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Legal Pluralism Between Islam and the Nation-State: Romantic Medievalism or Pragmatic Modernity?

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Abstract

This Essay attempts a reconciliation of sorts between two perspectives on legal pluralism, via specific reference to Islamic law, most notably in its pre-modern guise. The Essay begins with a provisional commitment to legal centralism, but primarily as a means of securing a functional place for sub-State reglementary regimes. To this end, legal centralism, as presented, is tempered by a demonstration that, even where the State enjoys an exclusive monopoly on the application of sanctions with impunity, it need not be the actual source of every rule it recognizes or applies as law.

ESSAY

LEGAL PLURALISM BETWEEN ISLAM AND THE NATION-STATE: ROMANTIC MEDIEVALISM OR PRAGMATIC MODERNITY?*

*Sherman A. Jackson***

INTRODUCTION

Legal pluralism emerged as a topic of serious scholarly discussion as far back as the 1930s.¹ The ensuing discourse among sociologists, anthropologists, and professional lawyers generated a multiplicity of attitudes towards and definitions of legal pluralism, all of which bore the ideological imprint of the respective disciplines. In 1986, however, the anthropologist John Griffiths introduced a binary distinction between what he termed “strong” and “weak” legal pluralism, the substance of which came to be widely recognized as a basic point of reference.² Variations on this nomenclature would include “classic” versus “new” legal pluralism,³ or even the more transparent “juristic” versus “sociological”⁴ legal pluralism.

According to Griffiths, “strong” (i.e., new, sociological) legal pluralism referred to and resulted from the fact that not all law is State law administered by a single set of State-sponsored institutions. “Weak” (i.e., classic, juristic) legal pluralism, on the other hand, referred to situations in which a State or sovereign

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1. See, e.g., EUGEN EHRlich, *FUNDAMENTAL PRINCIPLES OF THE SOCIOLOGY OF LAW* (Walter L. Moll trans., Russell & Russell Inc. 1962) (1936).

2. See generally John Griffiths, *What Is Legal Pluralism?*, 24 J. LEGAL PLURALISM & UNOFFICIAL L. 1 (1986).

3. See Sally Engle Merry, *Legal Pluralism*, 22 LAW & SOC’Y REV. 869, 872 (1988).

4. See Griffiths, *supra* note 2, at 5; Merry, *supra* note 3, at 871.

power recognized, validated, and backed different bodies of law for different groups in society.⁵ To be sure, this choice of “strong” and “weak” was neither idle nor value-neutral. It reflected, rather, the inner workings of an ideological campaign to break the hegemonic influence of professional lawyers and legal scholars who proceeded on the notion that law in the proper sense is State law and that it is only in the sense (and to the extent) that the *State* recognizes alternative systems or repositories of law that any legal pluralism exists. The prototypical example of this “juridical” or “classic” legal pluralism was the hybrid orders that resulted from the recognition granted by the European colonial powers to “tribal,” “customary,” or “indigenous” laws in the territories over which they came to dominate.⁶ Griffiths—along with a growing contingent of anthropologists, sociologists and even some legal scholars—wanted to break out of this mindset and insist that the juristic definition of law was under-inclusive and that below, outside, and all around the State were other “forms” and “systems” of reglementary regimes which the State neither exercised complete control over nor had the ability to eradicate.

Equally, however, if not more important was the argument that the existence of sub-State reglementary regimes was not an idiosyncratic feature of pre-modern, underdeveloped, or “primitive” societies. On the contrary, sub-State regimes were inextricably woven into the very warp and woof of modern Western States, from “the rules set by nightclubs and applied by their bouncers”⁷ to those written and unwritten regulations governing “guilds, churches, factories and [even] gangs.”⁸ This was the reality that classic/juristic legal pluralism had overlooked, ignored, or minimized as law. And it was part of the effort to correct this oversight and highlight—indeed, privilege—the hidden reality of sub-State reglementary regimes that informed the nomenclature of the defenders of legal pluralism. The aim, in other words, was to suppress the value and significance of juristic or classic legal

5. See Griffiths, *supra* note 2, at 5.

6. See, e.g., Julius Lewin, *The Recognition of Native Law and Custom in British Africa*, 20 J. COMP. LEGIS. & INT'L L. 16 (1938) (tracing British colonial accommodation of “native law and custom”).

7. See Emmanuel Melissaris, *The More the Merrier?*, 13 SOC. & LEGAL STUD. 57, 74 (2004).

8. Griffiths, *supra* note 2, at 17.

pluralism and relegate it to a position of lesser importance, whence its depiction as “weak.” Meanwhile, the existence within modern, Western States, of alternative, sub-State regimes was to be recognized and elevated to a new level of prominence via the designation “strong” legal pluralism.

All of this points up a perduring conflict between the sociologists and anthropologists of law, on the one hand, and the professional lawyers and legal scholars, on the other. The latter, argue the former, have been imprisoned by an ideology of “legal centralism,” according to which all law is and should be State-sponsored law, uniform for all persons, equally applied across all social groups, and emphatically superior to, if not exclusive of, any and all other systems or repositories of law.⁹ Law, on this understanding, must be administered by a single, integrated set of State institutions. Furthermore:

To the extent that other, lesser normative orderings, such as the church, the family, the voluntary association and the economic organization exist, they ought to be and in fact are hierarchically subordinate to the law and institutions of the state.¹⁰

On this understanding, the only law that really exists is law that is recognized and administered by the State, and the only legal pluralism that can exist is one where the *State* recognizes multiple sources, systems, or regimes of law. Sociological and anthropological approaches, on the other hand, want to deny the State this preeminence by both expanding the definition of law and insisting that all sorts of quasi-independent sub-State reglementary regimes function in modern society.¹¹ In other words, leaving aside the ideological reflexes of legal centralism, the actual situation on the ground, argue the proponents of this approach, both reflects and should be recognized as *de facto* legal pluralism.

