This article explores the validity of Muslim claims for a particularistic Islamic law of nations. Such claims include the normative rejection of current international law in whose creation and continued development colonised peoples had little active role. Yet irrespective of its geographic origin and alleged normative shortcomings, international law is primarily a modern phenomenon serving functional needs not attainable by pre-modern precursors. Discussing the nature of religious law and examining the incomplete reception of the institutional “package” of modernity, the article aims to highlight why historical models of Muslim international relations share the same shortfalls as other unilateral attempts by “universal states” to regulate inter-group relations. The demand for greater recognition of religious law both domestically and internationally is a phenomenon driven by dissatisfaction with the costs of the modernisation process. The appeal of religious law is based on its perception as a language of justice. Nevertheless, reliance on religious law is unlikely to yield satisfactory results in either practical or intellectual terms, and is unlikely to resolve the contradictions of the global modernisation process.

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Modernity and International Law

Critiques of the alleged narrow cultural outlook of current international law often point to historical precursors as evidence of the rich traditions around the world that were cast aside by colonialism and the distinctly Christian basis on which Western European states had organised their affairs.¹ Such critiques miss the fundamental epistemological and normative character of today’s international law as a primarily modern phenomenon.

International relations began as soon as at least two polities came into social, economic or military contact. It is reasonable to expect that such contacts would eventually lead to the establishment of certain standards of appropriateness in interactions. Pre-modern cultural centres that conceived of themselves as “universal states”, i.e. as the respective centre of the known universe over which they had mutually exclusive, comprehensive ambitions,² displayed early types of “inter-group normativity” characterised by their unilateral form and substance, flowing from a civilised core to regulate relations with outside barbarians: “However, the predominant approach of ancient civilisations was geographically and culturally restricted. There was no conception of an international community of states co-existing within a defined framework.”³

The recognition of formal equality is a decisive characteristic of modern international law, constituting a departure from the mutually exclusive claims of universal authority distinctive of pre-modern conceptions of international relations:

Such systems of international rules and practices, however, were not truly international, in the modern sense of the term, since each system was primarily concerned with the relations within a limited area and within one (though often more than one) civilization and thus failed to be world-wide. Further, each system of international law was entirely exclusive since it did not recognize the principle of legal equality among nations which is inherent in the modern system of international law. It was for this very

reason that there was no possibility of integrating one system with another. Though each freely borrowed from the others without acknowledgment, each system claimed an exclusive superiority over others.\textsuperscript{4}

The religious wars in Europe were fought precisely over the claim of exclusive superiority of one ideological system over another. Their crippling cost and inconclusive outcome led to the principal normative basis of the Westphalian system: the coexistence of distinct entities quite indifferent to each other’s internal constitution. Modern international law can therefore be conceptualised as a functional response to the demise of the normative unity of the Church in the wake of the Reformation and the devastation of the Thirty Years War.\textsuperscript{5}

Modern international law is inter-state law properly speaking because it accepts the formal equality of different units that dispute each others’ normative vision and substitutes consensually agreed rational norms for the divinely sanctioned, undisputed normative unity characteristic of Western Christendom prior to the Reformation.\textsuperscript{6} This reflects the loss of moral certainty and the realisation after the inconclusive religious wars “that a certain degree of right might exist on both sides.”\textsuperscript{7} This formal-rational character of modern international law is intimately tied to the development of the institutionally organised bureaucratic state (\textit{Anstaltsstaat}) and its underlying


\textsuperscript{6} On the claim of religious unity of Western Christendom under the diarchy of Church and Emperor despite its political and territorial subdivisions, and the position of Eastern Christendom after the Great Schism see chapters 1 and 2, respectively in Wilhelm Georg Grewe, \textit{The Epochs of International Law}, trans. Michael Byers (New York: Walter de Gruyter, 2000), pp. 37-60.

conceptions of sovereignty and territorial integrity as they emerged from the Westphalian peace.

It is thus correct that the modern conception of international law developed among Christian nations and certainly contains religiously inspired concepts. But what makes it “modern” and constitutes its most distinguishing characteristic is the repudiation of a normative certainty emblematic of pre-modern universal states and their unilateral universalist ambitions. What is crucial is thus not the choice between Christianity or other religious beliefs, but between religion or reason as the main ordering principles, i.e. between their respective “sacred laws”\(^8\) or the formal rationality of modern, secular and bureaucratic law. Johansen’s discussion of the sacred character of Muslim jurisprudence (fiqh) builds extensively on this insight:

Max Weber analyzes the fiqh as a “sacred law”, a category under which he subsumes Islamic and Jewish law, Hindu law, medieval canon law and, in general, all legal norms controlled and applied by “priests”. In Max Weber’s theory, the concept of sacred law seems to fulfil a triple function: it makes norms of behaviour in different civilizations available as points of comparison for a theory on the history and evolution of the rationalization of the law in modern Europe. At the same time it helps to explain why civilizations with a sacred law cannot enter the process of modernization. Such a law, according to Max Weber, is considered to be “one of the most important barriers against the rationalization of the legal order and of economy”. The sacred law, therefore, serves to mark off the limit between a modern and a pre-modern society and this may, in fact, have been the main function of this category in the context of Weber’s theory.\(^10\)

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Weber’s main motivation was the development of theoretical tools permitting the comparative study of culture in order to answer the main question defining his sociology: why did modernity, characterised primarily by rationality, develop in Western Europe and nowhere else? He ascertained, in my view correctly, that wherever sacred scripture constitutes the main source of law whose norms are established through a process of legal revelation (Rechtsoffenbarung), the resulting legal system remains structurally irrational (formell irrational). Because the development of law is divorced from the practical preoccupations of society and no mechanism for the systematic creation of new law exists, “the role attributed to the revelation, the tradition and the jurists as their interpreters weighs heavily in favour of stereotyped forms and norms which are hostile to the rationalization of the practical functions of law.”

The disruptiveness of the modernisation process which inevitably destroys existing social ordering mechanisms and social systems (Lebensordnungen) challenges not only traditional livelihoods but, more importantly, identities and normative systems. It thus entails a significant loss of individual and group autonomy under the impact of alien, incomprehensible forces (Fremdbestimmtheit) and is therefore strongly resented as a threat to the individual’s and group’s definition of the self. Durkheim used the term “anomie” to describe this condition of alienation and purposelessness characterised by the weakening of established norms in a society undergoing considerable economic and social change, especially when traditional values which continue to be widely professed are increasingly out of step with the altered

socio-economic reality, presenting an ideal unobtainable in real life. It is not uncommon that the search for “authenticity” to counter this normative dissonance sometimes seeks release in political violence.

Colonialism and Defensive Modernisation

Always a destructive and upsetting process, modernisation in the Muslim world was experienced as especially alienating and threatening. Just like in the rest of the developing world, two aspects are noteworthy: first, the process of modernity did not come about as a result of indigenous factors but followed outside domination, often accompanied by formal colonialisation. Secondly, this external imposition entailed a very rapid modernisation process often overwhelming the capacity of local institutions to adapt. Both factors strongly reinforced the inherently alienating and threatening character of modernisation, while foreign domination counteracted its liberating and empowering aspects. By precluding legitimate means to assert autonomy, only deviance or resistance remained as possible reactions.

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We have described international law as a quintessentially modern phenomenon which in its original European context had an indisputable progressive thrust. In dependent territories, by contrast, international law arrived as part of the overbearing package of modernity imposed by force and shed of its liberating elements. The contested universality of international law therefore cannot be adequately discussed in isolation from the spread of modernity, which irrespective of its inevitability and normative desirability was and continues to be perceived in large parts of the world as the illegitimate imposition of Western ways, thereby tainting the very idea of progress.

