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Legal Pluralism in an Islamic State: Reflections on the Afghan Constitution

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Abstract

This paper addresses the importance of legal pluralism as an essential feature of Islamic government. Drawing on legal and political concepts from pre-modern Muslim systems and jurisprudence, the author explains the importance of differentiating between two types of law in an Islamic context: (1) "*siyasa*," made by the state in furtherance of the public good; and (2) "*fiqh*," made by religious legal scholars based on interpretation of the *Qur'an* and *Sunnah*. The separation of *fiqh* from *siyasa* has existed in Muslim societies for centuries, but has disappeared in the modern period. The European nation-state model of government, in which all lawmaking power is centralized with the state, has become the norm in most Muslim-majority countries, leaving most Muslims unaware of the classical history of *fiqh* as a separate legal sphere with different legal authorities. Without a clear differentiation of *siyasa* from *fiqh*, modern Muslim countries run the risk of "legislating" *Shari'a*, which eliminates the *fiqh* pluralism that was inherent to the *fiqh* realm and creates dangerous near-theocratic forms of government. The author articulates a way to translate the pre-modern *fiqh-siyasa* separation of powers into a contemporary model for Islamic constitutionalism and analyses some features of the current Afghan Constitution from this perspective.

Asifa Quraishi-Landes*

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Introduction

This paper presents a model of Islamic constitutionalism based on the nature of Muslim legal and political systems in pre-modern periods before colonialism. This model is not the typical "Islamic state" model that is commonly discussed today. Unlike the "Islamic state" discourse, this model starts with the idea of legal pluralism. Pre-modern Muslim societies, in nearly every time and place, were built on legal pluralism, in striking contrast to the western, originally European nation-state model of legal centralism that is currently dominant in Muslim-majority countries and has greatly influenced the "Islamic state" paradigm. More importantly, the principle of Islamic legal pluralism is a powerful tool that can solve some of the perceived conflicts between secular and religious forces in Muslim-majority countries today. For example, Islamic legal pluralism is a key to overcome the apparent contradiction between international human rights and *Shari'a* – an issue with which the Afghan community is familiar with because of the dual commitments in the Afghan Constitution.

I. Legal Centralism

In the field of comparative constitutional law, most discussions about legal pluralism begin with an examination of a central state government, and then ask whether and how to accommodate non-state law; for example, tribal, customary, or religious law operating among the people. In such a discourse,

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the state is central to the whole system, and non-state laws appear outside the overall constitutional system. Figure 1 below provides an illustration of this school of thought.

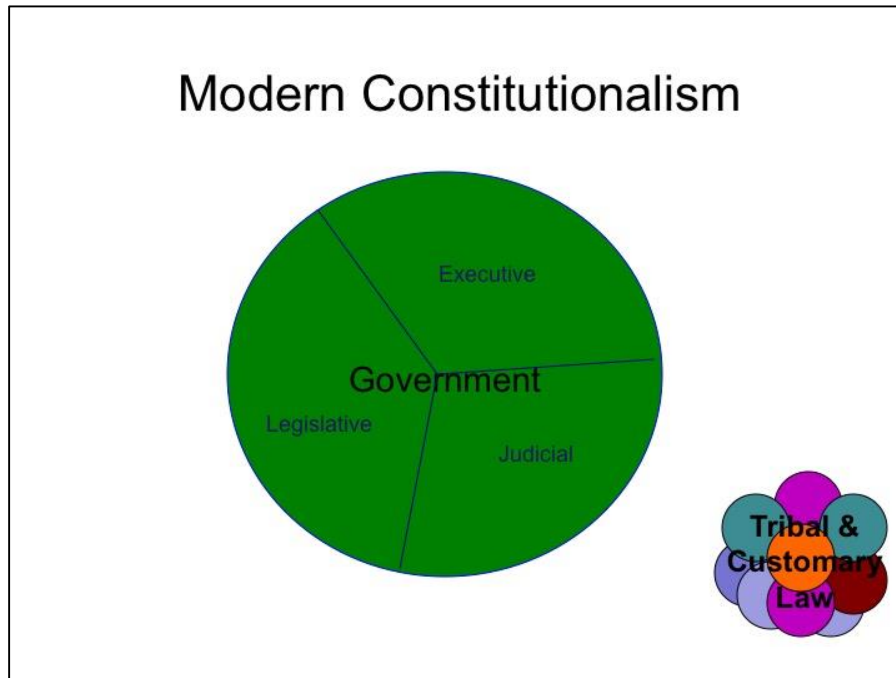

Figure 1

This centralized way of thinking about law and government comes from the European nation-state ideal. In this nation-state constitutional model, all law originates from the state. Whatever laws are not created or sanctioned by the state do not have any status as law for the people.[1]

II. Legal Pluralism in Pre-Modern Muslim Societies

But this is not the way things were in Muslim history. In pre-modern Muslim societies, legal pluralism, rather than legal centralism, was the starting point. Simply put, there were two types of law, one state created (*siyasa*) and one non-state created (*fiqh*), each existing in an interdependent relationship with each other.[2]

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[1] *See* Sherman Jackson, "Legal Pluralism Between Islam and the Nation-State: Romantic Medievalism or Pragmatic Modernity?", (2006-2007) 30 *Fordham Int'l L. J.* 158.
[2] *See* Asifa Quraishi, "The Separation of Powers in the Tradition of Muslim Governments", in *Constitutionalism in Islamic Countries: Between Upheaval and Continuity* (Tilmann Röder and Rainer Grote, eds., Oxford University Press, 2011). *See also* Frank Vogel, *Islamic Law and Legal System: Studies of Saudi Arabia* 31 (Brill 2000) (describing *siyasa* and *fiqh* as "macrocosmic" and "microcosmic" law).

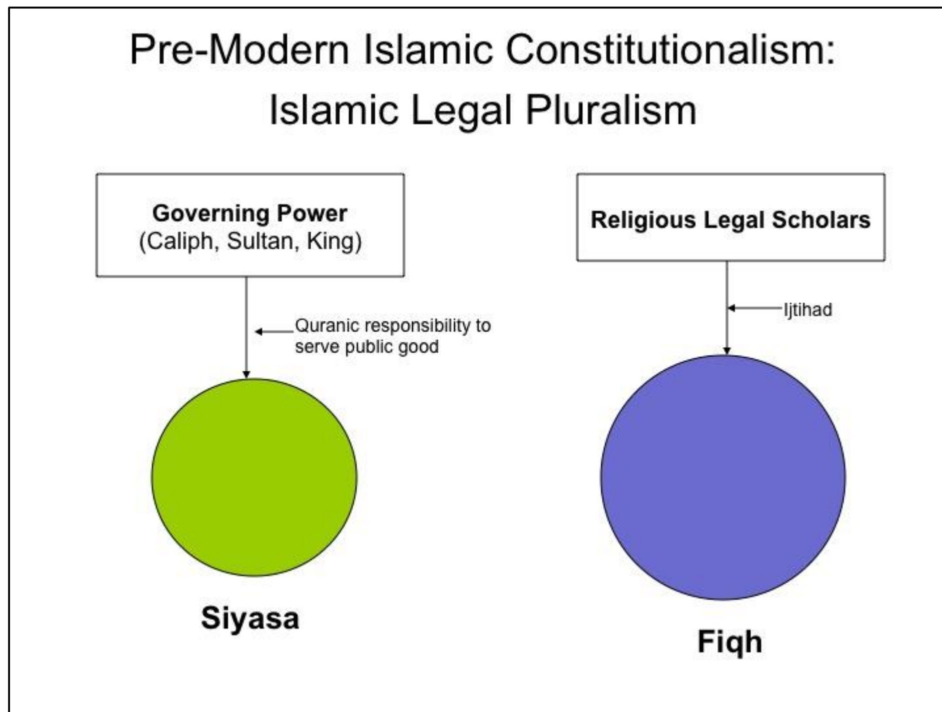

Figure 2

If one holistically examines Islam's large history, and the vast geography covered by the region, there emerges a very clear pattern of these two realms of law in nearly every time and place. There was the religious law of *fiqh*, created by religious legal scholars (*ulama*/*fuqaha*) based on their study and interpretation of the *Qur'an* and *Sunnah* of the Prophet Muhammad (peace be upon him). And there was also the realm of *siyasa* law, where rulers made all sorts of laws that were important for order and justice, but that didn't come from studying the *Qur'an* and *Sunnah*. *Siyasa* laws covered matters such as fair marketplace standards, general public safety, and treatment of labor – all matters that are important for the public good, but do not originate from reading verses from the *Qur'an*.[3] Today's *siyasa* laws might include matters such as professional licensing standards, environmental laws, traffic laws, and whether or not Afghanistan joins the World Trade Organization. Because the *Qur'an* directs rulers to rule justly and to serve the people, *siyasa* law was considered legitimate as a *Shari'a* matter based on its service of the public good (*maslaha 'amma*).