To be sure, there is a practical disconnect between these two approaches to and valuations of legal pluralism. As the sociologists and anthropologists of law clearly demonstrate, State law is not the only reglementary force in modern, Western society,

9. *See id.* at 9.

10. *Id.* at 3.

11. *See* EHRlich, *supra* note 1, at 39, 55-60; Griffiths, *supra* note 2, at 5-6, 9-10; Melissaris, *supra* note 7, at 73-76. *See generally* Merry, *supra* note 3.

not to mention the rest of the world. At the same time, as the legal centralists would insist, *within* any given polity, the State is under no *obligation* to recognize any of these alternative regimes; nor does their existence necessarily provide any insulation from State laws or sanctions.¹² Therefore, if the aim—again, *within* a given polity—is to gain not merely academic but practical recognition for sub-State reglementary regimes and/or endow these with the ability to refract if not preempt the application of State rules and sanctions, it seems that legal centralism is the only framework within which this might be accomplished. For, ultimately, only the State can convert rules into sanctions that are applied with anything approaching immunity. As such, *State* recognition must be recognized as the *sine qua non* of any truly meaningful legal pluralism.

This brings us, of course, to an ideological impasse. From the perspective of sociologists and anthropologists of law, ceding to the State a rightful monopoly over law can only confirm the State's homogenizing authority and reduce legal pluralism to its most meaningless effect. From the perspective of the legal establishment, meanwhile, legal pluralism, both weak and strong, threatens to undermine this very authority and with it the integrity and sovereignty of the modern Nation-State.

In this Essay, I shall attempt a reconciliation of sorts between these two perspectives on legal pluralism, via specific reference to Islamic law, most notably in its pre-modern guise. I shall begin with a provisional commitment to legal centralism, but primarily as a means of securing a *functional* place for sub-State reglementary regimes. To this end, legal centralism, as I present it, will be tempered by a demonstration that, even where the State enjoys an exclusive monopoly on the application of sanctions with impunity, it need not be the actual *source* of every rule it recognizes or applies as law. On the one hand, this preserves enough of the modern State's presumed monopoly over law to assuage misgivings about assaults on its sovereignty. At the same time, it holds out the possibility for various sub-State regimes to gain the effect of bona fide law, despite their diversity and despite their provenance in sources other than the State.

12. See, e.g., *Gonzales v. O Central Espirita Beneficente Unaio do Vegetal*, 126 S. Ct. 1211, 1216-17 (2006); *Employment Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872, 878-79 (1990).

A. *Legal Centralism Between Politics and Law*

At bottom, legal centralism is not a legal doctrine but a political one. It emerged as a corollary to the rise of the modern Nation-State and its newly asserted monopoly over law and the distribution of rights. As Georges Gurvitch so aptly observed, “judicial monism correspond[s] to a contingent political situation, namely the creation of large modern States between the sixteenth and nineteenth centuries.”¹³ Along with law, however, the new Nation-State seems also to have co-opted the legal profession as well, at least in the sense that lawyers and legal professionals come to see law *inherently* as the exclusive preserve of the State *inherently*, a perspective that apparently begins with legal education and extends over the life of a professional career. Speaking in this regard, Emmanuel Melissaris notes:

The research programme of academic legal studies seems to have become an extension of the law of the state. At best, it occasionally expands into new areas of legal regulation, such as alternative dispute resolution mechanisms, but only because and to the extent that the latter are endorsed by or co-ordinated with state law.¹⁴

From this vantage-point, lawyers habitually conflate the *political* reality of law as the zealously guarded preserve of the modern State with the very nature of law itself. This has the subtle effect of imposing a certain teleological prism through which not “the people” but the State is seen as the primary constituent of law.¹⁵ From here, numerous conclusions about law (and politics) are asserted and assumed rather than validated, while

13. Melissaris, *supra* note 7, at 59 (describing Gurvitch’s observations on judicial monism).

14. *Id.* at 76. Melissaris believes, for this reason, that only academic theory can advance the cause of legal pluralism, which will be a long time in gaining serious consideration in institutionalized jurisprudential discourse. *See id.*

15. One might ask in this regard, for example, whether the principle of “equality before the law” is primarily designed to serve the concrete needs of the people, especially in an ethnically, religiously, and culturally diverse society, or whether its primary function is to promote and preserve the legitimacy of the State. As Griffiths points out: “the concepts of ‘difference’ and ‘sameness’ are not empirical, but reflect a particular juridical value, namely that differences of person *ought* in general not to be taken account of. There is nothing in the nature of the world or of social life [that would require] anyone to agree . . . that the acts of any ordinary person and of a businessman, of a clerk and of a layman, of a patrician and of a plebian, etc., are really the same.” Griffiths, *supra* note 2, at 13.

others are summarily proscribed without ever having been coherently or substantively disproved.