Napoleon’s occupation of Egypt in 1798 began a series of military defeats for the Muslim world, through which henceforth the destiny of the region was determined by outsiders. The impact of this single event, and the unbroken\(^{20}\) chain of major defeats until 1967, 1991, and 2003, that followed it cannot be underestimated, especially if contrasted with the normative ideal and grandiose self-image derived from a particular reading of history:

Napoleon’s expedition inflicted severe narcissist wounds on the Islamic self-image which have yet to heal. The 1967 defeat inflicted similar wounds. … This Arab complex [goes beyond the issue of modern colonialism, it] is based on a strong delusion concerning Europe’s usurpation of our right to make history and to lead the world, in a moment of historical lapse, as is sometimes said here. We view the right to world leadership as if it were a divine right, for which God has chosen Arabs and Muslims. Thus, Arab

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unification is a necessary step to retrieve that right. Arabs and Muslims would always find it difficult to accept their position on the margins of modern history since they view themselves, consciously or unconsciously, as members of a great nation and the bearers of God’s true religion and that God is on their side.21

The resulting attitude towards modernity prevented in the Muslim world effective responses to the challenge of a dominant West.22 The response of the Muslim world throughout the 19th and 20th centuries remained paralysed, not least due to the memory of the relatively successful Islamic record during this competition in the past. In contrast, Japanese society already during the time of its self-imposed isolation from the outside world (sakoku) had engaged in a concerted and self-conscious attempt to learn Western arts (rangaku, lit. Dutch learning) to overcome its technological backwardness23. The Japanese immediately recognised the dramatically altered strategic realities after the forceful opening of their country in 1853 at the hands of American troops.24

While Japan resented the indignity of the subsequently imposed unequal treaties at least as intensely as did the Muslim world, Korea or China, it was quickly realised that a return to traditional policies was virtually impossible in the face of a dramatically altered geo-strategic reality.25 These treaties and the inferior international position which they ratified became the focus of a concerted and realistic medium term national policy. Realistic in so far

23) From 1640 until the forced opening of the country in 1853 the sole contact with the West approved by the Tokugawa shogunate was via a small Dutch settlement on the man-made island Dejima off Nagasaki. Grant K. Goodman, Japan and the Dutch (Richmond, Surrey: Curzon, 2000).
as Japanese decision-makers understood that the imposition of such unfair terms was less attributable to the wickedness of the foreigner than to one’s own technological, administrative and economical weakness. Defensive modernisation\(^{26}\) refers to the structural necessity to emulate innovations that affect a state’s relative power position. The structure thus forces its constituent units to become alike, a process described as the “sameness effect”: those engaged in a competitive environment, such as firms in a market or states in an anarchical international system, must adopt any innovation by their competitors, or risk destruction, thereby becoming functionally and organisationally similar to each other.\(^{27}\) Accepting this logic, the Japanese leadership embarked for defensive purposes upon a single-minded effort to industrialise and modernise in order to catch up with the dominant West and be able to compete effectively, revise the indignities suffered, and ultimately reclaim a prominent, if not dominant, position in the international system felt to be rightfully commensurate with the Japanese national self-image.

This strategy relied not on appeals to justice or a glorious past, but on a deep structural adjustment of Japanese state, economy, and society. Initiated already by the Tokugawa government after 1853, and fully coming into force after the Meiji Restoration in 1868 the country embarked on a dedicated course of economic and military reform under the banner “enrich the country, strengthen the military” (fukoku kyohei).\(^{28}\) An important part of this policy lay in the deliberate destruction of old institutions that presented obstacles to the stated goal of industrialisation and modernisation, replacing them with new institutions deemed more congenial to economic and political modernisation. Whatever normative position we take on this policy’s explicit acceptance of imperialism as a desirable and necessary aim of foreign policy, it is difficult to disagree with its unquali-

\(^{26}\) Steve Fuller, Science (Milton Keynes: Open University Press, 1997), pp. 121-134.

\(^{27}\) Kenneth Neal Waltz, Theory of International Politics (Reading, Mass.: Addison-Wesley, 1979), p. 128.

fied material success: by 1905 Japan had defeated Russia and risen itself to great power status, thereafter becoming accepted as an equal member of the international community.

This process of national renaissance was an explicit exercise of realpolitik unencumbered by domestic normative preoccupations. The superiority of the ways of the West were matter-of-factly accepted, and deliberate efforts to emulate them were initiated. This included the complete reception of international law without any criticism for the period in question, informed by the realisation that the successful revision of the unequal treaties could only be achieved within the framework of the existing legal and political system, underpinned by sufficient economic and military might.29

The success of Japan was greatly admired throughout the Muslim world, and especially her victory in 1905 gave great impetus to reform efforts aimed at introducing efficient administrations, Western law, and constitutional government.30 The superiority of the Western state model was well understood in the Muslim world. Analogous to the situation in Japan early attempts were made to reform existing governance, legal, economic, educational, and economic institutions along the Western model with the aim to compete more effectively. Perhaps the best known and most important of these efforts was the Ottoman Tanzimat.31


learn from the West was well acknowledged, leading to a “liberal age” of Arab thought. 32 But unlike Japan, Muslim reform efforts proved unable to dislodge those pre-modern institutions that prevented an effective adaptation and assimilation to the needs of a competitive international system. Max Weber’s analytical model of the sacred law as “one of the most important barriers against the rationalization of the legal order and economy”33 helps us to explain the relative failure of the Muslim world to find adequate responses to the challenge of modernity.

Without restating a large body of literature in English on modern Muslim state building, 34 we can assert that overall these reform efforts were not effective.35 Irrespective of this lacklustre performance in absolute terms,36 their relative record vis-à-vis other parts of the world is even more noteworthy. Generally, the relative uncompetitiveness of Muslim societies is not acknowledged by indigenous elites and publics. Whenever the comparison to more successful political economies cannot be avoided, the

relative failure is explained as the result of foreign domination, downplaying thereby individual and collective responsibility. This attitude is often accompanied by an insistence that many advances of the West actually had an Islamic origin.\textsuperscript{37}

The 2002-2006 series of UNDP Arab Human Development Reports\textsuperscript{38} has been one of the rare instances of an unbiased, comprehensive and brutally honest indigenous\textsuperscript{39} account of how badly their societies had actually been faring.\textsuperscript{40} The controversy it engendered is an indication that despite two centuries of engagement with the superior West and countless reform movements, an accurate factual assessment necessary for an effective process of emulation and synthesis was not accomplished. Unlike the Japanese in


the mid 19th century, Muslim reformers were never able or willing to fully dispense with anachronistic institutions, thereby preventing the arrival of their societies into the modern era. This attitude towards modernity was well expressed by the Syrian philosopher al-Azm:

A cultural form of schizophrenia is also attendant on the Arab (and Muslim) world’s tortured, protracted and reluctant adaptation to European modernity. …

In the marrow of our bones, we still perceive ourselves as the subjects of history, not its objects, as its agents and not its victims. We have never acknowledged, let alone reconciled ourselves to, the marginality and passivity of our position in modern times. In fact, deep in our collective soul, we find it intolerable that our supposedly great nation must stand helplessly on the margins not only of modern history in general but even of our local and particular histories.

We find no less intolerable the condition of being the object of a history made, led, manipulated, and arbitrated by others, especially when we remember that those others were (and by right ought to be) the objects of a history made, led, manipulated, and arbitrated by ourselves. Add to that a no less deeply seated belief that this position of world-historical leadership and its glories was somehow usurped from us by modern Europe fi ghaftaten min al-tarikh – while history took a nap, as we say in Arabic.41

The experience of continuous decline over the past two centuries led to a disproportionate focus on the challenges of modernity and the threat they pose to traditional values and notions of identity,42 marginalising the perception of opportunities for individual and collective advancement. The adaptation of the Western nation-state model and the integration into the existing international system governed by an international law whose substantive and procedural content had been established prior to the accession

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42) Berman expresses the dual nature of the modernisation process that combines both anxiety and promise: “To be modern is to find ourselves in an environment that promises us adventure, power, joy, growth, transformation of ourselves and the world – and, at the same time, that threatens to destroy everything we have, everything we know, everything we are.” Berman, *All That is Solid Melts into Air*, p. 15.
of the emerging Muslim states must be seen in this context of a reluctant reception of a truncated modernity:

As a final illusion, we formed the conviction that it would be possible to be selective with the nature of the things we were obtaining: to separate the wheat from the chaff, to choose technology and firearms while heroically ruling out the subversive, laicizing ideas which lay behind them. To be, in short, integral Muslims wholly subservient to the omnipresence of Shari’a, enterprising capitalists, efficient technocrats and – why not? – ardent nationalists as well. But then, before we had had time to take proper stock and get things in hand, we found ourselves on the wrong side of the stream: between what was happening in the world and what was happening in our heads, an abyss had opened up. Suddenly the bucolic vacation was over for in the meantime the world had changed, history had moved on, our familiar ecology had crumbled, and we were left stumbling about in no man’s land, neither the land of our forefathers nor that of the new masters.43

Perhaps the selective importation of some aspects of modernity could have been possible in a conscious and managed process of technological, organisational and legal reception that blends with local traditions to create a workable fusion akin the Japanese model. While conceivable in principle, such a fusion did not succeed anywhere in the Muslim world where the reform movements of the 19th century were, according to Ellul, already “ambiguous and quite alien to modern science.” These early reformist responses by writers such as Muhammad Abdu, al-Afghani or Rashid Rida were subsequently “totally absorbed by a tendency that is more fundamentalist than reformist in its nature.”