The *Shari'a*-legitimacy of siyasa is a crucial point to appreciate. *Siyasa* laws were legitimate as a matter of *Shari'a* because they served the public good. That means that *siyasa* was not "outside" the realm of *Shari'a*, but rather was an important piece of the *Shari'a* rule of law system. Under this system, both rulers and religious legal scholars together serve *Shari'a* by each doing their respective jobs: the job of

[3] For more details, see Kristen Stilt, Islamic Law in Action: Authority, Discretion, and Everyday Experiences in Mamluk Egypt (OUP 2012).

the rulers is to make and enforce laws that serve the public good (*maslaha*), and the job of the scholars is to study the *Qur'an* and *Sunnah* to articulate the details of the rules that are found there.

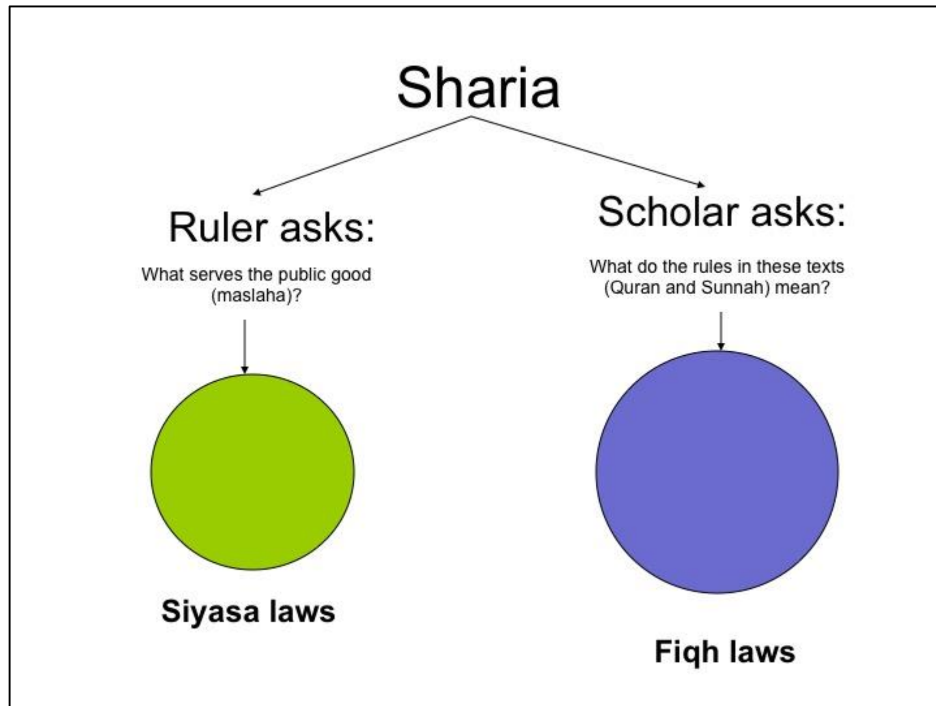

Figure 3

It is also important to bear in mind that *fiqh* laws are themselves quite diverse. To fully appreciate the significance of this – and why it is important to understand the difference between *Shari'a* and *fiqh* – we will take a moment to address the nature of *fiqh* in a bit more detail.

It is well known that *Shari'a* is a very broad concept. The term literally means "way", or "street" (in the original Arabic, it meant a way to water). The idea in the *Qur'an* is that *Shari'a* is "God's way" – the way God wants people to live their lives. Muslims are given information about how to live according to God's way in two sources – the *Qur'an* and the *Sunnah* of the Prophet (peace be upon him). But of course not every single life question is answered specifically in those two sources, so Muslim scholars (*ulama*) have taken on the work of *ijtihad* – of rigorous legal reasoning – to draw out of those original sources more detailed rules for everyday life. As they did this, they developed a whole curriculum of *usul-ul-fiqh* ("roots of *fiqh*"), with many tools helping them to perform *ijtihad* work. As illustrated in Figure 4 below, those tools are represented by the arrows coming in toward the "*ijtihad*" lines on either side.

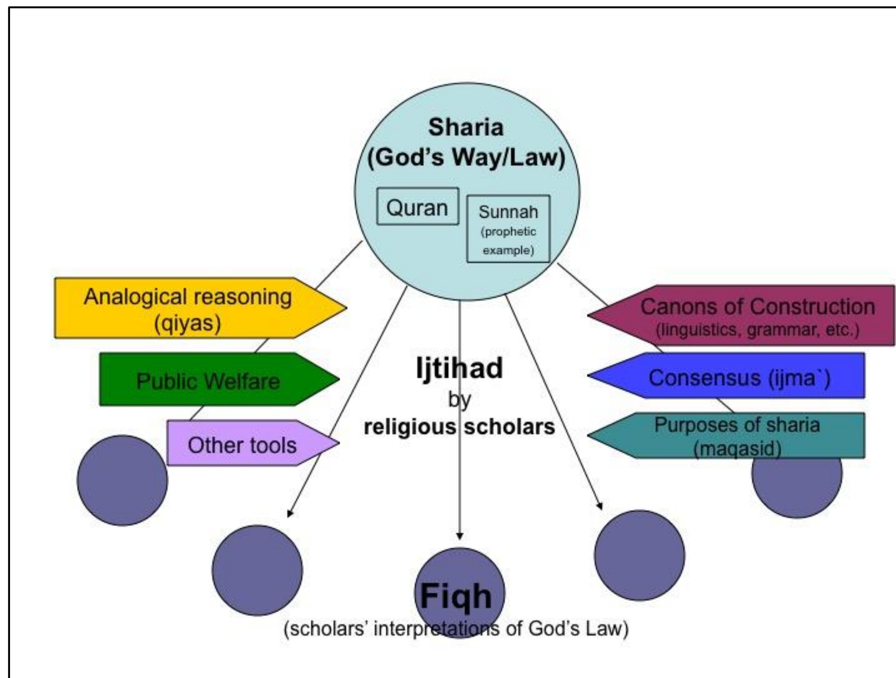

Figure 4

In Figure 4, more than one small circle of *fiqh* emerges from the *ijtihad* process. There are actually many, because more than one scholar performs this *ijtihad* work, and whenever there is more than one person reading the same texts, there is usually more than one conclusion about what those texts mean.

This brings us to something quite remarkable about Islamic jurisprudence. As they did their work, these scholars were very self-conscious of their own human fallibility, and therefore aware of the possibility that they could be making mistakes as they sought to articulate God's Law. So these scholars[4] called their legal conclusions "*fiqh*", which means "understanding", and they called themselves "*fuqaha*" – "the people who understand." That choice of words is very significant. These *fuqaha* were careful never to speak for God. They merely asserted that they had an understanding of God's Law, always with the possibility that they might be wrong and that someone else might be correct.[5] Thus, they took very seriously the famous *hadith* of the Prophet (peace be upon him) that the person who does *ijtihad* and arrives at the correct answer will receive two rewards from God, and the person who does *ijtihad* and arrives at the wrong answer will receive only one reward from God.[6] That *hadith* is significant for scholars working to articulate God's Law for two reasons. First, no one will be punished for their *ijtihad* effort, even if they are wrong (and it is always possible to be wrong). But more importantly, that *hadith* tells them that they will not know who is right and who is wrong until after they are all dead. That means

[4] Scholars performing *ijtihad* work were both men and women.
[5] *See* Bernard Weiss, "Interpretation in Islamic Law: The Theory of *Ijtihad*," (1978) 26 *Am. J. of Comp. Law* 199.
[6] Sahih Bukhari 6919; Sahih Muslim 1716.

that each scholar has to respect the *fiqh* conclusions of other scholars as potentially correct articulations of *Shari'a* in their lifetimes, even as they disagree with each other.