From the perspective of “legal orthodoxy” (read legal centralism), legal pluralism (strong and weak) is incompatible with at least three basic *desiderata* of a modern legal system. First, it is incompatible with the “rule of law.”¹⁶ Second, it compromises the State’s rightful monopoly on the legitimate use of violence, including the deprivation of life, property, or freedom.¹⁷ Third, it violates the fundamental principles of “equality before the law” and “universality.”¹⁸

While legal centralists, particularly in modern Western societies, may hold these values to be so basic that they can hardly imagine a functional legal (*cum* political) order that does not enshrine them as first principles, this should not seduce us into the disjunctive conclusion that State monopoly over law is the only arrangement that can accommodate these interests. For history has known both nomocracies and nomocratic cultures that embrace all of these principles, with no commitment to a legal philosophy that recognizes the State as the beginning and end of all law. Islam is a case in point.

B. *Islam and Legal Centralism*

It has been long recognized that Islam¹⁹ is a religion in which not theology but law emerged as the manifestation of its genius. As the celebrated scholar of Islamic law Joseph Schacht once put it:

Islamic law is the epitome of Islamic thought, the most typical manifestation of the Islamic way of life, the core and kernel of Islam itself. . . . Theology has never been able to achieve a comparable importance in Islam; only mysticism was strong enough to challenge the ascendancy of the Law over the

16. Luke McNamara, *'Equality Before the Law' in Polyethnic Societies: The Construction of Normative Criminal Law Standards*, 11 MURDOCH UNIV. ELEC. J.L. ¶ 9, <http://www.austlii.edu.au/au/journals/MurUEJL/2004/18.html> (last visited Sept. 22, 2006).

17. *See id.*; *see also* Melissaris, *supra* note 7, at 63-65.

18. *See* McNamara, *supra* note 16, ¶¶ 9, 12, 21, 37.

19. My characterizations in this Essay are based on an analysis of the majority expression of Sunni Islam. Shiite Islam would require a different treatment, owing to certain key differences in the two systems' management of the problem of religious authority. *See, e.g.*, 'ALLAMAH SAYYID MUHAMMAD HUSAYN TABATABA'I, SHI'ITE ISLAM 9-16, 42-45 (Seyyed Hossein Nasr trans., 1975).

minds of Muslims.”²⁰

Not only, however, did Islam develop into a nomocracy, i.e., a society governed by a system of laws, it spawned a nomocratic *culture* as well. Early in its history, Sunni Islam adopted a doctrine of prophetic infallibility, ‘*ismat al-anbiyâ*’, according to which the Prophet Muhammad (like all prophets) was credited with divine protection from sustaining errors in his scriptural interpretations.²¹ Far more important than the substance of this doctrine, however, was its corollary, namely that *only* the Prophet was infallible. On this understanding, no other individual, not even the Caliph, could claim interpretive infallibility.²² For Sunnism, the divine protection implied by ‘*ismat al-anbiyâ*’ passed not to any individual but to the interpretive community as a whole.²³ As such, only those interpretations on which the community of jurists unanimously agreed (such Unanimous Consensus going under the technical term, “*Ijmâ*”) were deemed infallible and thus binding on the entire community.²⁴ Where, however, their collective efforts resulted in disagreement, competing views simply had to be left to the market of debate.²⁵ To be sure, this was not an exercise in intramural religious relativism. On the contrary, pre-modern Islam confirmed Stanley Fish’s adumbration of the distinction between relativism and pluralism:

[T]he absolutely true, exists, and I know what it is. The problem is that you know, too, and that we know different things, which puts us . . . armed with judgments that are irreconcilable, all dressed up with nowhere to go for authoritative adjudication.²⁶

In the absence of the infallible Prophet Muhammad coming back and determining this or that view to be correct, there was indeed “nowhere to go for authoritative adjudication,” that is, other than the intellectual market of exchange. Here, however, we come upon another relevant feature of pre-modern Muslim

20. JOSEPH SCHACHT, *AN INTRODUCTION TO ISLAMIC LAW* 1 (1964).

21. See Sherman A. Jackson, *Jihad and the Modern World*, 7 J. ISLAMIC L. & CULTURE 1, 6 (2002).

22. See *id.*

23. See SCHACHT, *supra* note 20, at 59.

24. See *id.*

25. See *id.* at 59-60; Jackson, *supra* note 21, at 6.

26. See Stanley Fish, *Postmodern Warfare: The Ignorance of our Warrior Intellectuals*, HARPER’S MAGAZINE, July 1, 2002, at 33.

civilization, namely its commitment to a “public reason” via which to negotiate interpretive disputes.²⁷

In an insightful essay, *Exotericism and Objectivity in Islamic Jurisprudence*, Professor Bernard Weiss points to the centrality of the doctrine that the will of the Lawgiver (God) in Islam is made manifest almost exclusively through the “uttered word” or *lafz*, i.e., of God and His Messenger.²⁸ Similarly, only that which is deducible from the uttered word through *exoteric* means, i.e., the locutionary (*dalīl lafzī*) and illocutionary (*dalīl ‘aqlī*) dictates of words, is recognized as valid interpretive proof.²⁹ The resulting legal formalism,³⁰ developed and institutionalized by the discipline of *usūl al-fiqh* (legal methodology), aimed not simply to exclude all means of apprehending meaning that were closed or limited to the world of subjective experience, but to ensure that there was equal access to *all* legal sources and proofs and that these remained in the public domain.

The result was a nomocratic *culture* of what William W. Bartley III would term “justificationism.”³¹ In this culture, all assertions of legal doctrine (read rights and obligations) had to be justified on the basis of objective legal sources and proofs. In the sense that Muslim society was governed by a set of legal rules whose derivation was itself governed by a strict set of formal rules (i.e., *usūl al-fiqh*), Islam might be characterized as having represented an instance of “the rule of law squared.”