The fundamentalist movements of the 20th century build explicitly on these earlier premises about the permissibility of technological reception coupled with a strong proscription of normative change:

One must simply adopt the sciences and the techniques of the West without any reticence or superstitious backwardness, preserving, however, the integrity of the entire corpus of Muslim beliefs and their juridical and social applications. Science is accepted, provided that it does not encroach upon the realm of Islamic thought. One welcomes

43) Shayegan, Cultural Schizophrenia: Islamic Societies Confronting the West, p. 15.
technical progress, provided that it does not substantially modify the mentalities and the social and family structures.\textsuperscript{44}

Such 20th century Islamist writers\textsuperscript{45} think that the products of modernity can, and perhaps should, be accepted while strongly refusing its underlying principles. This “renewal” or “renaissance” of Islamic thinking was primarily expressed by an inordinate emphasis on the importance and application of Islamic law,\textsuperscript{46} especially in the public sphere where it was historically rather weak. Whether this attempt at filling the mental “abyss” resulting from wandering in an intellectual “no man’s land” has been ultimately successful remains questionable.\textsuperscript{47} The unqualified demand that the entire corpus of Islamic legal and social norms must be transposed unaltered into a socio-economic reality characterised by Western institutions, productive processes and organising principles is bound to create significant tensions which remain largely unanswered.\textsuperscript{48} At the same time it is important to recall that both political Islamism and the demand for greater recognition

\textsuperscript{44} Ellul, “Islam and Modernity”, p. 30.


of religion in the legal sphere are not peculiar to the Muslim world, but part of a broader global resurgence of religious political thinking.49

Unwilling Reception of Western International Law

International law is a prime example of an imported organising principle, necessitated by both the realities of an international system whose rules are set by other, more powerful actors, and the internal logic of a system based on the notion of nominally co-equal territorial states. Due to the imposed and humiliating manner in which the Muslim world was brought into the existing system of international law in the context of colonialism, elite and popular attitudes towards international law have shown a considerable degree of normative ambivalence, if not outright hostility, partly due to the above indicated anti-European complex.50 Nevertheless, one must not forget justifiable grievances stemming from a long historical memory of exploitation in which the rules of international law have quite reasonably been perceived as perpetuating the rights and interests of powerful Western states, without regard for the legitimate socio-economic needs of weaker non-European states nor respecting their cultural heritage. The “absurdity” of such an “international caste system” has done lasting damage to the normative acceptance of the substantive and procedural content of international law.51


Before exploring the validity of claims to Islamic exceptionalism and its attendant normative challenge to the universality of international law, we must therefore bear four points in mind:

Firstly, the reception of modern institutions – including the state, Western legal systems and international law – occurred in a context of external economic and military superiority, often imposed against considerable societal resistance in defence of established interests and social mores: “The idea, thus, of state sovereignty entailing the exclusive right to determine what is and what is not the law, or even what is or what is not an acceptable legal interpretation, is at best, in the context of classical Islam, a very violent one.”52

Secondly, the strength of domestic institutional, especially religious, interests denouncing the imposed character of many institutional innovations prevented the complete reception of Western institutional systems, leading to a truncated modernisation of exterior institutional forms without an understanding or appreciation of their necessary underpinnings in normative and functional substance. This partial adoption of Western institutions has

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led to generally highly ineffective, often repressive state structures in most of the developing world.\(^{53}\)

Thirdly, irrespective of these problems of reception of Western political and institutional models outside their original cultural context, and irrespective of particularistic claims to cultural specificity, the Westphalian model of territorial states exhibiting a number of common governance structures is today universally accepted by states.\(^{54}\) This means that virtually all political communities are either organised in a Western-type state or aspire to secede from an existing one in order to form their own. Leaving aside the hypothetical question whether alternative forms of political organisations are conceivable, the existing basic model of sovereign, territorially based states has \textit{de facto} and \textit{de jure} been adopted by virtually all political entities, irrespective of cultural, economic, geographic, or religious difference.

Finally, however, despite the universal adoption of the European model of a sovereign territorial state, the underlying normative and functional “package” remains deeply controversial. Such normative resistance notwithstanding, the success of the modern bureaucratic state depends, as Weber convincingly laid out, on the interplay of a number of complementary aspects, reinforcing and tempering each other.\(^{55}\) Western international law can be conceived as part of the functional and normative package attached to the modern bureaucratic state:

The foundations of international law (or the law of nations) as it is understood today lie firmly in the development of Western culture and political organisation. The growth of European notions of sovereignty and the independent nation-state required an acceptable method whereby inter-state relations could be conducted in accordance with commonly accepted standards of behaviour, and international law filled the gap.\(^{56}\)

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This description sees international law as primarily a functional response to a new type of political organisation where a multitude of nominally equal and separate states succeeded to pre-modern “universal states” with mutually exclusive ambitions.\textsuperscript{57} But it would be naïve to deny the significant congruence of international law with the beliefs and interests of the select group of powerful and Christian states instrumental in its development, and global expansion. The expansion of Western international law left in much of the Third World “a legacy of bitterness over their past status as well as a host of problems relating to their social, economic and political development.”\textsuperscript{58} Challenges to the universality of international law focus on this aspect, decrying that the cultural norms of non-Western nations have not been duly taken account of and that the currently existing international legal rules reflect the economic, political and strategic interests of powerful Western/Northern states and continue to discriminate against weaker Eastern/Southern states. Muslims have been particularly vocal in this criticism, pointing to the existence of a large body of prior Islamic international legal norms as the basis of an alleged particularistic notion of international law.

**Differing Perspectives on Islamic Law**

Apart from the linguistic and cultural obstacles that have to be overcome, Islamic law poses a number of distinct challenges that are compounded when attempting to evaluate the claim to a distinct Muslim legal perspective on international relations. Early restatements were mostly of an apologist bend, presenting the historical Islamic law of nations as a precursor to modern international law, stressing their mutual compatibility and the intellectual debt of the latter to the former:

> The earliest European writers on international law, such as Pierre Bello, Ayala, Vitoria, Gentiles and others all hailed from Spain or Italy, and they were all the product of the renaissance provoked by the impact of Islam on Christendom. … [Their works not having counterparts in Roman or Greek literatures] they are but echoes of these Arabic works


\textsuperscript{58} Shaw, *International Law*, p. 38.
on *jihad* (war) and *siyar* (conduct in time of war and peace). There must we seek for the link between the Roman and the Modern Periods, and there must we recognize the origin of the epoch-making change in the concept of international law. And we see the role played by Islam in the world-history of international law.59

One of the more recent and potentially authoritative works, Weeramantry’s monograph is characterised by a self-conscious effort to present Islamic law to a sceptical Western audience in the best possible light. The lack of critical discussion and his heavy reliance on a relatively small number of mostly dated commentators does not serve his stated aim of creating an appreciation for the civilisational contribution of Islamic law. Especially troublesome is his unqualified acceptance and uncritical restatement of problematic positions such as the “oneness of mankind under Islamic law” and his ensuing assertion that the concept of *jihad* in the early Islamic law of nations really was a doctrine of peaceful coexistence.60 In contrast, the dissertations by Kruse, Krüger and Lohlker present a more nuanced and ultimately convincing picture.61 Unlike the other authors discussed, they focus on historical state practice, as opposed to an exclusive reliance on dogmatic teachings.

The first, and still somewhat underestimated major difficulty in the study of Islamic law lies in its purported sacred character. The divine character of the law poses two distinct challenges: the ultimately inscrutable divine will is revealed in a particular form, leaving a varying latitude of interpretation but never permitting abrogation because allegedly human reason is limited in both capacity and legitimacy by “the unalterable propositions of the divine


origin of the law.” As Wael Hallaq continues to point out: “This basic but crucial fact restricts, on the one hand, the range of possible interpretations, yet allows, on the other hand, a wide spectrum of interpretative possibilities within the divine limitations of the law.”

It is difficult for someone not steeped in a religious belief system to accept divinely ordained limitations and the attendant restrictions they are claimed to place on the exercise of rational argument. Engaging in a jurisprudential discourse with adherents of a system of sacred law requires approaches quite at variance with those familiar to Western lawyers. The emphasis on individual conscience, belief as opposed to rational proof, and divine sanction are common features complicating the study of any sacred law. The study of Islamic law is further encumbered by its “microcosmic” conception of law which Vogel defines as “law that is inner-directed instance-law, law linked to a concrete event and generated by an act of individual conscience” as opposed to “macrocosmic” conceptions of “outer-directed rule-law, law in the form of general, abstract rules issued by an external, worldly institution.” This microcosmic focus is partly responsible for the fixation of Islamic jurisprudence with fastidious detail unconnected by an overarching systematics, compounded by the multiplicity of equally orthodox but distinct jurisprudential schools. The casuistry is difficult to penetrate and structure systematically. More importantly, it considerably


63) Frank E. Vogel, Islamic Law and Legal System: Studies of Saudi Arabia (Leiden: Brill, 2000), pp. 26-32. These conceptions are ideal types and do not constitute stark dichotomies, but rather the spectra or axes of a matrix along which different composite legal systems are situated. Even the “purest” Islamic legal system shows some macrocosmic ideals, just as Western legal systems show distinct microcosmic components, such as the principle of equity or trial by jury in the common law system.