Indeed, their attitude as scholars towards each other was quite inspiring. For example, imagine that two *fiqh* scholars are presented with the same legal question. One does *ijtihad* on the question and comes up with answer A, and the other does *ijtihad* on the question and comes up with answer B. There is no way to know who is correct in the eyes of God. They might disagree with each other's answers, and they might even write books about why one answer is preferable to the other. But ultimately, they would usually end their argument with the phrase "*Allahu A'lam*" (God knows best). That respectful attitude is quite remarkable, especially for people who were in the business of doing religious law. Think about how many times in world history religious authorities have claimed to speak for God, and therefore thought they were justified in forcing people to follow their orders. But the *fuqaha* of Islam refrained from this. They recognized that because they were fallible, they could not force anyone to follow their *fiqh* conclusions. Muslims were always welcome, of course, to come to them voluntarily for *fatwa*s to help them live their lives according to *Shari'a*, but most *fuqaha* firmly resisted situations in which people would be forced by the rulers to follow their – after all, fallible – *fiqh* rules.[7]

So, returning to Figure 4 – because the *fuqaha* recognized the potential validity of any *ijtihad* conclusion, the result was enormous *fiqh* diversity. This is an inherent feature of Islamic jurisprudence. It has always been this way. It is simply not possible to do Islamic jurisprudence according to its founding principles without acknowledging the fallibility of its *fuqaha* and therefore the lack of certainty in any individual *fiqh* conclusion. The result is that every *ijtihad*-based *fiqh* conclusion is equally valid.

Eventually, this *fiqh* diversity evolved into several identifiable schools of law (the *madhhab*s), each with a different methodology of interpretation. While there were hundreds of these schools in Muslim history, there remain only five dominant in the world today – four *Sunni* and one *Shi'a*. The reality is therefore that *Shari'a*, God's Law, is not a monolithic single code of law, but instead many different *fiqh* schools, each of which provide equally valid interpretations of the Law of God.

Muslim legal systems had to figure out how to accommodate this *fiqh* diversity. After all, if the different doctrines of all these different *fiqh* schools are equally valid, it is not possible to just declare one of them the law of the land. Therefore, unlike law in Europe, legal centralism was not an option. Instead, Muslims had to figure out another way to set up their legal systems. Their solution was two types of law: they separated law into the realms of *siyasa*, which is made by rulers, and *fiqh*, which is produced by scholars.

[7] For example, 'Abbasid Caliph al-Mansur (753-775 AD/135-158 AH) approached Malik ibn Anas (eponym of the Maliki *fiqh* school) to adopt Malik's law book, "*al-Muwatta*," as the official law of the Empire, but he refused. According to one report, Malik asserted that it would be "too severe to force the people of different regions to give up practices that they believed to be correct and which were supported by the *hadith* and legal opinions that had reached them." Umar Faruq Abd-Allah, Malik's Concept of 'Amal in the Light of Maliki Legal Theory 100 (1978) (D.Phil University of Chicago 1978).

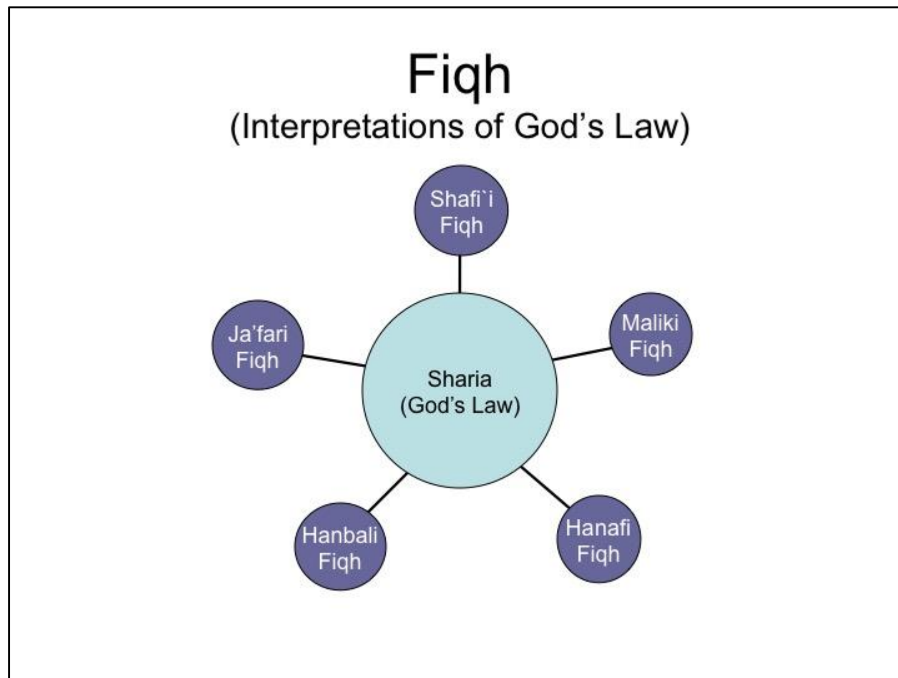

Figure 5

It is important to recognize that this was not a separation of "church" and state. Rather, it is a separation of types of law – both being religious, both serving *Shari'a*. But these systems did not fall into the theocratic systems seen in Europe because Muslim legal systems were based on legal pluralism, not legal centralism. There was a clear separation of two types of law within Muslim lands – the first being that made by the rulers (*siyasa*) and the second (*fiqh*) made by Muslim scholars. The rulers had police power to enforce law upon the population, but they did not have authority to articulate *fiqh* laws. It actually took some fighting between rulers and scholars[8] to get to that point, but fairly early in Islamic history it became settled that the Muslim rulers were not going to be the ones interpreting scripture.[9] Their task was to make whatever laws that were necessary for the public good. But they would not have the right to declare what the *Qur'an* means for the people. That task was performed by the *fuqaha*, operating in the private sphere, and doing so in a very pluralistic manner, which meant that there was a lot of *fiqh* choice for individual Muslims. Thus, unlike in Europe, religious government in Muslim lands

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[8] This period of fighting is known as the *Mihna*.

[9] See Marshall G.S. Hodgson, The Venture of Islam: Conscience and History in a World Civilization I: The Classical Age of Islam (UCP, Chicago 1974) 285-319, 479-89; Khaled Abou El Fadl, Speaking in God's Name: Islamic Law, Authority and Women 26 (Oneworld 2001) ("after the age of mihna . . . [the fuqaha', or Muslim legal scholars] establish[ed] themselves as the exclusive interpreters and articulators of the Divine law. . . . [T]he inquisition was a concerted effort by the State to control the juristic class and the method by which Shari'ah law was generated. Ultimately, however, the inquisition failed and, at least until the modern age, the [fuqaha', or Muslim legal scholars] retained a near exclusive monopoly over the right to interpret the Divine law.").

was not theocratic – the people with physical police power were not the same people who declared the religious law.[10]

Within these parallel but interdependent realms of *fiqh* and *siyasa*, there grew different sorts of adjudicative institutions.