And yet, Islamic law was emphatically neither the product nor preserve of the Muslim State. In fact, it developed in conscious opposition to the latter. Private Muslims during the first two centuries or so after the death of the Prophet Muhammad (632 CE) succeeded in gaining recognition for their interpretive efforts as representing the most reliable renderings of divine intent. By the early decades of the third/ninth century, a fledgling interpretive methodology (*usūl al-fiqh*) had emerged, with the Qur’ān, Sunna (normative practice and supplemental commen-

27. See Jackson, *supra* note 21, at 6.

28. See Bernard Weiss, *Exotericism and Objectivity in Islamic Jurisprudence*, in ISLAMIC LAW AND JURISPRUDENCE 53, 55 (Nicholas Heer ed., 1990).

29. See *id.* at 55-58.

30. On the role and centrality of linguistic formalism in Islamic jurisprudence, see generally, Sherman A. Jackson, *Fiction and Formalism: Towards a Functional Analysis of Usūl al-Fiqh*, in STUDIES IN ISLAMIC LEGAL THEORY 177-201 (Bernard G. Weiss ed., 2002).

31. See, WILLIAM WARREN BARTLEY, III, THE RETREAT TO COMMITMENT 73, 88, 91-92, 97, 98, 102 (1984) (elaborating on his so-called justificationism).

tary of the Prophet Muhammad), and the Unanimous Consensus (*ijmâ'*) of the jurists as primary sources and analogy (*qiyâs*) as the main method of extending the law to unprecedented cases.³² During this same period, the jurists—still private and doggedly independent of the State—began to organize themselves into formal interpretive communities or schools of law, known as *madhhabs*. By the fourth/tenth century, the *madhhab* had emerged as the exclusive repository of legal authority. From this point on, all juristic interpretation, if it was to be sanctioned as “orthodox” would have to take place within the boundaries of a recognized school. By the end of the fifth/eleventh century, based on the principle of survival of the fittest, the number of Sunni schools would settle at four: the Hanafî, Mâlikî, Shâfi‘î, and Hanbalî schools, all equally orthodox, all equally authoritative and all emphatically independent of the State.³³ These were the Sunni schools that would pass down into modern times.

It is important to note in this context that the role of the jurists was not purely or even primarily academic, as I understand the role of private legal scholars to be in the Civil Law tradition.³⁴ As I have noted elsewhere, the legal opinion or *fatwa* of the jurist carried the potential to confer concrete, actionable legal rights and obligations, independent of the State.³⁵ Legal *authority*, in other words (as distinct from *power*,³⁶ which the State did have) derived not from the State but from the community of jurists. Thus, when a man came to a jurist and asked if his statement to his wife constituted a declaration of divorce, the jurist’s (*mufti*’s) answer could have the effect of actually preserving or terminating this marriage, again, independent of any State supervision or validation.³⁷ Clearly, Islamic law was not

32. See SCHAFF, *supra* note 20, at 17-18, 47-48, 59-60.

33. See *id.* at 57-68.

34. See ALAN WATSON, *THE MAKING OF THE CIVIL LAW 172-74* (1981).

35. See SHERMAN A. JACKSON, *ISLAMIC LAW AND THE STATE: THE CONSTITUTIONAL JURISPRUDENCE OF SHIHAB AL-DIN AL-QARAFI* 219 (Ruud Peters & Bernard Weiss eds., 1996). In the summer of 2004, I attended a question and answer session held by the Grand Mufti of Egypt, Shaykh ‘Alî Jum‘ah, at the mosque of Sultan Hasan in Cairo, following the Friday prayer. At one point, he was asked whether it is permissible for a Muslim to sell alcoholic beverages, “even if this activity should take place in a state-owned institution.” To this the Mufti responded, “What has the state to do with this? This is *my* jurisdiction (*dawlat ayy? Da batâ‘î ana!*)!”

36. Power, as I use the term, is the ability to *force* compliance. Authority, on the other hand, is the ability to *enlist* compliance on the belief that it is right to comply.

37. I say “*could* have the effect” here for two reasons. First, the legal opinion *qua*

grounded in any commitment to any strict dictates of legal centralism, certainly not in the sense of any State monopoly over law. And yet, it emphatically and unequivocally endorsed the principle of the rule of law, indeed, as I have suggested, "the rule of law squared." As we shall see, while the only *system* of law consistently invoked by Muslim States was Islamic law, or *shari'ah*, the Muslim State resigned itself to both the distinction between executive and interpretive authority and its complete lack of the latter. In determining the substance of Islamic law, the Muslim jurist stood alone, and s/he³⁸ was accountable to no one but God. Similarly, the process of acquiring and passing on legal authority took place entirely outside the apparatus of the State. In the words of the late, great Islamicist, George Makdisi: "Neither Caliph, nor sultan, nor their viziers, nor any other person could confer this authority, or obligate the professor of law [i.e., the *mufti*] to do so (against his wishes)."³⁹

To be sure, such an arrangement would spawn sizeable disa-

legal opinion is not binding on any individual, unless it reflects the view of a Unanimous Consensus. Thus, the man in question could petition an opinion from another jurist that would authorize him to act in opposition to the first opinion. Second, there *are* instances where a legal opinion may be acted upon only under State supervision, as, e.g., where it deals with criminal sanctions, or requires investigation as a prerequisite to the determination of facts, or where there is a strong, outstanding disagreement within the legal community accompanied by a conflict between the priority to be given to a "right of man" (i.e., a private right) versus a "right of God" (a public interest). *See, e.g.,* JACKSON, *supra* note 35, at 220-21.