64) While the dissent between and even within these schools does often pertain to matters of principle of great consequence, the obsession with detail has driven even well-versed scholars such as Goldziher to denounce it as “petty ritual and legal dissent”, “foolish fastidiousness”, “tedious quibbling” and “over-subtle hairsplitting”. Ignaz Goldziher, Vorlesungen über den Islam, 2. Auflage (Heidelberg: Carl Winter, 1925), pp. 50, 54-57, 67; quoted and discussed in Johansen, “The Muslim Fiqh as a Sacred Law”, pp. 45, n. 161.

complicates a clear assessment of the position of Islamic law on a number of controversial issues.66

The second major obstacle to the penetration of Islamic law is the extreme discrepancy between the dogmatic ideal with which its jurisprudence (fiqh) is exclusively concerned and the legal reality which, although not acknowledged by doctrine, diverged sharply from the allegedly uniform and immutable stipulations of the sacred law. Legal dogma takes notice that it depends for its realisation on a sanctioning state but refuses to accept the reality of actual governance where historically the state has always assumed very far-reaching, but dogmatically unacknowledged legislative and judicial competences: “The law is constituted according to its doctrinal ontology (Rechtsquellenlehre) without the state, but it exists in the world as an applied law only by virtue of the state.” The tension between dogmatic pretence and the unacknowledged functional role of the state points to “an area in which historically the compromise between the two must be found, even if it theologically cannot be found.”67

The contradiction between the “dogmatic no” and the “historical yes” that Johansen alludes to has characterised the development of Islamic law


from its very beginning.\textsuperscript{68} Easily overlooked in contemporary debates about the supposedly unalterable tenets of the sacred law of Islam is the historical compromise found with “royal and hereditary, imperial and sovereign governments”, governance structures completely at variance with both the doctrinal content of the law and the Prophetic model. Yet the historical record is unambiguous that a compromise was indeed found,\textsuperscript{69} an analogy likely to hold with regard to the accommodation with the requirements of modernity:

\begin{quote}

each time in history that the idealist “no” came into collision with the historical “yes”, the general tendency of this history has always been towards a victory of the historical “yes” over the idealist “no” to such a degree that it condemns the idealist point of view in an irrevocable manner, marginalizing it particularly to other times.\textsuperscript{70}

\end{quote}

This “historical yes” has contradicted the “dogmatic no” throughout the development of Islamic law, yet the persistent denial that any accommodation is possible, let alone actually took place, continues to be a major obstacle to a better understanding of the legal reality throughout the Muslim world. Attitudes towards modern international law are particularly informed by insistence on allegedly immutable dogmatic obstacles. Here it is often claimed, paradoxically by both Western “essentialists” and Islamist protagonists, that the unalterable principles of the divine law always will and always have taken precedence over rationally derived, and therefore “merely” man-made norms of international conduct.

\textsuperscript{68} With the possible exclusion of the period of direct governance by the Prophet guided by a process of continuing revelation described as a “theonomic Situation” where no contradiction between divine revelation and human reason is deemed to exists.\textsuperscript{69} With the exclusion of the period of direct governance by the Prophet guided by a process of continuing revelation described as a “theonomic Situation” where no contradiction between divine revelation and human reason is deemed to exist.\textsuperscript{70} With the exclusion of the period of direct governance by the Prophet guided by a process of continuing revelation described as a “theonomic Situation” where no contradiction between divine revelation and human reason is deemed to exist.


As discussed above, Weber correctly identifies the recourse to revelation as the major dissimilarity with the purely rational law that plays such an indispensable role in the modern bureaucratic state. Yet, there is a major difference to state, as Weber does, that the sacred laws of any religion is fundamentally dissimilar to the formally-rational law of modernity, as opposed to claiming that there is something peculiar that sets Islamic law apart from all other legal systems and religious traditions. Schacht began his book with an explicit reference to the Weberian concept, but he uses it less to differentiate religious law from modernity with which he was not particularly concerned, but to set Islamic law apart from other religious legal systems: “Islamic law is a particularly instructive example of a ‘sacred law’. It is a phenomenon so different from all other forms of law … [even] Jewish law and Canon law are sensibly different.” This understanding dominated Western thinking ever since a serious study of Islamic law began in the mid 19th century and continues to exert a strong influence on popular and non-specialised academic thinking to this day:

There is a common view that the shari’a is fixed and clearly discernible from its sacred sources. For Muslim ideologists this fixity and clarity are functions of its divine origin. For many Western observers they are functions of the fixity of “Muslim society”, totally other from “the West”, with religion as its essence.

Characteristics of a Sacred Law

Societies evolve, social mores adapt, laws change. The fact that Islamic law dogmatically does not acknowledge this change has encumbered our understanding of this inevitable process. It is nevertheless apparent that change and adaptation occurred, albeit scholarly recognition of this process began belatedly only in the later 20th century. Early Western scholarship held that “*fiqh* is not a legal system but a deontology because it mingles religion, ethics and politics in an unsystematic way in order to construe the image of an ideal society.”

Such a system could not be analyzed in legal terms because it was based not on legal principles and rational theory but on impenetrable divine will. As a “deontology”, *fiqh* was seen as an amalgamation of undifferentiated individual duties, excluding the notion of rights, and not permitting the separation between law, religion, cult and ethics. The methods of comparative jurisprudence were deemed inapplicable because *fiqh* was not seen as law properly speaking.

Weber is dissatisfied with the term “deontology” and suggests instead the concept of “sacred law”. He realises that ideas and values can take different religious forms yet serve functionally equivalent tasks in their respective social systems (*Lebensordnungen*), thus permitting structured comparison. Weber’s concept is primarily a tool for situating and differentiating in his model of universal history between modern European law and the sacred laws of other civilizations (including pre-modern Christian canon law).

Weber is primarily interested in understanding what distinguishes rationality from belief, and why it became dominant in Europe, and which effects it had for Europe’s relationship with the rest of the world. Schacht, however,

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is interested in the relationship between revelation, ethics and law within a given religious legal system and takes up Weber’s concept to do precisely that. By separating the strictly legal content of *fiqh* from its liturgical and moral components, he defends the methodology of comparative law and emphasises against earlier detractors the legal character of Islamic law. But his insistence on accepting the books of *fiqh* as legal manuals led eventually to an overemphasis of doctrinal text over empirical legal reality, i.e. the marginalisation of historical context and social dynamism affecting the development of legal dogma. This Western scholarly preference for text over context is mirrored in the internal Muslim debate over the alleged malleability of the sacred law. The use of the term *shari’a* as a rallying point in political discourse has obscured the fact that it contains two distinct components, *fiqh* and *siyasa*. Both of them aim to approximate divine will and derive their authority from their “relationship to the encompassing term *shari’a*, the divine law.”

Initially no tension between piety and *raison d’état* existed because virtually any act of the prophetic leader was automatically deemed to enjoy divine blessing. While his immediate successors no longer benefited from divine revelation, their close association with the prophet and their presumably impeccable character minimised the scope for tension, reflected in a

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80) “The *fiqh* appears as an undifferentiated set of individual rules which do not seem to offer access for the rational analysis. Legal norms cannot be differentiated against the rest of the [liturgical and ethical] rules and a methodology for their production and application does not seem to exist. From these premises Snouck Hurgronje explicitly draws the conclusion that European jurists are not qualified to investigate in the history and systematic context of the various *fiqh* systems and refuses to call the *fiqh* ‘Islamic law’.” Baber Johansen (ed.), *Contingency in a Sacred Law: Legal and Ethical Norms in the Muslim Fiqh* (Leiden: Brill, 1999), pp. 43-46, especially 45.
85) Vogel, *Islamic Law and Legal System*, p. 172, emphasis added.
somewhat unrealistic political theory of the caliphate that stressed personal piety of the leader and communal unity. Shortly afterwards, however, the Islamic community disintegrated into a number of competing states which dramatically undermined the dogmatic stipulation of communal unity. Irrespective of its historical marginalisation the caliphate remained the frame of reference for Islamic political thinking. The devolution of actual temporal power to competing worldly leaders (sultans) posed a growing theoretical challenge:

The Mongol holocaust and the fall of Baghdad [in 1258] marks the terminus ad quem of normative political history. What follows is seen as an interregnum, a tortuous parade of power politics, military rule and outright usurpation, a trend that reaches consummation in the babri Mamluks at whose hands the caliph loses not only power but also effective authority, of which he remains shorn up to the rise of the Ottoman Turks.87

The functional administrative necessity for a ruler’s law unencumbered by the procedural constraints of fiqh, and the need to regulate dynamically evolving social interactions not governed by definite fiqh rules were recognised by all these temporal rulers. In time the ulema’s opposition to siyasa gave way to the

acknowledge[ment] that the scholar’s constitutional positions had outlived their usefulness, that the fiqh and its public law theory was too narrow and unrealistic, and that the ruler and siyasa principles had to be accommodated. Siyasa shariyya was the heading under which such thoughts were advanced. This theory recognized that Muslim society needs, alongside fiqh, siyasa power and even siyasa laws and tribunals. Further impetus came from observing the efficacy of the Mongol invaders’ dynastic law, the yasa.88


88) Vogel, Islamic Law and Legal System, p. 202, technical terms emphasised. Some have even suggested that the very term “siyasa” in Arabic is derived from the Mongol word “yasa”, see
Fiqh has been the product of the efforts of private individuals, described as an extreme case of jurists law: “It was not the creation of the early Muslim state or central power but evolved out of the efforts of private specialists acting, in many instances, in conscious opposition to the latter.”

