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Mohammed Fadel

Version  Publisher’s Version

Citation (published version)  Mohammed Fadel, "A Tragedy of Politics or an Apolitical Tragedy?" (2011) 131:1 Journal of the American Oriental Society.


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A Tragedy of Politics or an Apolitical Tragedy?

MOHAMMAD FADEL
UNIVERSITY OF TORONTO

1. INTRODUCTION

Fifty years after the publication of Joseph Schacht’s and Noel Coulson’s introductions to Islamic law, they continue to be widely read, despite an explosion of Islamic law scholarship in subsequent decades that superseded much of their work. Islamic legal studies have thus faced a paradox for some time: current scholarship has long moved beyond Schacht’s and Coulson’s positions as reflected in their respective introductions, but because there is no alternative introductory text, they have continued to occupy a place of special pre-eminence, despite the fact that virtually all current scholars of Islamic law would agree that these works do not adequately reflect subsequent scholarship.

Wael Hallaq, one of the leading Islamic law scholars of the post-Schacht and Coulson generation, aims to solve this dilemma with the recent publication of *Sharīʿa: Theory, Practice, Transformations*. *Sharīʿa* may very well be the most ambitious work written in the English language on Islamic law. It is a thorough survey of Islamic law and its relationship to Muslim societies from the rise of Islam to the present era. Students will find his outline of Islamic law substantially more accessible than the comparable section in Schacht’s *Introduction*. Teachers and students will especially welcome his highly informative discussion of Islamic law in Malaysia and Indonesia, which have not traditionally received the attention of Western scholars of Islamic law. Likewise, his treatment of the transformations of traditional legal orders, including, but not limited to, Islamic law since the eighteenth century, is comprehensive and to my knowledge unrivalled by any other survey. With its unmatched breadth and depth, *Sharīʿa* will undoubtedly be recognized as the new standard introduction to Islamic law and Islamic legal history in English, and in coming years I expect it to have as great an impact on the kinds of questions students and scholars of Islamic law pursue as the works of Coulson and Schacht had on previous generations.

*Sharīʿa* represents the culmination of Hallaq’s highly productive scholarly career, one which virtually provoked a revolution in the modern study of Islamic law. Beginning with the publication in 1984 of his landmark essay “Was the Gate of Ijtihād Closed?” Hallaq has pursued an ambitious and iconoclastic scholarly agenda that challenged the received truths of Islamic law, whether in theoretical jurisprudence or the development of substantive law. In 2005, Hallaq published a history of the origins of Islamic law, and he has also published outside of the narrow boundaries of Islamic law, most notably, a translation and introduction to Ibn Taymiyya’s refutation of Greek logic.

With the exception of one article that he wrote early in his career, Hallaq has shown little scholarly interest in Islamic political thought or in Islamic law in the modern era. After September 11, 2001, however, Hallaq’s writing has become increasingly focused on Islamic law in modernity, and in particular on the global and local political forces of modernity and


how they have formed (or deformed) Islamic law. Indeed, although the work under review begins with an overview of Islamic law from its origins with the Prophet Muḥammad, it is primarily Hallaq’s attempt to provide an interpretation of Islamic law and its place in the modern (and post-modern) world.

Methodologically, Shariʿa represents a fundamental break with Hallaq’s previous scholarship as he attempts, ambitiously, to set out a new approach to studying Islamic law, one that goes beyond what he calls “legal Orientalism.” In Shariʿa Hallaq endorses the methods of legal anthropology and social historians, on the one hand, and Michel Foucault’s theory of modernity and the state, on the other, as antidotes to what he identifies as the pervasive constraints of legal orientalism.