38. The notion of female jurists, especially in the pre-modern East, may strike some as odd, if not propagandistic. Note, however, to take just one example, that in the introduction to the authoritative manual on Hanafi law by the famous 'Alá' al-Dîn al-Kâsânî (587/11—), it is stated that the author's wife, Fâûmah, was a respected jurist whose name, along with that of her father (and later her husband) was appended to many a legal opinion. Indeed, it is stated that "[s]he used to transmit the doctrine of the school with great acumen. And sometimes when her husband, al-Kâsânî, would set out to issue a legal opinion (*fatwa*) she would intervene to correct his opinion and point out what was wrong with it, at which time he would yield to her opinion." *See* 'ALÁ' AL-DÎN ABÛ BAKR (b. Mas'ûd al-Kâsânî), *BADÁ'Î' AL-SANÁ'Î' FÎ TARTÎB AL-SHARÁ'Î'* 1:75 (A. M. Mu'awwad & A. A. 'Abd al-Mawjûd eds., Beirut: Dâr al-Kutub al-'Ilmiyah, 1997) (1318) (translation by author).

39. *See* George Makdisi, *La Corporation a l'époque classique de l'Islam*, in *THE ISLAMIC WORLD, FROM CLASSICAL TO MODERN TIMES: ESSAYS IN HONOR OF BERNARD LEWIS* 193, 206 (C.E. Bosworth et al. eds., 1989) (translation by author). A word should be said here about judges, who, unlike jurists, *were* exclusively appointed by the Muslim State. The judge's ruling, however, while binding, applied *only to the case under review* and did not affect the status of legal opinions, or *fatwas*, issued by the jurists or upheld by the schools of law. Islamic law, in other words, was emphatically *not* a system of judge-made law.

greement. A glimpse of just how much might be gleaned from the following. In 1982, a Saudi press issued an edition of a classical work, *Kitab al-Ijmâ'* (*The Book of Unanimous Consensus*) by the fourth/tenth century jurist, Ibn al-Mundhir (d. 318/930). This book catalogued all the issues on which the jurists of the day had reached unanimous consensus. The entire printed edition came out to be just 130 pages of large print. Meanwhile, a contemporary of Ibn al-Mundhir, the famous al-Tabarî (d. 310/923), composed a work entitled *Kitâb ikhtilâf al-fuqahâ'* (*The Book of Disagreement Among the Jurists*), which catalogued all the issues on which the jurists had disagreed. This work fell into some 3,000 pages in manuscript!

While the Muslim State clearly remained committed to the rule of law, it did not look upon this kind of legal diversity as a threat to or violation thereof. Nor did the fact that legal derivation remained outside its jurisdiction undermine this commitment.⁴⁰ We should be careful, of course, not to overstate matters here. The jurists did cede to the State discretionary powers via which it could supplement *sharî'ah* with edicts designed to fill in gaps or accommodate the quasi-legal (e.g., licensing of medical doctors, etc.). These edicts, however, were not the result of any "legal interpretation" and generally lasted no longer than the regime that issued them. The *madhhab*, or school of law, on the other hand, transcended political régimes and emerged as the most permanent institution in Islam, continuing all the way down to modern times.⁴¹

Turning to the issue of the State's monopoly on the legitimate use of punitive violence, here too we find Islamic law in basic agreement. While Muslim jurists recognized that this principle was not absolute (thus, e.g., Muslim parents could physically discipline their children), beyond the bright red boundary surrounding the family no one but the State had the right to

40. There was, in the formative period of Islamic law, i.e., the second/eighth century, a proposal presented to the Caliph by the Secretary of State, Ibn al-Muqaffa', to codify Islamic law. This proposal was roundly defeated, however, never to reappear until modern times and the European inspired project of the Ottomans. See SCHACHT, *supra* note 20, at 55-56, 92-93; Ann E. Mayer, *The Shariah: A Methodology or a Body of Substantive Rules?*, in *ISLAMIC LAW AND JURISPRUDENCE*, *supra* note 28, at 177, 179-182.

41. See JACKSON, *supra* note 35, at 133-41; FRANK E. VOGEL, *ISLAMIC LAW AND LEGAL SYSTEM: STUDIES OF SAUDI ARABIA* 169-308 *passim* (2000) (describing the discretionary powers of the Muslim State).

impose legal sanctions.⁴² A standard vindication of this monopoly is supplied by the seventh/thirteenth century Egyptian jurist, Shihâb al-Dîn al-Qarâfî (d. 684/1285). Explaining those instances where a legal opinion (*fatwa*), even one backed by Unanimous Consensus (*ijmâ'*), may only be acted upon by the State or under State supervision, al-Qarâfî notes that leaving the implementation of certain rules to the public will only bring harm to the latter.⁴³ He mentions specifically, inter alia, prescribed criminal sanctions (*hudûd*) and notes that:

Were the implementation of these rules left to the public and the common people set out to lash adulterers and amputate the limbs of thieves, etc., tempers would fly, egos would be stirred up, the people of character would be incensed, and chaos and strife would abound. Thus, the religious law settled this matter by delegating (the implementation of) these rules to the state (*wulât al-umûr*). The people surrender to this arrangement and accept it, willingly or unwillingly, as a result of which these great liabilities are avoided.⁴⁴

Even where the rule in question spoke to civil rather than criminal matters (e.g. divorce on grounds of a husband's insolvency), where an individual's acting on the rule threatened to upset public order, jurists called upon the State to monopolize its implementation.⁴⁵ In all of this, however, legal diversity was not deemed a theoretical impediment to the State's monopoly on the use of violence.