Given this private origin, the highly idealistic and procedurally cumbersome content of fiqh becomes understandable. But the functional needs of government administration did not always permit the state to live up to these high standards of procedural and substantive equity, eventually leading to the development of siyasa as state law, distinct and at times in opposition to fiqh.

Siyasa, in contrast, is the prerogative of the ruler “to take any acts, including legislation to supplement the shari’a and creating new courts that are needed for the public good (maslaha ‘amma), provided that the shari’a is not infringed thereby.” Note that this condition is a negative, permissible one, allowing the state to do everything that is not explicitly prohibited by a clear textual ruling, thereby “diverging often substantially from the norms of shari’a.” How far this prerogative extends has been a matter of dispute, but it is clear that the approach is far more flexible than the cautious methodology prescribed in fiqh.

As Vogel underlines, the distinction must therefore not be drawn between shari’a as the divine law and siyasa as the worldly deviation, but rather between fiqh and siyasa, both of which combine to realise the normative ideal

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90) Comprehensive discussion in chapter 5 “King’s Law as Complement and Competitor to Fiqh”, Vogel, Islamic Law and Legal System, pp. 169-221.


of the *shari‘a*. Priests had an obvious professional interest in obscurring the difference between these two spheres by trying to doctrinally limit the *siyasa* prerogatives of the state and thereby ensuring their continued influence and power as a professional guild.

The doctrine of *siyasa shari‘a*, i.e. state law tempered and in pursuit of religious stipulations, nicely served the interests of both priests and rulers. It ensured social influence and lucrative employment to the priestly caste who in return provided the temporal ruler with a semblance of religious legitimisation based on a simple *quid pro quo*: virtually anybody in control of the state was deemed legitimate as long as he set aside influence and employment to priests to watch over the religious law: "the true caliphate is that form of government which safeguards the ordinances of the *shari‘a* and aims to apply them in practice."

Despite these somewhat cynical origins, the continuing normative appeal of Islamic law stems from its provision of a "language of justice", i.e. its historical aspiration as a counterweight to the autocratic and oppressive temporal regimes. *Shari‘a* as the sacred law of Islam is thus made up of both textualist, jurist-made *fiqh* and the much more flexible, dogmatically unencumbered *siyasa* made and enforced by the state. While often overlapping in scope of application, *fiqh* has been dominant in private law, while *siyasa* has been dominant in public law. Despite purporting to implement the divine will and using revelation as sources, both are ultimately man-made.

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93) "Notice how *siyasa shar‘iyya* is well designed, with its macrocosmic focus on the utility of the actual society, to meet the deficiencies of an exclusively textualist, atomistic *fiqh*. But note also that the role it assigns the ruler is hardly magnificent, resonant with the grandeur of caliphs of old. It invokes no grander legitimacy and law-making function than the securing of the public good." Vogel, *Islamic Law and Legal System*, p. 174.


Modernity’s Discontents: Comparative Fundamentalisms

This brings us back to Zubaida’s apparent paradox of an “ideological symbiosis”\(^9^8\) between some Western commentators and Islamist agitators, who both maintain that civilisations are “totalities”, largely immune to social change let alone deliberate agency. The paradox disappears if one bears in mind that the intellectual confrontation runs not so much between different cultures, but rather runs within a given society over the direction of its normative development. Islamism is not primarily concerned with the West but is a participant in “a war between Moslems in the Islamic world about the future control and social structure of the Islamic world … It is a war about who, among contending Islamic groups, will gain power and control the *dar al-Islam*, the values that will govern it and how it will be organized.”\(^9^9\) Similarly, the academic debate within the West concerns primarily the future direction of intellectual inquiry in the spirit of empirical scepticism.\(^1^0^0\) There are simultaneous manifestations of a global phenomenon, namely the resurgence of aggressive religious political thinking across presumed religious divides.\(^1^0^1\)

The causes for this resurgence are manifold and often draw upon local specificities. What they have in common, however, is an unease with and rejection of the changes wrought by modernity, and in so far they are ultimately manifestations of the same global phenomenon: the destruction of traditional certainties under the impact of an overpowering constant process of innovation, turmoil and renewal as a result of modernisation.\(^1^0^2\) To describe the various forms of reaction against modernity with the common epithet “fundamentalism” is therefore neither coincidental nor arbitrary,\(^1^0^3\) but reflects their common refusal of the anthropocentric world view of

\(^1^0^1\) Kepel, *The Revenge of God: The Resurgence of Islam, Christianity, and Judaism in the Modern World*.
\(^1^0^2\) Berman, *All That is Solid Melts into Air*.
\(^1^0^3\) al-Azm, *Unbehagen in der Moderne – Aufklärung im Islam*, p. 77.
modernity that posits the “idol of reason” to displace God by claiming that “reason is the measure of all things, through which any knowledge can be achieved and will be achieved by man.”

As late as 1870 the First Vatican Council still attempted to “reject and denounce in general and in particular the extremely serious fallacies and heresies and the deleterious ideas of innovators” which included a long list of most that is today represented as the essence of Judeo-Christian Western tradition: materialism, rationality, secularism, liberalism, Americanism, neutralism, modernism, democracy and freedom of belief, religious tolerance, the separation of church and state, civil marriage and non-confessional education.

Our aim here is to draw attention to the comparable nature of fundamentalisms and their common root as a reaction against modernity, whether clad in Catholic, Protestant, Islamic, Jewish, or Hindu garb. And al-Azm thus concludes that today’s Islamism is no less an Islam in crisis, as the Papal fundamentalism … had been a Catholicism in crisis. Both are counter-reactions and adaptations to the threats and challenges produced by the sheer unbelievable dynamism and strength, the irresistible force and fascination of modernity.

To deduce from the “illusions of particularism”, namely the frequency of socio-political turmoil and the tortuous reception of the institutions of modernity that the Muslim world as such cannot be studied with general

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105) Quoted in al-Azm, Unbehagen in der Moderne – Aufklärung im Islam, p. 97. Pope Leo XIII in 1899 was quite categorical with regard to the potential accommodation of the church with modernity: “First of all: All efforts to adapt the teachings of the Church to the modern world, are fallacies. For – as clearly established by the Vatican Council – the Catholic faith is not a philosophical theory that could be developed by man, but rather a divine enactment which needs to be strenuously defended and declared infallible.” Quoted in al-Azm, Unbehagen in der Moderne – Aufklärung im Islam, p. 105. See also Lester R. Kurtz, The Politics of Heresy (1986), p. 47; Richard T. Antoun and Mary Elaine Hegland (eds), Religious Resurgence: Contemporary Cases in Islam, Christianity, and Judaism (Syracuse: 1987); Pervez Hoodbhoy, Islam and Science: Religious Orthodoxy and the Battle for Rationality (London: 1991).
analytical tools reduces these societies to an alleged religious-legal essence. This “essentialist” position maintains that understanding Muslim societies mandates the examination of ancient doctrinal manuals rather than observation of actual social practice. It is in recognition of the inevitable dynamism of any society over time and space that in the last three decades a greater recognition of the contingency of Islamic law developed, i.e. the legitimacy of dissent on identical problems and texts as a basic principle of fiqh as a consequence of the fallibility of human reason.

The view expressed by Snouck Hurgronje, and reiterated continuously thereafter – that there is such a thing as the Islamic law positing a fixed body of immutable rules which Muslim societies submit to irrespective of changing social reality – is counter-intuitive. It seems more commonsensical to expect some form of feedback between an inevitably changing social, political, economic and strategic external reality and the underlying norms of any given society – or to put it in Marxist terms: we would expect material conditions to have some impact on the normative superstructure of a society.

It is on the issue of the alleged impermissibility of ijtihad that the internal and external debates converge. The internal effort by secular or

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111) “By the beginning of the fourth century of the hijra (about A.D. 900), however, the point had been reached when the scholars of all schools felt that all essential questions had been thoroughly discussed and finally settled, and a consensus gradually established itself.
reformist Muslims challenges religious orthodoxy and questions the cultural and historical distinctiveness of the legal system of fiqh by separating it from shari’a proper, thus demanding a novel, more “progressive” interpretation of the foundational texts. The doctrine long accepted in Western scholarship assumed that all independent individual legal reasoning had ended relatively early by about 900 AD and that thereafter Islamic law remained by and large immune to innovation. Irrespective of the incredulity of the proposition that more than one thousand very eventful years were to have elicited no legal response, the doctrine has been thoroughly refuted in recent years.