Hallaq’s determination to defend the integrity of Islamic moral and legal traditions in the face of the sometimes vicious attacks they have received in popular and academic discourses since 9/11 distinguishes his writing radically from Coulson’s and Schacht’s at times condescending approach to Islamic law. Unfortunately, many of his arguments have the unhappy effect of reinforcing a central tenet of the “war on terrorism”: there is an irreconcilable conflict between Islam and modernity. Indeed, one might read Hallaq’s narrative as merely a sophisticated inversion of the moral conclusions of the legal orientalism he so heavily criticizes. Thus, what legal orientalists had seen as defects in Islamic law, Hallaq describes as its enduring strengths or even as evidence of its moral superiority to modern law; it is only our modernist bias that precludes us from appreciating these features of historical Islamic law. The goal of Hallaq’s narrative is to make the reader appreciate the moral accomplishments of Islamic law and come to the realization that its fate in the modern world—dominated by an instrumentally overbearing state when it is not marginalized outright—is essentially tragic; his narrative is ultimately a tale of how a more efficient, but amoral capitalist-based modernity overwhelmed traditional Islamic societies.

This narrative, however, all too often oversimplifies complex legal, social, and political problems, and too readily indulges casual comparisons between Islamic law and modern law to be convincing. While some simplification is required in order to make a general survey of this sort accessible to non-specialist readers, Hallaq’s narrative, too, often results in either incomplete or misleading accounts of Islamic substantive law. The principal flaw in Hallaq’s analysis is his apolitical conception of Islamic law. Given the centrality of politics to his narrative, he needed to provide a normative account of Islamic politics, something Shariʿa does not do; without such an account, however, we are unable to judge the normative legitimacy of the modern state from the perspective of Islamic law.

This review will proceed in three parts: an overview of the book’s structure and contents, a discussion of Hallaq’s theoretical framework, and a brief discussion of factual errors.

2. THE STRUCTURE OF SHARIʿA: THEORY, PRACTICE, TRANSFORMATIONS

Part one, “The Pre-Modern Tradition,” provides an account of the origins of Islamic law; the development of its jurisprudential theory, usūl al-fiqh; the rise of the principal institutions of that legal system, viz., the school of law, madhhab, and the law school, madrasa; the relationship of law and society; and an account of political legitimacy rooted in the concept of

the “Circle of Justice.” Part two, “The Law: An Outline,” provides an overview of the basic elements of Islamic substantive law, with chapters covering Islamic ritual law, contracts, family law, property, offences, jihad, and courts. Part three, “The Sweep of Modernity,” begins with a theoretical introduction and then discusses in detail the fate of Islamic law in the Indian subcontinent, Southeast Asia, and the Middle East and North Africa in the wake of European colonialism. A description of the modernization of law in the newly independent nation-states of the Muslim world following World War II follows. Hallaq concludes with a discussion of contemporary Muslims’ search for a new theoretical jurisprudence to replace the interpretive methods of the historical tradition of *uṣūl al-fiqh* outlined in part one.

Despite the book’s substantial advances relative to Schacht and Coulson, many aspects of the book are deeply problematic. As Hallaq himself notes in his preface, this book represents a significant departure from his previous scholarly activities (p. vii). Surprisingly for a scholar whose prior writings focused on legal theory, Hallaq chose here to follow the lead of legal anthropologists and social and legal historians of the Ottoman period, turning also to the work of Michel Foucault to theorize the modern state and its power relations, something Hallaq believes was absolutely necessary not only to understand the fate of Islamic law in the modern world, but also to have a better understanding of the operation of Islamic law in the premodern world.