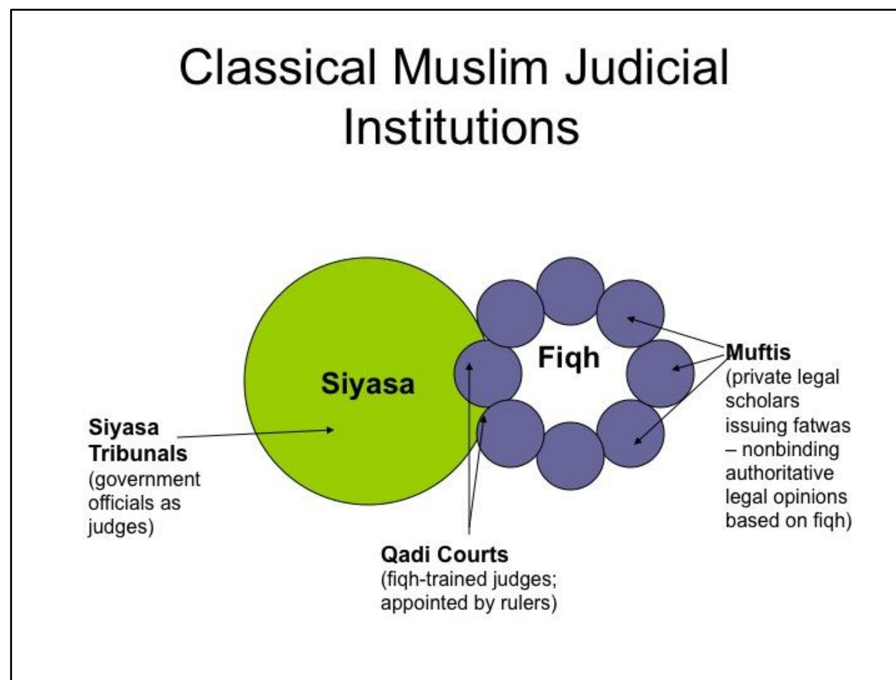

Figure 6

On the *siyasa* side, there were *siyasa* tribunals such as the *muhtasib*, the *shurta*, and other institutions, which resolved conflicts arising under *siyasa* law. And in the *fiqh* realm, people very often resolved most of their *fiqh* questions by going to a local *mufti*, i.e. a *faqih* who answers *fiqh* questions from the public. These *fiqh* questions might be on anything from proper prayer practices, to inheritance rights, to the validity of different types of contracts – anything relating to how to live a Muslim life according to *Shari'a*. *Fatwa*s from *mufti*s often resolved most issues completely privately, outside any state action, but sometimes *fiqh*-based legal issues arose which required the exercise of the power of the state. That

[10] *See* Mohammad H. Fadel, "The True, the Good, and the Reasonable: The Theological and Ethical Roots of Public Reason in Islamic Law", (2008) 21 *Canadian J. of L. & Jurisprudence* 5, 46 ("[t]his area of the law was entirely independent of theological expertise, and accordingly, legitimized rule-making for the vindication of public interests rather than the vindication of express revelatory norms."); Khaled Abou El Fadl, "Islam and the Challenge of Democratic Commitment," (2003) 27 *Fordham Int'l L. J.* 4, 64 ("Only the jurists [were] qualif[ied] to investigate and interpret the Divine will. . . . However, pursuant to the powers derived from its role as the enforcer of Divine laws, the State was granted a broad range of discretion over what were considered matters of public interest known as the field of *al-siyasah al-Shar'iyyah*.").

is where the *qadi* courts came in. The *qadi* was a *fiqh* scholar appointed by the *siyasa* ruler to apply *fiqh* law. *Qadi*s therefore wore two hats – one of *fiqh* and one of *siyasa*.

To illustrate, here is an example to show how this overlap of *fiqh* and *siyasa* worked in the *qadi* courts. Imagine that a woman is having an argument with her brother. Their father died and she did not get any inheritance because it all went to her brother. Imagine also that both parties belong to the *Maliki* school of *fiqh* and that they both know a particular local *Maliki mufti* in their town. They could go to that *Maliki mufti* and resolve their debate by asking the *mufti* how much her inheritance should be. This might end the issue completely without the need to invoke the power of the state. However, problems would arise if they cannot agree on a mufti, or if the mufti issues a ruling about her inheritance that is ignored by her brother. Under such circumstances, she would need the power of the state to force her brother to comply – whether it is to take his wages, or to put him in jail, or to use some other force to make sure he follows the *Maliki fiqh* rule applicable to their case. She would therefore go to a *qadi* – a *Maliki qadi* who would rule on the question, but whose decisions are backed by the power of the state in case her brother decides to ignore it.

There had been this sort of interdependence across Muslim lands throughout Muslim history, this overlap of the two legal realms of *fiqh* and *siyasa*. The details varied with time and place, but basically, the *siyasa* authorities would appoint a variety of *qadi*s from each *madhhab* present in the populations over which they ruled. In this way, the people had tangible control over which *fiqh* law they wanted to follow, and the state facilitated that choice by making sure that there were judges of that school for them to go to when there was any legal conflict. In fact, in some large cosmopolitan cities, it would not be unusual to find *qadi*s and *mufti*s of three, four, or even five schools operating on a regular basis.[11]

That was a very basic summary of the history of Muslim legal systems – it could be called the classical Islamic constitutional structure of legal pluralism. In it there were two different types of law, with very different purposes and attributes. *Siyasa* is usually uniform, whereas *fiqh* is very diverse. *Siyasa* was created to serve general public needs of safety, justice, and order, whereas *fiqh* provide rules to guide Muslims to live a life according to the will of God. *Siyasa* was enforced by the state through use of force, while *fiqh* was partly enforced by the state and partly self-enforced, depending on the nature of the issue.

[11] This is one of the reasons that Muslim societies were so easily able to absorb Jewish and Christian communities from other places. Muslim lands were often where refugee Jewish communities would go when persecuted by Christians. One of the reasons for that is that in Muslim lands they could still live according to their own Jewish law. In a system of legal pluralism with separate *siyasa* and *fiqh* legal realms, Jewish courts were just one more circle in the many circles of *fiqh* diversity. They could be accommodated quite easily into this system without any threat to the overall constitutional structure.

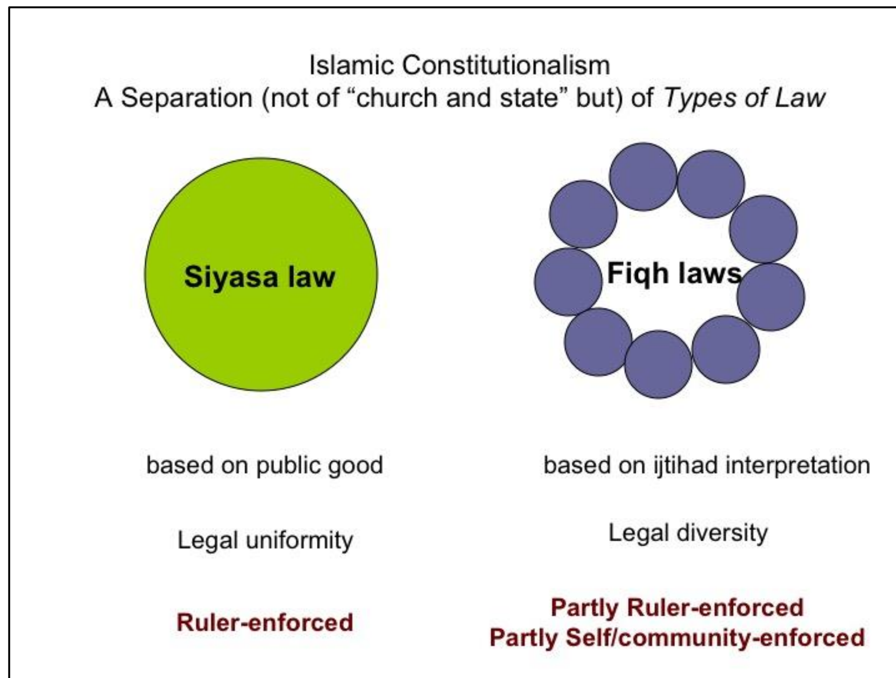

Figure 7

This is very different sort of legal pluralism than the one that is currently being discussed in modern constitutional debates. Modern constitutionalism presumes legal centralism, where state law defines what law is, so debates over legal pluralism today are mostly just a struggle to figure out how to make that state law recognize other non-state laws. On the contrary, in pre-modern Islamic legal pluralism, it was presumed that the state would operate in an inter-dependent way with other non-state laws.