This is explicitly the approach chosen by self-avowed Islamic reformers such as an-Nahim or secularists such as al-Ashmawi. Murphy sums up the latter approach quite well: “In essence, Ashmawi argues that the only authentically Islamic usul al-fiqh which can be accepted are the Qur’an, selected Hadith (those that are in conformity with the spirit of the Qur’an), unfettered ijtihad in relation to those material sources and, finally, the consideration of the public good at any given time (maslaha, etc.). Given that Ashmawi rejects the idea that the Qur’an can be seen as containing specific legislative commands that are also eternally applicable, it is clear that his overall vision of the Islamic usul rejects the notion of the actual existence (within a true consideration of the Islamic message) of any such things as usul al-fiqh, or Islamic law.” Julian Murphy, “An Analysis of the Writings of Muhammad Sa‘id al-‘Ashmawi and their Significance within Contemporary Islamic Thought”, Dissertation, Oxford University (Oxford, 2001), p. 128. The first sentence applies equally well to an-Nahim, whose project remains, however, both politically and intellectually unconvincing. His point of departure is the alleged distinction between “tolerant” Meccan verses versus the more assertive Medinan revelations. Abdullahi Ahmed an-Nahim, Toward an Islamic Reformation: Civil Liberties, Human Rights, and International Law (Syracuse, NY: Syracuse University Press, 1990), p. 147.

doctrinal and evidentiary particulars of this debate are for present purposes less interesting than the acknowledgment that this “orientalist” doctrine found ready adherents within Muslim society, viewing

Islam [as] a total “civilisation”, not just a religion but a political and social system, and the divinely revealed law is at its core. This view is advanced both by some Western commentators, holding the “clash of civilizations” position, and Islamists, insistent on the totality and indivisibility of Islam. There is a kind of ideological symbiosis between the two. “Muslim society” in this perspective is not amenable to analysis in terms of economics, politics or sociology, but has religion as its essence which moves it and determines its processes. The sacred law is the major part of this essence. It is not just a law, but a “total discourse” determining family, morality, ritual and politics.114

The “orientalist” position of Bernard Lewis that understanding anything at all about what happened in the past and what is happening today in the Muslim world requires the appreciation of the universality and centrality of religion as a determining factor in Muslim peoples’ lives,115 can be rebuked as simplistic and reductionist.116 But as Zubaida points out, the same position is often taken by Muslim proponents as well, and academic and popular discourse has found it much harder to dispel similar essentialist assertions when made by Muslim (or other Third World proponents) under the guise of “cultural authenticity”.117

114) Zubaida, Law and Power in the Islamic World, p. 3. Zubaida mentions Gellner, Muslim Society. as a foremost example of this approach because it “consider[s] Muslim society, unlike any other in modern times, to be impervious to secularization. In this perspective, this essential quality explains the resurgence of Islamic politics in modern times … [as] a ‘return’ to an essence which had always been there.”


116) One just needs to point to oil and the issue of rentier economics to identify one very major factor in the modern history of the Muslim world where religion explains little, but where universal social scientific methods can explain a large part of the picture. On these aspects see Katouzian, The Political Economy of Modern Iran.

117) An-Nahim’s thesis claims to be a moderate exercise and as such must be differentiated from more radial Islamist ventures, but like them he claims that religion is the only frame of reference for Muslim societies, an-Nahim, Toward an Islamic Reformation, p. 3.
Culture and societies are capable of change; culture might change slower than economic or political structures, but change it does. Inevitable historical forces require adaptation despite the fiercest resistance. As Fukuyama notes

> we see evidence of cultural change all around us. Catholicism, for example, has often been held to be hostile to both capitalism and democracy … yet there has been a “Protestantisation” of Catholic culture that makes differences between Protestant and Catholic societies much less pronounced than in times past.118

This is the societal application of the same “sameness effect” that Waltz described for the forced adaptation of states to the demands of a competitive and anarchical international system.119 The same holds true mutatis mutandis for Muslim societies. The following observation by Eric Hobsbawm could equally be applied to virtually all Muslim countries: “in the 1980s, socialist Bulgaria and non-socialist Ecuador had more in common than either had with the Bulgaria or Ecuador of 1939.”120 The present manifestations of intolerance and parochialism in the Islamic world can thus be seen as the paroxysm of a society reeling from an overpowering modernity. Islamic movements owe much of their appeal to their ability to exploit the contradictions of the modernisation process.121 Lack of experience, and the absence of a viable alternative socio-economic model, are likely to lead to popular dissatisfaction with the lacklustre performance of actual Islamist governance – positions that were powerful rallying points of opposition quickly

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121) This aspect is well explored by Johnson’s concept of “blowback” which basically refers to the “common idea … that peoples who refuse or fail to modernize defensively may nevertheless be empowered to interfere with the spread of imperialist ambitions. [In contrast to] the lazy word ‘backlash’, which fails to capture the extent to which Western exploitation unwittingly provides the material conditions for its own opposition.” Steve Fuller, “Looking for Sociology After 11 September”, *Sociological Research Online* (n.d.); referring to Chalmers Johnson, *Blowback: The Costs and Consequences of the American Empire* (New York: Henry Holt & Company, 2000).
loose their allure once their inability to respond to, let alone resolve the contradictions of modernity become apparent.¹²²

**Universality and Particularity of International Law**

At the heart of political Islam lies the dissatisfaction with the inevitable contradictions of the modernisation process and the desire to reclaim authenticity and identity. The psychological need to reassert control and agency over social change explains the popular appeal of calls for a re-introduction of Islamic law. In part this appeal can be traced back to the historic role of the religious law as a language of justice vis-à-vis autocratic regimes, reinforced by the latter’s association with ostensibly secular-socialist, but effectively dictatorial and kleptocratic Pan-Arab regimes. What is more difficult to understand is the popular fascination with the most atavistic aspects of Islamic law. Again there is a strange coalition between Western “essentialist” critics of Islam and indigenous Islamists, both of which concentrate on the same limited number of penal sanctions, economic and family rules as the embodiment of Islamic civilisation. The fundamentalist discourse emphasises these elements and their incompatibility with current international law precisely because they serve as markers of identity:

> It is precisely because the codified *shari’a* in its mundane application to civil matters resembles other profane codes that those who seek the *shari’a* as an identity and difference marker vis-à-vis the West emphasize those elements in it which are distinct and often disapproved in liberal contexts: the penal provisions, the patriarchal norms, the ban on alcohol and the interdiction of dealing in interest. These aspects, at the same time, bring a semblance of public law to what otherwise would be a *shari’a* confined to its common historical limits to private law and civil transactions, which detracts from its centrality to a proposed Islamic state.¹²³

The desire to enlarge the writ of the religious law into the public sphere leads to collision with international law on at least two distinct but related


points. There is an immediate clash with the normative content of international law concerning human rights and good governance standards that run counter to the domestic agenda of political Islam especially with regard to corporal punishment, female equality, democracy and participation. But there is also a more indirect challenge stemming from the desire to expand the perceived inner-Islamic solidarity into a distinct Islamic law of nations regulating intercourse between the various Muslim nations and building upon historical precursors.

The first challenge is really not all that different from the normative criticism made by other Third World states, centering as it does on the critique of insufficient participation in the development of and consent to the substantial rules of international law, coupled with the denunciation of the continued marginalisation of the Third World at the expense of the interests of a small number of powerful industrialised states. While not incorrect, it begs the question of relevancy in a world marked by power differentials that are not surprisingly reflected in the normative superstructure of international law. Without increasing its power, no amount of normative criticism is likely to improve a given state’s relative standing in the international system, let alone lead to significant changes in the substantial and procedural rules of international law.

The second claim, the ability to define with reasonable precision a body of international norms of a distinctly Islamic nature must likewise be treated with caution. Recalling the fundamental distinction between fiqh and siyasa which jointly make up shari’a, we need to be hesitant to accept works that purport to present a unified vision of the Islamic law of nations with sole reference to a limited number of fiqh manuals. It is true that Islamic jurisprudence early on developed a distinct body of judicially binding rules

\[\text{(124) Kruse, Islamische Völkerrechtslehre, p. 170.}\]


on international intercourse, *siyar*, defined in the canonical commentary by as-Saraskhiy as:

> the behaviour of the Muslims in dealing with the Associators (non-Muslims) from among the belligerents as well as those of them who have made a pact (with Muslims) [and live as Resident Aliens or non-Muslim Subjects]; in dealing with Apostates who are the worst of the infidels, since they abjure after acknowledgment (of Islam); and in dealing with Rebels whose position is less (reprehensible) than that of the Associators, although they be ignorant in their contention on false ground.\(^{127}\)

It is for our purposes not necessary to discuss the systematic structure and normative content of these rules.\(^{128}\) Despite the wealth of binding stipulations of clearly international scope, *siyar* remains a pre-modern normative system that neither with regard to its systematic order nor its fundamental assumptions nor its functional task can be equated with modern international law.\(^{129}\) We recall that pre-modern systems of regulating international relations were characterised by their unilateral nature and universal ambitions. Both elements are clearly discernible in the system of *siyar*.