For Hallaq, the problem with traditional Islamic legal studies—with its focus on legal theory—was that it was theoretically impoverished. It never recognized that terms such as “law” were themselves problematic concepts. Confusion over the meanings of these terms is “responsible for a thorough and systematic misunderstanding of the most significant features of the so-called Islamic law” (pp. 1–2). While orientalists had found premodern Islamic law to be deficient because it lacked a distinction between law and morality, Hallaq argues that it was the orientalists’ parochial conception of law—one that was a product of their experience of modernity’s distinctively amoral legal order (pp. 2–3)—that led them to this conclusion. Once this modernist bias is purged, it becomes possible to accept Islamic law on its own terms. When we do so, Hallaq argues that this feature of Islamic law, the fusion of law and morality, is in fact one of its greatest advantages: “Islamic law’s presumed ‘failure’ to distinguish between law and morality equipped it with efficient, communally based, socially embedded, bottom-top methods of control that rendered it remarkably efficient in commanding willing obedience and—as one consequence—less coercive than any imperial law Europe had known since the fall of the Roman Empire” (p. 2).

Hallaq also takes another orientalist theme—the contradiction between law and practice—to be a manifestation of orientalism’s modernist bias. Orientalists understood the “gap” between legal doctrine and social practice to be evidence of a lack of integrity in the legal system. For Hallaq, however, this “gap” represents Islamic law’s own internal ethic of restraint, one that eschews modern law’s insistence that all persons adhere to its norms on pain of punishment. In other words, according to Hallaq, Islamic law adopts a “hands-off approach” to further its goals, a characteristic that explains why it regularly deployed mediation as its preferred tool for legal ordering rather than the modern system of discipline and punish (pp. 2–3).

The modernist biases of orientalism, however—again, according to Hallaq—are not simple analytic errors that can be overcome by greater theoretical consciousness: they are part and parcel of a modernist political project whose goal was to destroy traditional systems of governance (which included, but were not limited to, Islamic law) and to replace them with modern institutions, including modern law, that could more effectively serve the instrumental goal of capital accumulation. Thus, the orientalist interest in Islamic law was always an
adjunct to the colonialist project of imposing modernity on “the Islamic subject,” a project first overseen by European colonialists, but later, in the post-independence era, uncritically, perhaps even enthusiastically, adopted by indigenous Muslim political elites themselves, whether secular or religious. Modern studies of Islamic law, then, are fatally flawed because they are inextricably linked to the politically oppressive project of modernity (p. 10). It is the inherently political project of orientalism, therefore, that justifies Hallaq’s methodological turn away from legal theory and toward the social sciences and social theory.

Hallaq gives his most systematic account of the conflict between legal modernity and Islamic law in his introduction to part three of the book. He identifies six antinomies between modern law and Islamic law that make their coexistence impossible. While both are “machines of governance,” they govern societies in “their own, markedly different ways”; Islamic law can only tolerate political rule-making if it is marginal and does not effect the substance of its rules, while modern law insists on exercising a monopoly over rule-making through its own political processes; both claim legal sovereignty, but while modern law identifies the state as the locus of sovereignty, in Islamic law it is the law itself that is sovereign, with the result that the state contemplated by Islamic law is “the incomplete, and certainly ‘stunted,’ equivalent of the modern nation-state”; the law of the modern nation-state is profoundly centralizing whereas Islamic law, because of its epistemological commitments, is “demonstrably centrifugal” as manifested in its administrative institutions which were left almost entirely in the hands of Muslim jurists themselves without the interference of a state hierarchy; the modern state is an abstract legal entity whose existence is ideological and whose purpose is to obfuscate “the domination of one class by another” whereas Islamic law “neither promoted economic classes nor encouraged capitalistic or class dominance”; while Islamic law operates through the grass-roots mechanisms of civil society, and thus produces “self-governing” societies, the law of modern nation-states is “superimposed from a central height in a downwards direction, first originating in the mighty powers of the state apparatus and thereafter deployed to the individuals constituting the social order”; and the goal of the law of the modern nation-state is the homogenization of society through the production of the “good citizen . . . who can efficiently serve the state,” and “obedience” and “discipline” are central to the modern state’s functioning, whereas Islamic law was not concerned with producing citizens, and thus did not arrogate to itself a monopoly of violence—indeed, its main concern was transcendental, and to the extent that it became involved in actual disputes, it tried to resolve them using the least disruptive social means available (pp. 362–66).