III. Legal Centralism in Modern Islamic States

All this changed with modernity. In nearly every Muslim-majority country, whether it was previously colonized by a European power or not, European nation-state legal centralism became the norm. With independence, new Muslim-majority countries continued this norm as the basis of their legal systems. And even when political Islamic movements started advocating for an "Islamic state," they did not change that basic European presumption of legal centralism.[12] Instead, they merely looked for ways to add *Shari'a* to the established nation-state. Rather than thinking about recreating a modern system with a *fiqh-siyasa* legal pluralism, they used the state's legal centralism to legislate *fiqh* rules. In their mind,

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[12] See Mohammad Hashim Kamali, "Methodological Issues in Islamic Jurisprudence," (1996) *Arab L. Q*. ("The government and its legislative branch tend to act as the sole repository of legislative power. . . . The advent of constitutionalism and government under the rule of law brought the hegemony of statutory legislation that has largely dominated legal and judicial practice in Muslim societies.); Sherman Jackson, "Shari'ah, Democracy, and the Modern Nation-State: Some Reflections on Islam, Popular Rule, and Pluralism," (2003) 27 *Fordham Int'l L.J.* 88.

the state was where all law had to be located, and thus where one would introduce *fiqh* into the system. To date, they often end up introducing the rules of one *fiqh* school, or sometimes pieces of *fiqh* rules from different schools, to their codes[13] and call this "*Shari'a* legislation."

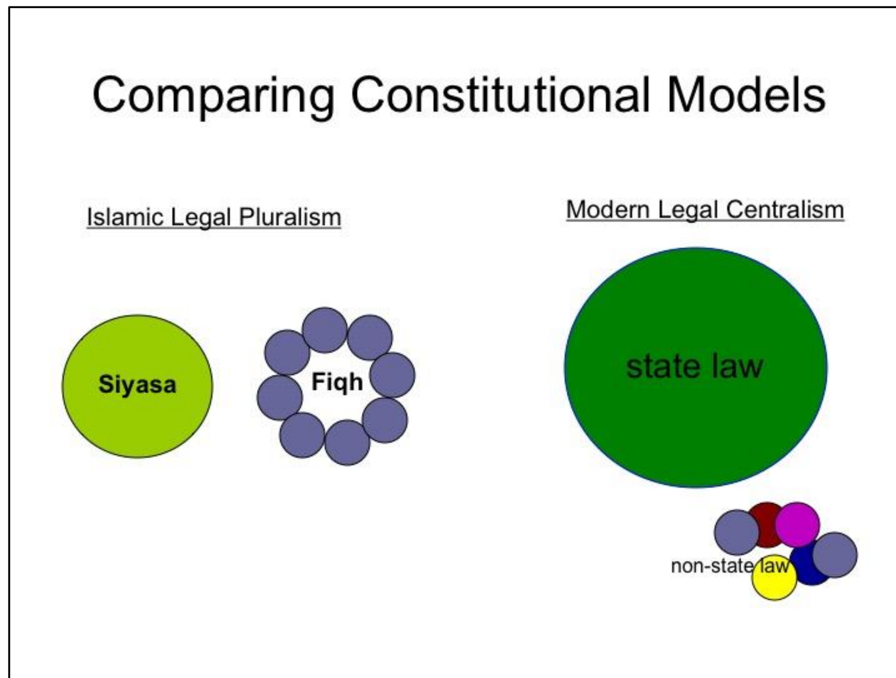

Figure 8

This is a very dangerous and sad turn of events. By enacting one collection of *fiqh* laws as the law of the land, these countries have actively discarded *fiqh* diversity, so much so that this diversity largely has now been forgotten by most Muslims around the world. Worse, because these enactments are usually described as "*Shari'a*," many Muslims living in these countries think that they cannot disagree with this legislation, because, after all, what Muslim would disagree with God's Law? What these Muslims do not realize is that when their government claims to enact "*Shari'a* legislation", what it is really doing is making a choice among different (and equally valid) *fiqh* rules on that topic. If average Muslims knew more about *fiqh* diversity, they would be able to realize, for example, that while the government has picked the *Hanafi* rule on a particular matter, and while the *Maliki* rule happens to be different, they are both valid as *Shari'a*. But because Muslim populations do not know enough to be able to see that, governments can manipulate their populations into supporting these laws as if it were a religious obligation to do so.

[13] These *fiqh* rules are usually introduced to personal law codes, although they may in some states be introduced to criminal codes as well.

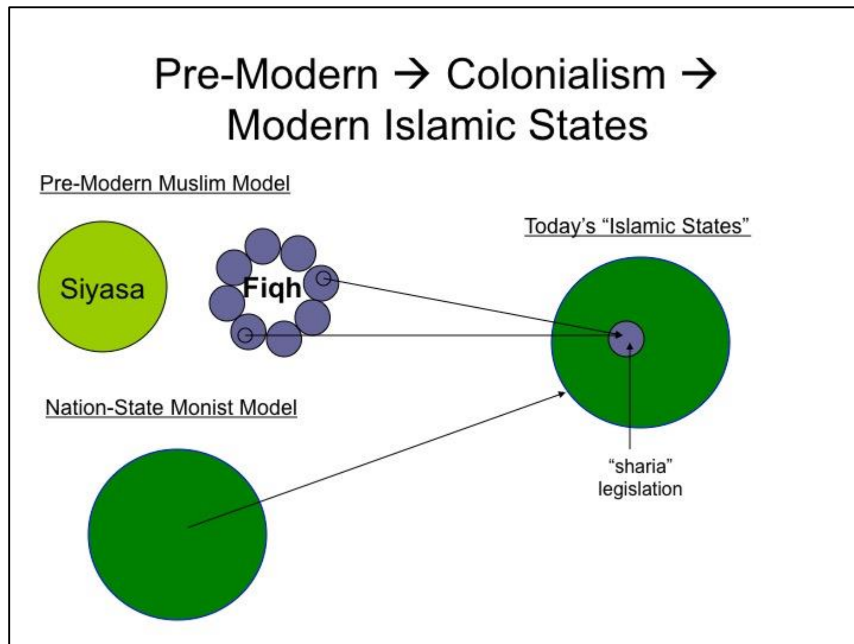

Figure 9

The result is that the way people think about *Shari'a* itself has now changed. Before, Muslims were more aware that *Shari'a* existed in the form of many *fiqh* schools, and Muslims had a choice of which school to follow. But today, the phenomenon of *Shari'a*-based legislation has created the idea that *Shari'a* is uniform, not diverse, and should be articulated and enforced by the state.