Islam is a universal religion in the sense that it does not preclude conversion on the basis of parochial distinction, and thus in principle aspires to convert the entire humanity. The universal aspiration doctrinally precludes permanently peaceful relations with the non-Muslim exterior; while contractual relations are possible these are seen doctrinally as stop-gap measures on the way to global domination. Rechid likened this basic position to Soviet teachings on international law: both systems have as their defined

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final goal the attainment of dominion over the entire globe. Until then the world is divided into two opposing parts, *dar al-Islam* / Communism and *dar al-harb* / Capitalism.\(^{130}\) In analogy, any rules developed for interaction between these two camps can be little more than an “international law of a transitory period.”\(^{131}\)

Such comparisons, however, “should not be pushed too far”,\(^{132}\) for just as the Socialist camp quickly reversed its initial dogmatic position to accept peaceful coexistence as a norm of international relations\(^{133}\) based on eminent necessity and the impracticability of the earlier doctrine, one can observe that in actual practice the Muslim world has throughout its history maintained peaceful contractual and trade relations with a large number of non-Muslim entities, including entering into alliances against other Muslim states. Likewise the doctrinal prohibition on relations between Muslim states (because of the normative stipulation of a common, indivisible community of believers, the *ummah*) was, of course, circumvented in practice. Given its subject matter, most of this practice would fall within the purview of the *siyasa* prerogatives of the rulers. It does not take a very imaginative jurist

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to find justifications for the conclusion of such contractual relations with infidels if all that needs to be shown for their doctrinal legitimacy (within the corpus of siyasa) is the furtherance of the Muslim public good (maslaha).

These developments of state practice effected under the looser doctrinal rules of siyasa were as a rule ignored by the authors of fiqh. The content of the fiqh manuals can thus give an unduly exaggerated degree of the doctrinal hostility of Islam. More important still, is to recall that we deal here with a pre-modern normative body developed in the framework of a universal state whose global ambitions were matched by its contemporary peers:

The universal nomocracy of Islam, like the Respublica Christiana in the West, assumed that mankind constituted one supra-national community, bound by one law and governed by one ruler. For it was held, as stated in a Qur’anic injunction, that “If there were two gods, the universe would be ruined.” The nature of such a state is entirely exclusive; it does not recognize, by definition, the co-existence of a second universal state. While Islam tolerated Christianity and Judaism as religions, Islamdom and Christendom, as two universal states, could not peacefully coexist.

Seen from the vantage point of religious parochialism and local particularism against which both Islam and Christianity protested, their universal appeal and the “unity of mankind” they each stress can be welcomed as distinct advances. But this religious appeal is the summons to conversion (da’wa), not peaceful coexistence. The best classical doctrine has to offer those who resist the call to conversion is the status of protected aliens, dhimmi or mustāmin. Muslim authors who stress the peaceful nature of Islam rely on those injunctions that stress the equality of mankind and the abolition of tribal, ethnic, and social distinctions. Referring to various Prophetic hadith and Quranic verses, Weeramantry all but implies that Islam anticipated the formation of the UN:

“The whole universe is the family of Allah …”. Humans are as “alike as the teeth of a comb” and Islam thinks not in terms of any tribe or nation but of the community of mankind. Allied to this idea is that of the total sovereignty of God over all nations.

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The rulers of nations are at best His viceregents and cannot hence insulate or compartmentalise their nations as though they are totally sovereign entities free to act contrary to or independently of the interests of mankind as a whole.\textsuperscript{136}

Hamidullah had restated the same position, likewise stressing unity, equality, non-discrimination as guiding principles. He equally conveniently ignored the exclusionist ambition of the universal state:

Islam believed, on the other hand, in the universality of the Divine call with which Muhammad was commissioned. It was this conviction which led the Muslims to aspire to a world order, but we must distinguish between the domination of a nation based on race or language and between the nation aspiring to establish on earth the kingdom of God, where His word alone (the Qur’an, in this case), and not human ambition, should reign supreme. … They wanted to conquer the world, not to plunder it, but peacefully to subjugate it to the religion of “Submission to the Will of God” – in contradistinction to racial religions admitting members only on basis of birth rights – religion of which they were not the monopolizers but which was open to all the nations to embrace and become equals. In a word, the Muslim aim was to spread Islamic civilization and to realize a universal Polity based on the equality of the Faithful and a system which provided the basic necessities of all the needy in the country, irrespective of religion, property or any other difference.\textsuperscript{137}

Likewise, considerable unfamiliarity with the predatory character of the Islamic conquest is betrayed by Mahmassani’s unsubstantiated claim that: “Wherever they penetrated, Muslims were, in general, regarded as equal humble teachers and preachers of Islam, not as lofty and predatory colonizers.”\textsuperscript{138}

What these lengthy quotations are meant to illustrate is not so much the inherent aggressive tendencies of Islam that many Western commentators ascribe to Islam, particularly in light of its doctrine on \textit{jihad}, i.e. the duty to expand the reach of Islam by word and by deed. Both its universalist ambition and its doctrine of holy war are quite similar to the religious

\textsuperscript{136} Weeramantry, \textit{Islamic Jurisprudence: An International Perspective}, p. 133.

\textsuperscript{137} Hamidullah, \textit{Muslim Conduct of State}, pp. 79-80.

and political thinking of other historical universal states. It is in no way remarkable that Islamic law therefore countenanced at some point in its historical development a doctrine of global expansion, by both violent and non-violent means, and considered itself the centre of the universe for which it could and would unilaterally stipulate norms of interaction. As Kruse convincingly argues, that was very much the standard for all pre-modern civilisations, Roman, Christian or other, defining for instance the rules governing the interaction between Christians and heathens. The rules of *siyar* were imposed on the individual Moslem and the state purely as unilateral “inner duties vis-à-vis the non-Muslim exterior.” Here *siyar* probably went much further than comparable legal systems by giving unambiguous legal personality and judiciable rights to protected non-Muslims.

Irrespective of its interest to legal historians and students of Islamic law, it seems proper to ask what relevance, if any, a legal system based on “permanent hostility between human communities, mutual negation of the right to existence and complete absence of interrelationships (*Beziehungslosigkeit*)” can have as a basis for modern international relations as often claimed by Muslim activists and apologists alike – including such distinguished jurists as the President of the International Court of Justice, Judge Weeramantry. The best that can be achieved within the framework of *siyar* proper is an “episodic, transient international law of the transitory period” in approximate analogy to ill-fated early Soviet conceptions. Claims to cultural authenticity notwithstanding, it appears difficult to conceive what exactly *siyar* could constructively contribute to modern international relations. Here Krüger correctly insists that

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It remains to be noted that the legal basis for all questions of international law is always the municipal Islamic law. Even when problems of international law are being dealt with, so are their sources not simply international legal acts, international custom and generally recognised legal principles, but norms of municipal Islamic law. We can thus conclude: “siyar” refers to that part of Islamic law which deals with issues of an international character. The “siyar” can thus be compared to contemporary private international laws [sic], through which external subject matters are regulated. One can therefore speak of an “external law” (Außenrecht) of the “dar al-Islam”, through which its relations and those of individual Muslims to legal subjects outside of this territory are regulated.\(^{144}\)

Here we need to recall that these rules were developed at the time of a highly successful Islamic expansion, both religiously, culturally, and politically.\(^{145}\) And while unilateral external rules as such were nothing exceptional among pre-modern legal systems, their factual relevance obviously increases dramatically if the state that propagates them has the wherewithal to impose and enforce them. A persistent challenge for Muslim societies has been to come to grips with the reality of an inferior position in the international hierarchy of power. One of the current attractions of the rhetoric of an “Islamic law of nations” lies in reminding Muslim societies of this irretrievably lost time when they could unilaterally impose rules, rather than be passive objects of history as the recipients of an international law made by others.\(^{146}\)

Mahmassani portrays the Muslim expansion as exclusively positive and beneficial by extrapolating the modern concept of democracy back into the Prophetic enterprise, an approach that has since become quite common among Muslim apologetics, again stressing the unity of the state and the uniform basis of its law:


\(^{146}\) Al-Azm, “Time Out of Joint.”
Islam wrought a complete social revolution in the life of the Arabs and of all other peoples who embraced the new religion. It transformed the quasi-states of the Arab tribes and their harsh heathen customs into a real unified state based on the overriding concept of the religious bond and on the principles of democracy and justice.\textsuperscript{147}

The international rules developed during that period were strongly influenced by the successful outcome of the early expansionary wars,\textsuperscript{148} and no rules governing relations between different Muslim states were countenanced due to the normative ideal of Muslim unity under one caliph. As Krüger shows, as late as the 18th century relations between the Ottoman and Persian empires were nominally governed by the \textit{siyar} rules on rebellion and apostasy,\textsuperscript{149} a legal fiction that did not acknowledge the reality of mutually beneficial and persistent relations between equals.