As for the issue of equality, here we find that Islamic law evinces a principled commitment, but to *substantive* rather than *formal* equality. The difference between these two is summarized in an exchange related by Professor Stephen L. Carter. In this exchange, a leading Christian evangelist protests that Muslim inmates (in the American correctional system) have no cause to complain because they have all the rights and privileges that Christian inmates have. To this Carter responds:

42. See JACKSON, *supra* note 35, at 218.

43. See *id.* at 220-21.

44. See SHIHÂB AL-DÎN AL-QARÂFÎ, *KITÂB AL-IHKÂM FÎ TAMYÎZ AL-FATÂWÂ 'AN AL-AHKÂM WA TASARRUFÂT AL-QÂDÎ WA AL-IMÂM* 148 (A. Abû Ghuddah ed., Aleppo: Maktabat al-Matbû'ât al-Islâmîyah, 1967) (1387) (translation by author). Among the other rules that require State supervision, al-Qarâfî mentions those that require factual determination (e.g., whether a husband is actually insolvent and thus unable to support his wife), distributing the spoils of war, collecting land and poll taxes, and the like. *Id.* at 146-55.

45. See JACKSON, *supra* note 35, at 220-23.

No doubt they do. But they would prefer to have the rights they need as Muslims. The right to do every-thing that Christians are allowed to do is not the same as the right to follow God in their own way.⁴⁶

Rather than a formal equality, where a presumably objective standard that is assumed to be religiously, culturally, and historically equidistant from all societal members is uniformly applied, Islamic law opted, *mutatis mutandis*, for a substantive “equality of respect” where the standards to which constituent communities held themselves were given recognition. This was clearly the case with regard to the various subdivisions within the Muslim community, the four schools of law, with all their intramural differences, being equally recognized.⁴⁷ It also extended, however (i.e., beyond the perimeters of criminal law, which policed, *ceteris paribus*, the greater public and not the private spaces of groups (e.g., schools, churches) or individuals⁴⁸) to non-Muslims. As I have established elsewhere, even reputedly puritanical Hanbalites upheld the two-part rule, stipulating that (1) if non-Muslims did not submit their disputes to Muslim courts, they were to be left alone, and (2) if they did submit their disputes to Muslim courts, they were to be judged on the basis of their *own* law,⁴⁹ unless they specifically requested Islamic justice.⁵⁰

46. STEPHEN L. CARTER, *GOD’S NAME IN VAIN: THE WRONGS AND RIGHTS OF RELIGION IN POLITICS* 158 (2000).

47. This was in fact the subject of my book, *ISLAMIC LAW AND THE STATE: THE CONSTITUTIONAL JURISPRUDENCE OF SHIHĀB AL-DĪN AL-QARĀFĪ*, *supra* note 35.

48. Even murder that was not the result of “publicly directed” violence, as for example what happened at Columbine High, was deemed a civil offense, not a criminal one. On this point, see Sherman A. Jackson, *Domestic Terrorism in the Islamic Legal Tradition*, 91 *THE MUSLIM WORLD* 293, 294-97 (2001). Similarly, while wine-drinking was deemed a criminal offense for Muslims (though the Hanafī school allowed the consumption of certain forms of wine, e.g., *nabīdh*, in non-intoxicating amounts) it was not so for Jews and Christians. In this light, some jurists held the wine of non-Muslims to be valuable and Muslims who destroyed it to be financially liable. No such liability attached to the wine of other Muslims (with the possible exception of cases where the latter were Hanafīs). On this point, see SHIHĀB AL-DĪN IBRĀHĪM (b. ‘Abd Allāh Ibn Abī al-Dam), *KITĀB ADĀB AL-QADĀ’* 118, 166-20 (M.A. Ahmad ed., Beirut: Dār al-Kutub al-‘Ilmīyah, 1987) (1407).

49. See Sherman A. Jackson, *Sharī‘ah, Democracy and the Modern Nation State: Some Reflections on Islam, Popular Rule and Pluralism*, 27 *FORDHAM INT’L L.J.* 88, 105-06 (2003) (discussing the Muslim response to the Zoroastrian institution of incestuous “self-marriage”).

50. Timur Kuran notes that under the Ottomans, Jewish and Christian litigants often opted for Islamic law instead of their own legal regimes, even where the Muslim authorities afforded them the right to be judged according to the latter. See Timur

It is clear, from these depictions, that legal centralism is an *ideological* commitment born of a particular *historical* experience. Like all ideologies—powerful dogmas and oversimplifications designed to sustain commitment and spawn action—it runs the risk of taking itself as the self-evolved natural order of things and losing sight of its historically informed *raison d'être*. While legal centralism may be an effective means of preserving such institutions as the rule of law, the State's monopoly over the legitimate use of force and equality before the law, it is not clear—certainly not in purely *legal* terms—why only specific concretions of these values should be taken seriously or why legal centralists should not consider alternative arrangements that might be equally effective in accommodating their agenda. Indeed, unless legal pluralism is disqualified on patently non-legal grounds, it is not clear that it is incompatible with all constructions of legal centralism.

C. *Medieval Romanticism or Pragmatic Modernity*

Of course, the medieval realities that informed the classical Muslim State have longed expired, presumably never to return. Prior to the onset of the forces that set in motion Francis Fukuyama's "End of History," States simply did not see themselves as monopolizers of law or as homogenizers of society. In the case of the Muslim State, as the Islamic intellectual historian Schlomo Goitein points out, "with the exception of some local statutes, promulgated and abrogated from time to time, the state[s] as such did not possess any law . . ." ⁵¹ Law in pre-modern times, in other words, was invariably of sub-State provenance. And to the extent that the sub-State terrain was culturally and religiously variegated, so too would law be.