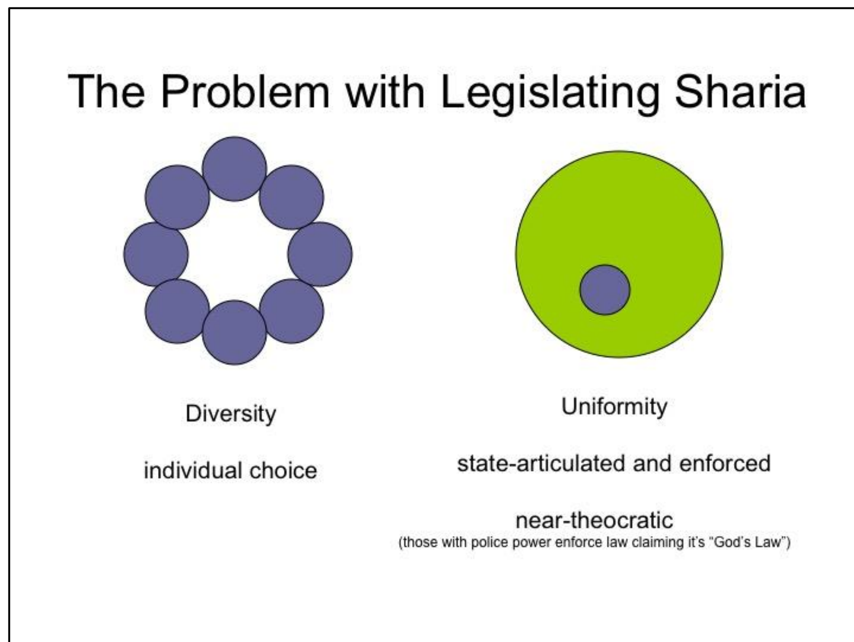

Figure 10

Sadly, and ironically, this is the closest thing to a theocracy that Muslims have ever seen. Islam has never had a "church", so Muslims did not make the mistake of merging church and state as happened in Europe, where the state dictated the meaning of religion and enforced it with its police power. Instead, as described above, in Muslim history the people articulating *fiqh* (the *fuqaha*) were not the same people who held police power (the *siyasa* rulers). Today, however, Muslim states are combining these two powers – using legislation and *Shari'a* courts to declare and enforce their preferred *fiqh* rules, calling it the Islamic law of the land. This is a very strange thing for Muslims to do. *Shari'a*, as applied in the world, used to be characterized by diverse interpretations, with Muslim rulers allowing – even facilitating – people to follow whichever school of thought with which they identified. That is a characteristically Islamic principle of freedom of religion – to follow whichever *fiqh* school one may choose to follow – and that is what Islamic governments, for many centuries and in many lands, recognized. But it is certainly not what Islamic states do today.

Afghanistan is not quite that bad, however. The Afghan Constitution does have some features of merging the *fiqh* realm with the *siyasa* realm, but it is not as drastic as the Constitutions of other countries, such as Egypt, where the Constitution declares that *Shari'a* should be "the source" of legislation. Instead, Articles 130 and 131 of the Afghan Constitution direct judges to follow *Hanafi* law, or *Shi'i* law if the parties are *Shi'a*, when there is no relevant state law or constitutional provision governing the case. Because this is directed to the judges, and not to Parliament, this preserves one aspect of the separation of *fiqh* and *siyasa* – i.e., that *fiqh* should not be the basis for state legislation. Thus, the Afghan Constitution calls not for *Hanafi* or *Shi'i fiqh* to be used as a gap-filler for state legislation, but instead only on a case-by-case basis, by individual judges in relevant litigation. This is closer to how *fiqh* was enforced by Islamic governments in pre-modern times – through *qadi*s applying *fiqh* law, and not through uniform one-size-fits-all state lawmaking. Moreover, Article 131 is a powerful recognition of *fiqh* diversity. It formally acknowledges that *Shi'i fiqh* is different from *Sunni fiqh*, and that Muslims should be able to choose which one should apply to them. Although this does not (yet?) extend to *Maliki*, *Shafi'i*, and *Hanbali* Muslims, it is still a very powerful honoring of the agency that *fiqh* diversity has always granted Muslims.

Nevertheless, there are aspects of Afghanistan's laws that are examples of the problematic phenomenon of "*Shari'a* legislation" – where pieces of different *fiqh* from different schools have been enacted as the uniform law of the land. This can be found in Afghanistan's civil code provisions covering marriage and divorce, for example. Many Afghans probably believe these rules to be mandated by Islam, and it is highly unlikely that many are aware that they are a collection of different rules from different *fiqh* schools, nor that there are other, equally valid, *fiqh* options out there that were not enacted. The ultimate result, then, is that the Afghan conception of *Shari'a* is probably quite similar to that found in most Muslim populations around the world today: they think of *Shari'a* as a relatively monolithic code of rules, and that it is perfectly appropriate for the state to legislate that code as a matter of state law. As explained earlier, that attitude is not only dangerous for its theocratic implications, but it is also a radical departure from Muslim history.

IV. The Proposed Model for Modern Islamic Constitutionalism

This paper suggests a new Islamic constitutional model based on the idea that there is a way to bring back a more robust set of *fiqh* choices for Muslims living in Muslim countries. It posits that the way to do that is by re-introducing the *fiqh-siyasa* principle of pre-modern Islamic legal pluralism, amending it as appropriate for modern considerations, such as democratic decision-making.

What does this model look like? First, it takes the idea of *siyasa* as the ruling power over a land. That concept translates easily to the police power held by modern state governments. Modern governments, then, would operate as the *siyasa* side of a modern *fiqh-siyasa* system of legal pluralism. Further, because *siyasa* is legitimate as a *Shari'a* matter because of its service of the public good, we can conclude that a modern *Shari'a*-conscious Islamic government should first and foremost act in the public good. To adjust for modern realities, democratic decision-making should be the way to decide that public good today.[14] Modern democratic Islamic governments, being the modern equivalent of *siyasa*, should therefore democratically enact and enforce laws that serve the public good. That means that the first question a modern Islamic government should ask whenever it acts is: "Does this serve the public good?" It is important to see that this is a very different question than "is this *Shari'a*?" or "what is the *fiqh* rule on this?", because, as established in Muslim history, the job of the Muslim ruler is to serve the public good. It is *not* the ruler's job to select which *fiqh* rule to impose on the people.

Thinking this way would be a big shift from typical discussions of political Islam. Those discussions usually presume that in order to make a state Islamic, it has to create "*Shari'a* legislation." But that way of thinking is based on a colonial model of legal centralism – where law is located only with the state. That is why political Islamists are fixated on the state. They see the state as the only way to establish *Shari'a*-based laws. But that approach forgets that the state is really only one of two arms of a *Shari'a* rule of law system. The other is *fiqh*. When a Muslim state (*siyasa*) legislates *fiqh*, it is collapsing the two realms of *fiqh* and *siyasa* together, which leads to theocracy.

But there is another reason why this is not a logical way to create a *Shari'a* rule of law system. The concept of *Shari'a* legislation does not make much sense in light of an understanding of *fiqh*. That is because there is usually more than one *fiqh* rule on a given question, and therefore no way to decide which one is "truly" *Shari'a* in order to legislate it. For example, an Islamic government decides to enact divorce laws according to *Shari'a*, and is considering legislating that abandonment by the husband is a ground for divorce. Under the *Hanafi* school, the husband has to have been gone for ninety or more years. However, under the *Maliki* school, he could be gone for only four years. Which one is to be considered *Shari'a*? They are both legitimate articulations of *Shari'a*. We cannot declare either one of these *fiqh* rules to be "the" correct version of *Shari'a* law because that would be going against the epistemological foundations of Islamic jurisprudence, which holds each *fiqh* school's rules to be equally valid. In reality, the only way a state can select among *fiqh* rules on a *maslaha* basis is to ask the question: "which one serves the public good better?" That is exactly the job of a Muslim ruler in the first place – to serve the public good. It would therefore be better to begin addressing the public good directly, and to forget about the distracting questions on what the *fiqh* is on any given issue. If this model is applied to the example given above regarding an Islamic government trying to decide which

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[14] In pre-modern Islamic societies, this would be determined by the caliph, sultan, king, or other ruler.

divorce law it should enact as the law of the land, the answer would be whichever it concludes best serves the public good (*maslaha*). That would create a much more productive use of debate in the public sphere, because everyone can offer their insights about what serves the public good. Under this model, public discourse does not have to devolve into an argument of "who's got their Islam right", or worse, destructive claims over who is more Islamic than who.