As in many other fields, the normative ideal of \textit{fiqh} bore only very tenuous relation with reality; the early disintegration of the Muslim empire, although doctrinally unacknowledged, led to a number of contemporary Muslim states. Obviously they maintained relations with each other, both friendly and hostile, governed by rules developed under the \textit{siyasa} prerogatives of their respective rulers. As often the case with \textit{fiqh}, however, these rules remain almost entirely unacknowledged and centuries of legal discourse on international relations continued to pretend that the Muslim empire continued to exist, continued to be governed by one effective \textit{caliph}, continued to be united, strong and expansive\textsuperscript{150} – all this despite the very real evidence of internal strife, arrested development, and increasing weakness vis-à-vis the outside world. There is a certain element of schizophrenia or at least cognitive dissonance even in current compilations of “Islamic international law” that focus exclusively on abstract \textit{siyar} in total disregard to centuries of countervailing historical legal practice under the unacknowledged banner of the ruler’s \textit{siyasa} powers.

\textsuperscript{147} Mahmassani, “The Principles of International Law in the Light of Islamic Doctrine”, p. 209.
\textsuperscript{149} Krüger, \textit{Fetwa und Siyar}, pp. 35, n. 68 and the literature quoted there..
\textsuperscript{150} Juynboll, \textit{Handleiding tot de kennis van de Mohammedaansche wet}, p. 334.
Kruse, building on Baron Taube’s conception of cultural or regional “types of international law” (Völkerrechtstypen), correctly asserted that “Islamic jurisprudence starts from religious principles and posits ‘ideal demands’ which have had almost never any correspondence to the state placed in reality.” And because this doctrinal Islamic international law presumes a non-existing political unity, Kruse cannot agree with von Taube that the plurality of Muslim states developed among themselves such a particularistic body of international law. Because of the doctrinal refusal to take reality into account, he does not think that von Taube’s assertion that one can speak of an Islamic international law, in analogy to the particularistic “Christian-occidental international law” that developed between the Christian states for their own use.

But because such relations evidently did exist in actual state practice, Kruse suggests the term “Muslim international law” as a designation because “we are dealing here with a law of relations (Verkehrsrecht) developed by Muslims grouped in states and not with deductions from the principles of Islam.” Even if he seems unaware of the distinction between siyasa and fiqh, his position is correct with regard to the latter, for de facto practice of “Muslim international law” cannot be ascertained by studying manuals of fiqh, because it “remained alien to the Muslim scholar [faqih] and constitutes a hitherto unresearched part of the Islamic legal reality which can be only established from the historical records.” Kruse’s four-fold distinction is helpful to remind us of the relatively limited role of doctrinal siyar compared to actual state practice. Lohlker self-consciously tries to

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154) Kruse, Islamische Völkerrechtslehre, p. 5.
155) Kruse, Islamische Völkerrechtslehre, p. 4.
156) Kruse, Islamische Völkerrechtslehre, p. 9. He distinguishes between (a) Muslim international law (Muslimisches Völkerrecht); (b) siyar (Verfahrensweise); (c) contractual international law (Vertragsvölkerrecht) as the doctrinally permitted limited Kompromisrecht balancing the demands of dogma and praxis; and (d) “particularistic customary international law” (partikuläres
fill this lacuna by focussing, quite unencumbered by the usual fixation on the rules of *fiqh*, on the contractual *practice* between Muslim Granada and its Christian neighbours.\textsuperscript{157}

What these studies are showing is yet another reiteration of the familiar dualism of a “historical yes” in the face of a most stringent “dogmatic no”.\textsuperscript{158} They go some way in responding to the need Montgomery Watts identified when he wrote that “[n]o work on Islamic political theory has adequately dealt with the problem … of the relationship of political theory to the historical realities”.\textsuperscript{159}

**Evaluation**

The 20th century has been a period of great socio-political turmoil for all Muslim societies, and appropriate responses to its challenges have yet to be found. But in trying to evaluate the various efforts Muslims have made and continue to make to find adequate responses to change and modernisation, we need to be wary of claims purporting to represent supposedly immutable stipulations of *the* Islamic law, whether they are presented by Western commentators, Islamist activists, Muslim apologists, or Islamic reformers. As we have seen the supposedly clear and monolithic *shari’a* is made up of *fiqh* which is itself sub-divided into a number of equally orthodox schools, and *siyasa* made up of countless instances of state practice with varying degrees of religious conformity. Thus while the most egregious demands for the institution of this or that atavistic penal sanction usually can be, and often are met by countervailing milder interpretations, we must not forget that deciding between these propositions is ultimately a political process between

\textsuperscript{157} Lohlker, *Islamisches Völkerrecht: Studien am Beispiel Granadas.*


competing ideas among Muslims.\textsuperscript{160} This holds equally true with regard to the contested universality of international law. Maximalist claims for Islamic “authenticity” need to be placed in their proper political context of competing interests.\textsuperscript{161} Regarding the acceptance of the state, and by implication the current system of international law, Jackson points out that

the idea of the nation-state has emerged as a veritable Grundnorm in modern Muslim political and religious discourse. No longer is the question seriously raised whether Islam can legitimately countenance such concepts as territorial boundaries, state sovereignty or even citizenship. 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.\textsuperscript{162}

But apart from convincing/forcing their populations to go along with these processes of legal transformation, and apart from the technical difficulties involved in changing existing administrative and legislative systems, these efforts have run into a major theoretical/normative problem: modern states are founded on the assumption that the state is the sole repository of legal authority. Generally, the claim that the true sovereign in an Islamic state is God has been taken to mean the mandatory implementation of Islamic law, including the claim that with respect to international commitments, Muslim states should be bound by something akin to an “Islamic jus cogens”, i.e. that the divine rules, being peremptory and non-negotiable, will always take precedence over a contradicting norm of international law.\textsuperscript{163}

The problem lies, of course, in deciding who is authorised to define what Islamic law actually demands in a given situation. Those states that have pursued Islamisation programmes have been extremely reluctant to relinquish the power of the state to define the law of the land. This, however,

\textsuperscript{162} Jackson, Islamic Law and the State, p. xiii.
\textsuperscript{163} The “normal” concept of ius cogens has been established in the Barcelona Traction, Light and Power Co. Ltd. Case in ICJ Reports, 1970, p. 32, para. 34, and found reflection in Articles 53, 64, and 66 of the 1969 Vienna Convention on the Law of Treaties.
contradicts the tradition of classical Islamic law where authority to define law was acquired informally, by way of pious and scholarly reputation rather than official designation.\textsuperscript{164} This inherent conflict between traditional repositories of authority and the modern concept of authority based on the sovereignty of the (Islamic) state applies in principle to all “Islamic republics”. The reverence felt by most Muslims towards the idea of \textsl{shari’a} stems partly from a desire for authenticity and cultural “ownership”, but more importantly it derives from its historical role as a brake on autocracy and governmental abuse: “The political resonance of the \textsl{shari’a}, historically and at the present, is associated with its function as a language of justice.”\textsuperscript{165} The combination of the unprecedented power resources of the modern state with the virtually unlimited\textsuperscript{166} and unchallengeable prerogative of divine mandate, however, creates the tangible danger of tyranny which “relates to the extremely broad scope of Islamic law and the resulting propensity it bears for lending itself to swollen and unassailable claims to legal authority.”\textsuperscript{167}

The claim that Muslim societies are so different from all other human communities that they respond solely to the dictates of an immutable ancient moral code assumes that the universal struggle over economic and political interests is somehow suspended among the adherents of Islam. Such a hypothesis, however, is not only counter-intuitive on its logical merits but runs against historical and contemporary empirical evidence. In evaluating claims for Muslim exceptionalism in international law it is therefore submitted that rather than examining competing interpretations of religious dogma, one might be better advised to note which societal groups stand to benefit from ostentatious Islamisation drives. Recognising the importance


\textsuperscript{165} Zubaida, \textit{Law and Power in the Islamic World}, p. 4.


\textsuperscript{167} Jackson, \textit{Islamic Law and the State}, pp. xxiii-xiv.
of domestic politics, i.e. the struggle over competing interests, one is quite likely to learn that the very same socio-economic mechanisms that produce authoritarian outcomes in non-Muslim settings likewise operate in an Islamic context. Perhaps the Islamic world is not, after all, so different from other parts of the world.

168) Jackson, “The Primacy of Domestic Politics”; Kehr, Der Primat der Innenpolitik.