In reality, however, the sub-State terrain of modern Nation-States is no less culturally or religiously diverse; nor is it devoid of active reglementary regimes. It is only the Nation-State's legal centralist underpinnings and the fact that law is now State-sponsored that obscures this reality. As Griffiths notes, analyses of legal pluralism are "almost all written under the sign of unification: unification is inevitable, necessary, normal, modern and

Kuran, *The Economic Ascent of the Middle East's Religious Minorities: The Role of Islamic Legal Pluralism*, 33 J. LEGAL STUD. 475, 484-88 (2004).

51. 1 SCHLOMO GOITEIN, *A MEDITERRANEAN SOCIETY* 66 (1967).

good.”⁵² This is because, from the perspective of legal centralism, “[u]niform law is not only dependent upon but also a condition of progress toward modern nationhood.”⁵³ Increasingly, however, whether we are talking about the Muslim world or the United States, the homogenizing agenda of legal centralism is finding itself in increasingly apparent competition with sub- and non-State reglementary regimes of various forms, origins and degrees of authority.

In the Muslim world, the problem begins with the fact that Islamic law historically precedes and transcends the State. This means that there is an entire universe of legal rights and obligations that are authoritative and deeply felt in the hearts and minds of people yet totally independent of the State. The political theory underlying the modern Nation-State is ill-equipped to deal with this. Consequently, modern Muslim States tend either to seek to co-opt the religious law or to suppress it. The result is almost invariably one or another form of Islamic “fundamentalism,” which at its core has *nothing* to do with “literalist interpretations,”⁵⁴ but is a playing out of the conflict engendered by the modern State’s presumed monopoly over law in the face of large segments of the population’s recognition of other, prior and, in their view, “superior” sources of law. Given the general pervasiveness of the logical underpinnings of the Nation-State, both sides proceed on the basis of the presumed normativeness of “juristic monism,” i.e., the view that there can be only one law of the land uniformly applied across the board. On this understanding, modern Muslim societies are transformed into verita-

52. Griffiths, *supra* note 2, at 8.

53. *Id.*

54. Contrary to the view of some scholars, classical Islam never produced a literalist canon. Even the Zāhirite school (from the word *zāhir*, “apparent”) was not literalistic but “empiricist,” i.e., it emphatically limited the deduction of legal doctrine to formally recognized sources of the law, excluding all *a priori* presumptions and speculation. In terms of legal interpretation, the Zāhirites were actually often more “liberal” than their counterparts. For example, since they rejected analogical reasoning, they rejected analogizing from gold and silver to other forms of money. On this basis, they would reject the entire edifice of laws regarding interest. Indeed, on a strict Zāhirite interpretation, there would be no ban on interest on paper money! Clearly, borrowing the term fundamentalism from the experience of late nineteenth and early twentieth century Christianity in the West has bred much ignorance and confusion. See, S.A. Jackson, *Literalism, Empiricism and Induction: Apprehending and Concretizing Islamic Law’s Maqāsid al-Shari’ah In the Modern World*, 2006 MICH. ST. L. REV. (forthcoming); SCHACHT, *supra* note 20, at 63-64; see also IGNAZ GOLDZIEHER, *THE ZĀHIRĪS: THEIR DOCTRINE AND THEIR HISTORY* (Wolfgang Behn ed. & trans., Leiden, E.J. Brill 1971) (1884).

ble powder-kegs where control over the State is deemed a prerequisite to control over the law, and where each party wants to ensure that if there is only going to be a *single* law of the land, that law is their law.⁵⁵

In the United States the situation is not as volatile. The United States enjoys the advantage of having emerged *as a modern Nation-State* where the presumption that the State had a monopoly over law was not borrowed but original. Even European immigrants who brought with them aspects of their legal heritage recognized that the process of “Americanization” entailed a degree of forfeiture.⁵⁶ This contrasts sharply with the situation of Egyptians, Syrians or Pakistanis. For Egyptian-ness and Syrian-ness—both of which connote Islam *cum* Islamic law—pre-existed the Egyptian and Syrian states. As later developments, neither of these States can assume the authority to define these nationalities in the way that the United States could do, at least in the formative stages of its history, with U.S. identity.⁵⁷ As for such modern creations as Pakistan, which came into existence as a would-be “Islamic State,” those, by definition, connoted reglementary regimes prior to and transcendent of the State.

And yet, the United States is not without its issues in confronting a sub-State terrain that is at least equally (if not more) culturally, historically and religiously diverse as the societies of the Muslim world. A good example of how this is reflected in legal terms would be the present debate over gay marriage. While the State assumes, on the one hand, the right to regulate marriage, it recognizes, on the other hand, that marriage is per-

55. I have not been able to keep up with legal debates and constitutional developments in the new Iraq. To my mind, however, given its history, whether the new constitution is able to embrace and or accommodate some or another form of legal pluralism will be key to Iraq's success in managing its multi-ethnic, sectarian, religiously pluralistic society. See, e.g., Mohamed Y. Mattar, *Unresolved Questions in the Bill of Rights of the New Iraqi Constitution: How Will the Clash Between “Human Rights” and “Islamic Law” Be Reconciled in Future Legislative Enactments and Judicial Interpretations?*, 30 *FORDHAM INT'L L.J.* — (2006).