It can be said that this model appears to be too similar to a secular state. If the only thing that a Islamic government is concerned with when making law is whether such law is in the public good, then some might worry how this standard will make sure that the state is staying within the boundaries of Islam when it decides this public good. This is a very legitimate concern for Muslims to have, and it is very important to take seriously the concern of many Muslims that they want the laws of their government to not go against *Shari'a*. Many countries have in fact put this idea in their constitutions[15]. These sorts of provisions reflect a very important public feeling about *Shari'a*-compliance that must be honored. However, it is important to be careful about how these provisions are interpreted in order maintain a *fiqh-siyasa* separation of law. More specifically, it is not appropriate to understand "contrary to *Shari'a*" to mean "contrary to *fiqh*". To do so would result in attempts to check the compliance of a rule or decision with a normative order that is pluralistic by definition and tradition. In other words, which *fiqh* rule should state law be checked against? For example, if the state decides to require a minimum of ninety years abandonment to be grounds for divorce, such legislation would be legitimate if checked against the *fiqh* of the *Hanafi* school. However, if this legislation is checked against the *Maliki* rule, it would not be. This leads us back to the dilemma of enacting *Shari'a* legislation in the first place: *Shari'a* isn't one legal code, but rather, exists in as many diverse *fiqh* schools.

Moreover, if "contrary to *Shari'a*" is taken to mean "contrary to *fiqh*", that would mean that the state could not make any laws on anything on which there is any diversity of *fiqh* rules. Because there are a lot of *fiqh* rules on a wide variety of topics, including contract law, property law, and criminal law, this would drastically limit the state's lawmaking power. It would tie the hands of the state, especially today, when there are many issues on which strong state lawmaking power is important – such as environmental regulations, labor law, and economic regulation. To be more specific to Afghanistan, Article 3 of the Afghan Constitution states: "In Afghanistan no law may contravene the beliefs and ordinances (*mu'taqadat wa ahkam*) of the sacred religion of Islam." It remains to be seen how the legal authorities will interpret "*mu'taqadat*" (beliefs) and "*ahkam*" (ordinances), but it is possible that "*ahkam*" might be confused with "*fiqh* rules", in which case Afghanistan may face some of the problems described above.

But there is a different way to apply this constitutional "*Shari'a* check" principle. There is a concept in Islamic jurisprudence common to all the schools that is also broad enough to accommodate a wide range of state action, known as the *maqasid* (purposes) of *Shari'a*. Muslim jurists of all *fiqh* schools agreed long ago that *Shari'a* ultimately serves to protect five things: religion (*din*), life (*nafs*), family (*nasl*),

[15] See for example, Article 3 of the Afghan Constitution: "In Afghanistan no law may contravene the beliefs and ordinances of the sacred religion of Islam"; see also Article 2 of the Egyptian Constitution: "Islam is the religion of the state and Arabic is its official language. The principles of Islamic Shari'a are the principle source of legislation".

property (*mal*), and intellect (*‘aql*).[16] All these elements together are said to serve the public good (*maslaha*). Thus, the *maqasid* are much more useful tools with which to check state lawmaking for consistency with *Shari‘a*. There is a wealth of classical Islamic writings on *maqasid* to draw upon to work out the details and implications of these five purposes in the modern world, and each country could designate whatever institution it thought best to perform these *maqasid* analysis – whether a *Shari‘a* Review Board, a Supreme Court, or a Constitutional Court. If staffed with both *fuqaha* and specialists in relevant law and social issues such as economics, technology, science, etc., this is where robust conversations over whether something is “Islamic” should take place. It would be a much better place for these debates than the political realm of bargaining, lobbying and politicking.

In sum, Figure 11 below illustrates the series of questions that a modern Islamic government should ask whenever it enacts a law of the land:

Figure 11

Of course, *siyasa* is not the only kind of law there is. Attention must also be given to the realm of *fiqh* law, and especially to recognizing its inherent diversity. To retain the key strength of classical Islamic legal pluralism, a modern Islamic constitutional system must give individuals real choice over the school of *fiqh* with which they govern their lives. Thus, they have to be able to opt for their preferred *fiqh* school, and opt out of the state enacted law – that has been democratically-determined to serve the public good. Under this model, an individual Muslim should be able to, for example, opt out of the

[16] See Imran A. K. Nyazee, *Theories of Islamic Law* 189-217 (Adam Publishers 1996); Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence* (3rd ed. 2003), p. 351-67, 397-409.

state-made law of divorce because he is a *Maliki*, and choose to have his divorce adjudicated under *Maliki* law, or whatever other Islamic law of his choosing. A modern Islamic government should facilitate that choice by providing judges trained to adjudicate based on the *fiqh* schools represented in the population.

Figure 12 below illustrates how the opt-out parallel *fiqh* realm would work:

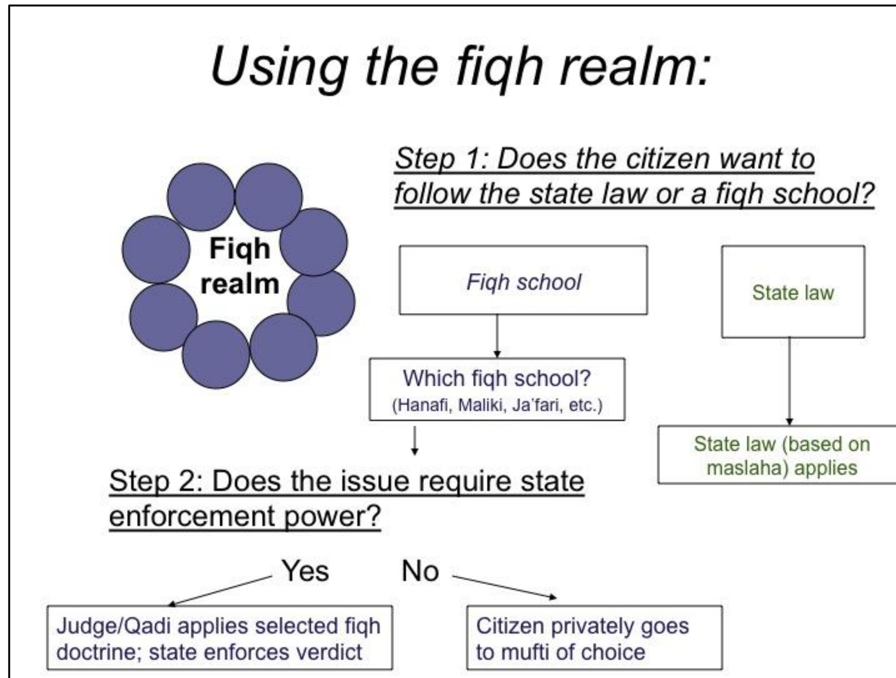

Figure 12

If a given citizen finds the enacted state law acceptable, then things would proceed according to whatever generalized substantive and procedural arrangements have been made by the state. But if a citizen would prefer to follow one of the *fiqh* schools, then she would go to either a mufti or a *qadi* of that school, depending on how much the power of the state is needed to resolve her legal issue.

Here are a few examples in order to give a better understanding of this model. First, imagine that a modern Islamic country wants to abolish slavery. The question therefore arises if it could do that as a matter of state law. If this country took *fiqh* as its source of legislation, then it would face a big obstacle in passing such a law, because the *fuqaha* never banned slavery. On the contrary, the *fiqh* is full of rules governing the treatment of slaves as property. If instead, this country separates *fiqh* and *siyasa*, remembering that the job of *siyasa* power is first and foremost to serve the public good, then the situation changes significantly. Its first question is simply "does banning slavery serve the public good?" That question would probably be answered with a "yes". Its next question would then be "does that rule contradict the *maqasid* (purposes) of *Shari'a*?" That is, does a ban on slavery contradict the protection of religion, life, family, property, or intellect? It is again likely that most *fuqaha* would conclude that a

slavery ban would not conflict with any of those purposes. The ban would therefore be passed, and likely survive a *Shari'a* review.[17]

Here is another example. Should a Muslim state prohibit women from traveling without a *mahram* (a male family escort)? Again, rather than looking to see if this is consistent with existing *fiqh*, the legislative question should be "does it serve the public good to prohibit women from travelling alone?" It is well-known that the classical *fiqh* schools have rules that restrict women's movement based on whether or not she is accompanied by a *mahram*. However, the issue here is whether the *state* should enforce this *mahram* rule – as a matter of *state* law. This is a very different question from "what should a Muslim woman do?", which is a question for the *fiqh* realm. When deciding whether or not to travel alone, a Muslim woman should go to her preferred *mufti* for guidance and act accordingly.[18] But whether or not the *state* should decide that question for her depends on whether or not it serves the public good to do so. Would it serve the public good for the state to restrict visas and passports and create other immigration controls to restrict non-*mahram* travel for all the women in the whole country, instead of the *fuqaha* making it on a case by case basis for each woman's particular situation?[19] What if a woman does not have a male relative and she needs important medical treatment that she has to fly to another country for? Would it really be in the public good to prohibit her from doing that? The answer is unclear for Afghanistan. That is to be decided by the people of Afghanistan – through open and honest public discussion about the public good. This discussion should happen before passing such a law.