Hallaq’s characterization of the state is essentialist; he likens it to a living organism with immutable characteristics whose nature is predatory. Thus, the state

is a species whose members behave in a particular way, cover distance and time in a particular way, and, like all other organisms, feed on their prey in a particular way. Surely, every state is different, just as every snake or hawk is a unique creature. But snakes, by their nature, live and perform certain functions that are particular to them, however much their individual members differ in strength, shape or aggressivity [sic]. And the state is a particular modern creature that fulfills fairly well-defined functions of governance and dominance (including welfare and a host of charitable works), no matter how much its agencies and institutions may conflict, and no matter how much one individual state may differ from another. A state is a state, just as a hawk is a hawk, and not, say, a sparrow. (pp. 360–61)

The most important legal artifact of the state is the code, whose goal “is the production of order, clarity, concision and authority.”

3. Paradoxically, Hallaq exempts the common law from this discussion, but he dismisses it as irrelevant because “the vast majority of Islamic states did not adopt [the common-law system],” but instead adopted civil law systems,
the field of social relations and displacing all other sources of regulatory authority (p. 367). According to Hallaq, Islamic law never claimed for itself exclusive authority along the lines of modern codes, as evidenced by its cooperation with customary law (‘urf) and “royal law (siyāsa shar‘īyya)” (p. 368). Finally, Hallaq seizes upon what he deems to be a fundamental distinction between the role of the modern lawyer and that of the premodern Muslim jurist: the former are simply agents of the state, while the latter produced the law independently of the state and were the law’s agents, not the state’s. Indeed, “[t]hey were . . . public intellectuals who spoke truth to power, social and religious morality being their guide” (p. 370).

The history of Islamic law for Hallaq follows a tragic arc: its essential ethos, a commitment to moral self-government, is best reflected at the origins of Islamic law in the study circles of private scholars working outside the emerging caliphal state’s halls of power (pp. 18–19). Counterpoised to the morality of the jurists stand the government and the ruling elite, who are interested in the law only to the extent that it can further their own power, largely by winning them legitimacy in the eyes of the population, whose ultimate loyalty is actually to the law and its representatives, i.e., the jurists, not the rulers (p. 20). Rulers’ instrumental view of the law meant that they were not above dispensing with legality whenever “their quest for material gain or will to power” demanded it (p. 135). Paradoxically, the juristic class was not immune from corruption, and over the course of Islamic history they bartered their moral and political independence for various material privileges granted to them by the ruling elites. Corruption originated when jurists began to accept the lucrative positions available in the madrasas that the ruling elite established as a tool to co-opt the religious scholars. Hallaq states that “the legal elite ultimately succumbed to moral compromise, and increasingly so. By the seventeenth century, most legists were in the employ of the government, and the professors and author-jurists who held out had to function within a diminishing ‘moral community’ created by the financial and material dependence of their less independent peers on the ruling powers” (p. 151). The coup de grâce was delivered as a result of the scholars’ alliance with the Ottomans. Although the scholars’ relationship with the Ottomans resulted in the incorporation of Islamic law into the machinery of the state in a manner that was unprecedented in Islamic history, far from viewing this development as a wholesome synthesis of politics and law, Hallaq concludes that this symbiosis of law and politics “allowed [the Ottomans] to decapitate [the Islamic legal system], and decapitate it they did [in the nineteenth century]” (p. 158).

