nytimes.com/2008/03/16/magazine/16Shariah-t.html?pagewanted=all&_r=0.

discourses about Islamic government. For most westerners (and those who have benefitted from a western education), the idea of religious law evokes a history of state churches, imposed religious doctrine, and sectarian-fueled religious wars. With this backdrop, westerners are understandably alarmed by news of widespread support for *sharia* as the law of the land in Muslim-majority countries. If *sharia* is the Muslim equivalent of "religious law," so goes the thinking, we are doomed to see history repeat itself, this time with Muslim actors. This explains the increase in calls for a Muslim renaissance, reformation or enlightenment—apparently in the hope of bringing Islam forward into the modern era by teaching Muslims how to separate "church" from state as Christians did centuries ago.[45]

Setting aside the paternalism inherent in these calls, they also reveal a myopic Eurocentrism that fails to see that Muslim experiences with religious law and government have not been the same as western experiences. A separation of church and state, for example, makes no sense for a religion that has never had a "church" in the first place. Moreover, unlike the uniformity of canon law and the legal centralism of the European nation-state, pre-modern Muslim governments did not operate on the assumption that all law emerges from the state. On the contrary, the *fiqh-siyasa* division of lawmaking authority, along with the inherent and unavoidable diversity of *fiqh*, has always protected pre-modern Muslim societies from code-like imposition of uniform religious law by Muslim rulers.

Therefore, if we take seriously the possibility that "*sharia*" does not directly translate as "Islamic religious law," as defined by western experiences with religious law, we open up a new way of thinking about religious Muslim government that is not doomed to repeat the religious violence of Christian Europe. The starting point is to realize that the term "*sharia*" is not the Muslim equivalent of "religious law" in the European sense of the term. Rather, for most Muslims, *sharia* corresponds to an "ethical ideal"[46] of what is just and good,[47] and is popularly used in general

45. *See, e.g.*, AYAAN HIRSI ALI, HERETIC: WHY ISLAM NEEDS A REFORMATION NOW (2015); John Floyd, *An Islamic Reformation is the world's best chance for peace*, THE JERUSALEM POST (Apr. 4, 2015, 8:22 PM), http://www.jpost.com/Middle-East/An-Islamic-Reformation-is-the-worlds-best-chance-for-peace-396161; Raza Rumi, *Islam Needs Reformation from Within*, THE WORLD POST (Jan. 16, 2015, 4:41 PM), http://www.huffingtonpost.com/raza-rumi/islam-needs-reformation-f_b_6484118.html. For an insightful critique pointing out the irony of such calls, *see* Ed Simon, *ISIS Is the Islamic "Reformation"*, RELIGION DISPATCHES (Mar. 13, 2015), http://religiondispatches.org/isis-is-the-islamic-reformation/.

46. *See, e.g.*, David L. Johnston, *Intra-Muslim Debates on Ecology: Is Shari'a Still Relevant?*, 16 WORLDVIEWS: GLOBAL RELIGIONS, CULTURE, AND ECOLOGY 218 (2012) (surveying proliferating literature on Muslim ecology and the prevailing use of the term "*sharia*" as "a source of ethical values").

47. *See, e.g.*, Jennie S. Bev, *Why 72 per cent of Indonesians want sharia*, COMMON GROUND NEWS SERVICE (June 11, 2013), http://www.commongroundnews.org/article.php?id=32990&lan=en

Muslim discourse about social justice, anti-corruption, and fairness. Layered on top of this classical understanding of *sharia* is the idea of *sharia* as a state-codified body of law, which complicates the term significantly. But it is important to realize that codified *sharia* is a very modern phenomenon, first introduced by the European-influenced Ottoman Mejelle and then further controlled by the wholesale transformation of Muslim legal-political systems by European colonial powers. This modern state use of *sharia* has made contemporary Muslim governments more prone to theocracy than was possible in pre-modern times. But it is not *sharia* itself that has caused this situation. Rather, it has resulted from misguided efforts to insert *sharia* into a nation-state structure that claims exclusive control over all law. The phenomenon of "*sharia* legislation" is a wholly modern, post-colonial, phenomenon: It depends upon the positivist legal monism of the nation-state. Simply put, modern Muslim governments would not be able to uniformly enforce their selected *fiqh* rules if the pre-modern bifurcation of *fiqh* and *siyasa* legal realms had survived. The theocratic consequences of this status quo should therefore offend not just secularists who feel that state law should be separated from religion, but also *sharia*-minded Muslims because it disrespects *fiqh* diversity and lets the state claim control over what used to be left to the autonomy of independent *fiqh* scholars.[48]

In other words, *sharia* operated in pre-modern Muslim governments as an Islamic rule of law, not as a collection of rules codified by the state. As I have explained above, pre-modern *sharia* as a rule of law system was made up of two realms of law: *fiqh* and *siyasa*. *Fiqh* was, and is, inherently diverse, articulated by religious scholars—not the rulers—seeking to understand divine law, while the governing power created and enforced *siyasa* laws ostensibly in service of the public good. Crucial to the interdependent relationship between these two realms was the fact that the *siyasa* power of government operated parallel to the *fiqh* realm; it was not the government's role to legislate *fiqh*. Rather, the *sharia* responsibility of