Only after the question of the public good is answered, would the second question of whether or not such a rule contradicts the *maqasid* of protecting religion, life, family, property, or intellect be addressed.

The final example returns to the earlier hypothetical about how an Islamic country should enact laws of divorce. If it uses the model proposed here, legislation becomes much simpler than trying to answer the impossible question of which *fiqh* school's rule of husband-abandonment is the "correct" *Shari'a* rule. Under the proposed Islamic constitutional model, the state should enact whatever rule that the people democratically decide better serves the public good. This might happen to correspond with the *Maliki* rule, or the *Hanafi* rule, or some other school, but it would be enacted not *because* it is that school's *fiqh* rule, but rather because the society has decided that that particular *fiqh* rule serves the public good. Whatever divorce law is passed would then, of course, have to pass the *maqasid* check – i.e., does it

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[17] Looking ahead to the opt-out *fiqh* realm, it might be asked whether or not individual Muslims could choose to "opt-out" of a state slavery ban by asserting that they want to follow a *fiqh* school that allows slaveholding. This is a challenging question, but not one impossible to resolve. To do so, the state would simply have to decide whether it serves the public interest to allow *fiqh* opt-out exceptions to this (and other) state rules. Classical Islamic jurisprudence allowed rulers to do quite a lot in the name of *maslaha*, even trumping *fiqh* rules if necessary (Caliph Umar's suspension of the punishment theft in a time of famine, might be considered one of the earliest examples of this), so the same prerogative can be taken by a modern state government's exercise of its *siyasa* powers. The key is always to remember that the state rule is being made for *maslaha* purposes only, not as any substantive change to the *fiqh* rules themselves – that is only for *fiqh* scholars to do.

[18] It is important to comment here that not all restrictions on one's behavior are the result of state control. Many of us refrain from doing things every day that the state allows us to do – such as smoking, or donating money to corrupt politicians, or eating unhealthy food. So it is entirely possible that a Muslim woman might go to her local *mufti* to see if her *fiqh* school allows her to travel alone without a *mahram*, and if that *mufti* says no, she would choose not to travel – *even* if the state did not prohibit her from doing so.

[19] Some countries do this very thing – drawing their rules from *fiqh* on this subject. But that is because they collapse *fiqh* and *siyasa*, using the power of the state to enforce their preferred *fiqh* rules. As explained above, that approach does not take seriously the first job of the state – which is to serve the public good.

serve the protection of religion, life, family, property, or intellect – and if it does, then that is the law of the land. For those citizens who still feel uncomfortable with that legislation, it is important not to forget the parallel opt-in *fiqh* realm. That is, an individual Muslim could always opt not to follow the state divorce law that was passed, but choose to have his divorce adjudicated according to another school, for example, the *Shafi'i* school. The Muslim state would then facilitate that person's choice to opt out of the state law into the *fiqh* realm by providing an appropriately trained *Shafi'i* judge. This might be through alternative dispute resolution institutions, a parallel court system, or some other mechanism that the state has created for this purpose (again, based on what best serves the public good (*maslaha*)).[20]

Conclusion

In summary, Figure 13 illustrates what this new model of Islamic constitutionalism would look like:

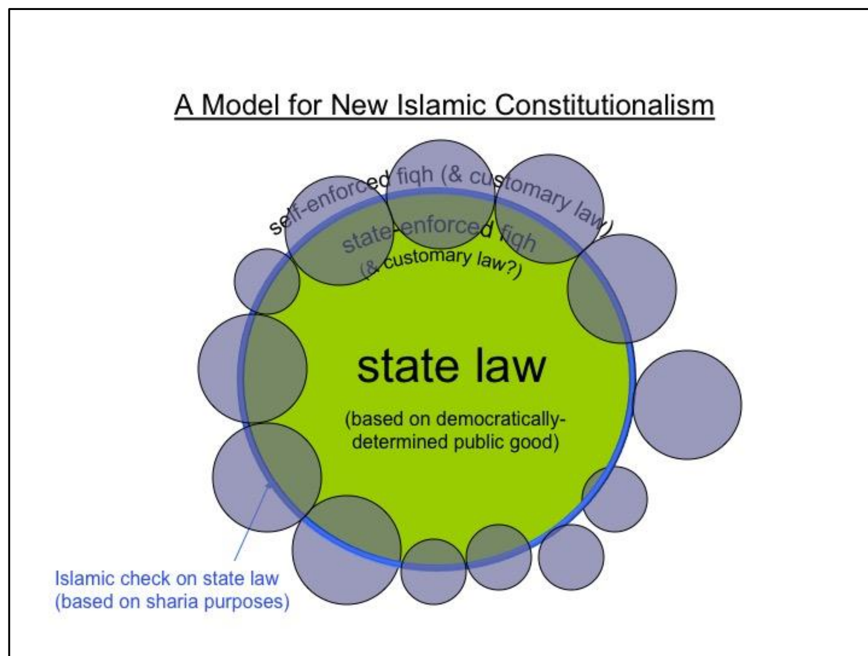

Figure 13

In the center is the state, creating laws via some democratic institution such as a representative parliament, congress, president, etc., always trying to serve the public good. Whenever laws are made in this realm, they should be answering the question "what best serves the public good?" It is important

[20] It might be asked here, what if there is a *fiqh* conflict between two parties of two different *fiqh* schools – which *fiqh* school would they use? The answer to this is too complex for this short paper, but a short answer is to think about the many commonly-used conflict-of-laws tools that can be employed to resolve these conflicts, just as they are already used to resolve legal conflicts between citizens of different states and countries. For example, contracts often specify which law will govern future disputes between the contracting parties.

to remember that this is an Islamic thing for the state to do. It was established long ago in Islamic history that the *siyasa* power exists first and foremost to serve the public good. That was the first job of a Muslim ruler, and therefore the first job of a modern Islamic state.

Further, there should be no concern that this will end up as an un-Islamic secular legal system. This is because, first, there is a Shari'a check on state lawmaking, in the form of checking it against the *maqasid* purposes of *Shari'a*.[21] Second, the system is one of legal pluralism that includes a realm of *fiqh* law – in all its diversity – as a built-in parallel realm of law alongside the state law. That means that every Muslim has the option to follow the *fiqh* rules of their choice based on their own personal *madhhab* affiliation.

This combination of democratic state law, checked by *maqasid*, and optional *fiqh* law with all its diversity is a new way of thinking about an Islamic state. More importantly, this approach is more authentic to Muslim heritage than the states currently described as "Islamic", because it is not based on the European nation-state idea of legal centralism. Instead, it takes its inspiration from the legal pluralism of *fiqh* and *siyasa* that was characteristic of Muslim law and government before colonialism and the modern era. This classical Muslim structure should be especially exciting to today's multi-ethnic and multi-cultural societies because it successfully worked out the constitutional challenges of legal pluralism long before western legal scholars started wrestling with them. It is a shame that modern Islamic political movements did not embrace this classical Islamic legacy when they embarked on their Islamization projects in the mid-20th century, choosing instead to build their systems on European-style legal centralism. But it is not too late. Muslim-majority countries today could adjust their systems closer to a *fiqh-siyasa* model of legal pluralism, and show that Islamic constitutionalism has something unique and powerful to offer the world. The model presented here is one way to do that.

[21] That check is represented in Figure 13 by the circle line or border around the state law.