In chapter four, “Law and Society,” Hallaq presents his conception of the relationship of Islamic law to Muslim societies. Its most important features were the relative absence of legislative guidance from the center and the reliance on informal dispute resolution techniques, e.g., mediation, arbitration, and “informal law courts” (p. 159). The importance of consensual dispute resolution is evidenced by the popularity of premodern legal maxims encouraging amicable settlements (ṣulḥ), reflected in legal principles such as al-ṣulḥ sayyid al-aḥkām (“amicable settlement is the chief of legal verdicts”) and al-ṣulḥ khayr (“amicable settlement is superior to a judicial verdict”). Such a governance structure was dictated by the fact that most Muslim ruling dynasties, at least after the decline of the caliphate, were “foreign,” and as a result, rulers had to respect local sentiment if they wished to preserve their rule (p. 159). A consequence of this decentralized legal system was that “morality and social ethics [were] intertwined,” something that contrasts sharply with modern dispute resolution

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4. It is somewhat odd therefore that in the modern period Hallaq laments the dissolution of traditional religious schools as one of the reasons leading to the Islamic legal system’s demise.

5. This legal maxim is an excerpt from Q al-Nisā’(4):28.
mechanisms in which moral considerations “are absent” (p. 160). This moral system of self-
governance was also the product of unique social factors, in particular the extended family
and kin group, which “constituted the unshakeable foundation of social existence and, as
such, its members always stood in a relationship of solidarity with each other” (emphasis
added), providing its members with both physical and economic security (p. 161). Other
social communities, including those organized by profession, religion, or ethnicity, often
lived together in neighborhoods, and their existence reinforced the moral community that
Islamic law both sustained and required (p. 161).

Hallaq describes premodern Islamic law naturalistically, as having both nourished and
sustained a particular and complex “ecology,” one that existed dialectically between Islamic
law’s normative commitments to a particular legal epistemology that generated a system of
legal pluralism, and a social reality that was composed of a plurality of social groups. This
combination of legal and social pluralism produced a minimally interventionist state. This
fact in turn sustained the “ecology” necessary to maintain Islamic law’s unique “episteme”
as well as the familial and social groups that flourished under the protections of Islamic law.
The advent of modernity with European colonialism destroyed this unique and mutually
reinforcing epistemic and social ecology, bringing this order to an end (p. 447). European
colonizers, beginning with the British in India, but including also the French (pp. 432–42)
and the Dutch (pp. 388–95), pursued a policy of “demolish and replace” (p. 376) with respect
to both Islamic law and other indigenous methods of governance such as customary law.
The colonizers’ most important tools in their attempts to solidify their control over Muslim
societies were codifying the laws, whether Islamic or customary, and subverting local prop-
erty regimes, particularly endowments (awqāf). Codification of Islamic law not only mar-
ginalized the juristic class by, among other things, making the entire hermeneutical method
associated with Islamic rule-making irrelevant, it also cut Islamic law off from its wider
social environment, effectively choking it of the social inputs it needed to adapt to changing
circumstances. When Islamic law came to be accused of being an ossified system, Hallaq
argues that this was largely the result of specific colonial policies that transformed it into
a rigid system in furtherance of the colonial project of juridical colonization, rather than a
product of its inherent structural features (p. 376). Once Islamic law became severed from its
moral and social environment, it became simply another tool in the modernization project.
Thus, even post-independence Muslim elites sought to appropriate Islamic law to the state
and to its centralizing project, and in this respect their policies were continuous with colo-
nialist policies (p. 443). It is not surprising then that modern Muslims have generally aban-
donned traditional uṣūl al-fiqh in favor of what Hallaq refers to as the “ʿAbdūh Riḍā project”
of displacing traditional Islamic law, which was morally grounded, with a new utilitarian
religion based on maṣlaḥa, in which vague appeals to maqāṣid can trump even explicit texts
of revelation (pp. 504–11).

3. HALLAQ’S NARRATIVE OF TRAGEDY AND THE
NOMATIVE ABSENCE OF POLITICS

Hayden White argued that historians give meaning to their narratives through the device
of “emplotment,” that is, by identifying it as a particular “kind of story.”6 While Comedy
represents “the temporary triumph of man over his world,” Tragedy provides more som-
ber lessons, “more in the nature of resignations of men to the conditions under which they

must labor in the world.” Hallaq’s narrative would certainly appear to be tragic by White’s criteria; the triumphs and accomplishments of Islamic law and the societies it nourished were reduced to naught with the onslaught of the uncontrollable social and political forces of modernity, the nation-state being only the most powerful manifestation of modernity’s amorality. Hallaq’s narrative of modernity suggests that contemporary Muslims are powerless to reconstruct their cherished moral world and must simply accept living in a permanent state of loss.