56. See, e.g., NANCY COTT, *PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION* 9-23 (2000). Chapter One, “The Archaeology of American Monogamy,” describes how the process of Americanization entailed the forfeiture of polygamy and converted monogamy into a signature of U.S. national character. *Id.*

57. See generally SAMUEL HUNTINGTON, *WHO ARE WE?* (2004). To be sure, the process of establishing U.S. identity is never fully complete and the substance of that identity is always contested. This is clearly reflected in Professor Huntington's recent book. *Id.*

ceived by many (if not most) Americans as a “sacred” *cum* religious institution. Moreover, there are well-established religious groups in the United States, most notably within the Christian community, that condone homosexual relations and have even consecrated religious authorities who are openly gay.⁵⁸ The present effort to pass a Constitutional amendment to ban gay marriage *for all religious communities* would seem thus to run the risk both of unduly entangling the government in religion (at least for that sizeable segment of the population that sees marriage as a religious institution) and of discriminating against those established religions that do not proscribe homosexual relations.⁵⁹ In the end, the government’s “juristic monism” invariably privileges some established religions while penalizing others, an effect that can ultimately serve neither the government nor the governed.

This brings me to my penultimate point, namely that formal equality, which is the basis of the one-size-fits-all approach, is only effective with populations that are more or less substantively equal. The same law equally applied to peoples who differ historically, socially, religiously, culturally, etc., will often produce an unequal effect. This is the point of the anthropologist Sally Moore, who notes that, contrary to the assumption of the legal centralists, the social space between legislators and individuals is not a “normative vacuum,” but is “full of norms and institutions of varied provenance,”⁶⁰ all of which contribute to the law’s ultimate effect. It would seem, thus, that to the extent that government wants to sustain its image of being equidistant from the entire population, these sub-State reglementary norms and institutions would have to be factored into its legal order.

Of course, the great stumbling block in any discussion of legal pluralism is the question of modality. Given our commitment to individualism and equality, how are we to accommodate different laws applying to different people? The shortest answer

58. For example, delegates to the 2003 Episcopal General Convention confirmed the consecration of Gene Robinson as bishop of New Hampshire. Robinson is openly gay and was at the time in a long-standing relationship with another man. See Laurie Goodstein, *Openly Gay Man is Made a Bishop*, N.Y. TIMES, Nov. 3, 2003, at A1.

59. See, e.g., Toni Lester, *Adam and Steve vs. Adam and Eve: Will the New Supreme Court Grant Gays the Right to Marry?*, 14 AM. U. J. GENDER SOC. POL’Y & L. 253 (2006) (arguing that a ban on gay marriage would violate the U.S. Constitution on equal protection grounds); Richard M. Lombino, II, *Gay Marriage: Equality Matters*, 14 S. CAL. REV. L. & WOMEN’S STUD. 3 (2004).

60. Griffiths, *supra* note 2, at 34.

to this question is that we already do. The laws regulating motor-vehicle operation or statutory rape treat persons differently according to their age.⁶¹ In some states, gay couples qualify for spousal benefits (e.g., insurance) while (unmarried) heterosexual couples do not.⁶² In this particular case, while it can be known that a couple is of the same sex, it is difficult to prove that they are even actually gay. At any rate, the point in all of this is that individuals, even if only for political purposes, remain members of groups. And different groups are, willy-nilly, subject to different laws and legal sanctions. The question, as such, is not whether a society that values individualism and equality can accommodate legal pluralism but, rather, which groups within that society will qualify for specific legal recognition.

CONCLUSION

This Essay has sought to suggest that legal pluralism, far from being a romantic notion from the medieval past, may offer some very practical alternatives for the culturally, religiously, and ethnically diverse twenty-first century Nation-State. This is not to suggest a complete scrapping of the legal centralist posture. It is simply to suggest (and recognize) that all law does not have to *originate* with the State, even as the State maintains its monopoly as legal executive. To some extent, this is already taking place and being recognized. As Klaus Günther points out, all kinds of sub-State non-governmental organizations (e.g., Amnesty International or Human Rights Watch) and “extra-State” international organizations (e.g., the World Trade Organization or the World Bank) have acquired the ability to hold States to legal norms and standards (e.g., of what is humane or what is protectionist) that are transcendent of any individual State.⁶³ Similarly, under the influence of U.S. law firms, private arbitration has been transformed into a veritable “international *lex mercatoria*”

61. See, e.g., N.Y. Penal Law §§ 130.25-130.35 (McKinney 2001) (differentiating degree of rape by age of actors); N.Y. Veh. & Traf. Law § 501 (McKinney 2005) (setting minimum age for operation of motor vehicle with general Class D license at eighteen years).

62. See, e.g., Cal. Fam. Code §§ 297-297.5 (West 2005); N.J. Stat. Ann. §§ 26:8A-2-4 (2004) (requiring both persons to be members of same sex or over age sixty-two to be eligible to register for domestic partnership and receive spousal benefits).

63. See Klaus Günther, *Legal Pluralism and the Universal Code of Legality: Globalisation as a Problem of Legal Theory* 5 (2003), <http://www.law.nyu.edu/clppt/program2003/readings/gunther.pdf> (last visited Oct. 5, 2006).

that is largely detached from national legislation and regarding which “national governments are only needed as bailiffs for the execution of the court decision.”⁶⁴ In such a context, it would seem ironic that national governments should grow comfortable with non-State reglementary regimes that originate ‘above’ or outside their jurisdiction, but look upon those sub-State reglementary regimes that exist and or develop within their territorial boundaries as constituting a mortal threat to the dictates of legal centralism and the integrity of the Nation-State.

64. *See id.*