(critiquing reactions to the Pew poll on Indonesian support for sharia because the "meaning of sharia is related to social justice and fairness among those who have lost faith in the government and institutions[,]" and that "[p]eace and compassion are required to establish a fair and just society, and were likely the impetus for the high percentage of Indonesian Muslims who supported sharia in this poll."); Johnston *supra* note 46 (describing how *sharia* is used by a growing number of Muslims to promote earth-friendly practices and lobby for government regulations that protect the environment, stating that "the use of *sharia* in this context has nothing to do with Islamist notions of theocracy and the imposition of oppressive medieval laws, but rather everything to do with a thriving civil society seeking to protect the precious resources of a planet created by God for the welfare of all his creatures").

48. In my forthcoming work, I explain how to retrieve this diverse *fiqh* realm as one part of a three-part template for modern Islamic constitutionalism.

the *siyasa* power was non-scriptural lawmaking for the public good. That is how Muslim government actors were expected to serve God.

Keeping all this in mind, if we take the Muslim desire for *sharia* seriously, rather than fighting it or trying to talk Muslims out of it, what might global conversations about Islamic government look like?[49] Could there be room for common cause if we open up the idea of religious government to experiences outside the European church-state paradigm? In this article, I have shown why the answer is "yes." By recognizing *siyasa* as the human-made public law arm in a *sharia* rule of law system, *sharia* can be the "law of the land" without creating a theocracy. The *sharia* legitimacy of state power in such a system rests not on jurisprudential study of scripture, but rather on its service of the public good. Modern Islamic constitutionalism, therefore, should begin with the principal that the legitimate exercise of government power is based on the public good. Thus, a society seeking to live under a *sharia* rule of law should create institutions to perform the responsibilities of basic societal governance, organizing civil society, and protecting the safety and welfare of the people—knowing that this is an Islamic thing to do, and that it can and should be done without direct reference to scripture.

This is a rule of law system in which religion is important, but not in a way that combines "church" and "state." It allows secularists and Islamists to find a middle ground without compromising their core values and purposes. For *sharia*-minded Muslims, the legitimacy of state action is based directly on classical *sharia* principles. For secularists, it requires laws to be justified in terms of the public good, not its religious pedigree. Respect for the idea of *sharia* as an Islamic rule of law requires an appreciation that human lawmaking that is non-revelatory in origin is necessary for public good, and that it is all part of God's Law.

This sort of Islamic government still looks to *sharia* for its legitimacy, but in a very different way than the "Islamic state" promoted by political Islamism and "*sharia* legislation" movements. Unlike those movements, this vision of a *sharia* rule of law rejects the idea that using state police power to impose *fiqh* rules is what makes the state Islamic. Quite the opposite, "*sharia* legislation" actually runs counter to the founding principle of Islamic jurisprudence that we cannot know God's Law with certainty. Instead, as explained above, service of the public good is the first Islamic responsibility of a Muslim government. Thus, for a modern Islamic state to enact a law—inspired by *fiqh* or not—as the law of the land for everyone, it

49. Among other things wrong with the 2013 Pew poll is its failure to appreciate the nuanced relationship of *fiqh* and *siyasa* in its questions about "*sharia*." *See* PEW FORUM, *supra* note 1. Thus, the responses received give us a general sense of a Muslim affinity for *sharia*, but the poll's references to *sharia* are so vague that it tells us very little about the way forward.

should do so on the basis that it serves the public good for that particular society at that particular time. In this way, Muslims can have *sharia* as the law of the land without imposing uniform religious rules upon an entire population. Of course, not everyone will give up the desire for *fiqh* legislation, and no system—secular or religious—can completely immunize a country from totalitarianism and oppression. My point here is simply to demonstrate that there is an important space—an Islamic space—for Muslims to support or oppose legislation solely on its service of the public good, rather than whether or not it is a religious requirement.

In other words, secularism is not the only way to protect against theocracy. If we recognize that government lawmaking based on the public good is itself part of a *sharia* rule of law system, this gives the average Muslim a *sharia*-mindful alternative to the misplaced desire for "*sharia* legislation." To those Muslim populations represented in surveys reporting large support for *sharia* as the law of the land, the message is this: A government *is* serving *sharia* even when all it is doing is lawmaking based upon the public good, because *siyasa* that serves the public good is a crucial part of a *sharia*-based rule of law. Simply put, serving the public good *is* the Islamic duty of a Muslim government.

This re-positions what is commonly expected of Islamic government. Taking the concept of *siyasa* seriously means that lawmaking by governments of Muslim majority countries serves *sharia* if—and only if—it seeks to serve the public good. So, if most of the world's Muslims want *sharia* to be the law of the land, this does not mean fighting with secular forces to enforce a uniform set of *fiqh* rules on everyone, but rather working together with them to create mutually beneficial laws that serve the common good. In other words, the key to modern Islamic constitutionalism is realizing that state action for the public good is itself a *sharia*-mindful thing to do.