It is tempting to dismiss Hallaq’s tragic framing of Islamic legal history simply as a case of misplaced nostalgia, but the roots of his narrative are much deeper: the tragic narrative has such a hold on Hallaq that he appears to either ignore, or be indifferent to, substantial empirical evidence that is contrary to his plot. Specifically, because it is the conflict between religion as representing a kind of idyllic, organic moral community and the state as representing the calculating instrumentalism of modernity which drives his tragic narrative, he ignores Islamic law’s attempt, through its rules governing the state, to make it part of the moral community. To put it differently, Hallaq views the historical polities or ruling elites (he refuses to call them “states”) as exogenous to Islamic law. The result is that, for Hallaq, far from constituting the institutions of governance, Islamic law must, through its representatives, the jurists, negotiate a practical arrangement with the individuals who, as a practical matter, have the power of the sword. Because they have little else to commend them, rulers are at best external appendages to the law, at worst necessary evils. Rulers only cooperated with the jurists to the extent it was convenient for them (largely to obtain the acquiescence of the population); however, if the law could be safely ignored without detrimental consequences to the ruler’s political interests, then legality could be dispensed with (pp. 133–35).

Whether in fact premodern Muslim rulers had this relationship to Islamic law is not my central concern; rather, my criticism is that Hallaq does not provide a legal account of the state, even though the modern state as contrasted to the premodern Islamic pseudo-state is said to be the essential difference between the two periods. Hallaq’s discussion of the “Circle of Justice,” as he himself admits, does not represent a juridical account of the state, and thus cannot provide an account of the state’s legality that is internal to Islamic law. Thus, his book is completely silent on the legal powers of the government, its legitimate authority, its legal responsibilities, the standards that govern its conduct, the effects of its lawful decisions or the remedies for its unlawful decisions. Even if one is predisposed to dismiss medieval jurists’ discussions of such issues as practically irrelevant, it would seem that any account of Islamic legal history in which the rise of the modern state is taken as the central antagonist requires an account of the premodern jurists’ normative theory of the state.

But Hallaq’s indifference to the premodern legal conception of the state not only detracts from his account of premodern Islamic law, it also precludes the possibility of a normative Islamic critique of the modern state that does more than reject the state simpliciter. Without a historical account of Islamic “constitutional” law, it is not surprising that Hallaq dismisses all modern reform efforts as simply “political” and barely worthy of attention, except to point out that modern Islamic reforms fail when judged by his ideal model of Islamic legality—uṣūl al-fiqh. While he is interested in even marginal figures if they claim to produce new versions of uṣūl al-fiqh, e.g., Muḥammad Shaḥrūr and Muḥammad Saʿīd ʿAshmāwī,

7. Ibid., 9.
8. Unfortunately, it does not appear that Muslims have learned this lesson, according to Hallaq, for instead of stoic acceptance of tragedy, they have become enraged. See Hallaq, “‘Muslim Rage’ and Islamic Law,” supra n. 2.
Hallaq ignores ʿAbd al-Razzāq al-Sanhūrī entirely, undeterred by the leading role he played in creating modern Arab civil codes; he also fails to engage Sanhūrī’s normative claim that his codes were substantially “Islamic,” despite Sanhūrī’s substantial theoretical work justifying this claim.  

Hallaq also ignores lengthy works in which Egyptian Muslim jurists present systematic commentaries and criticisms of the Napoleonic Code, written shortly after its adoption by Egypt; nor does he engage with the work of modern scholars who take modern Islamic legislation seriously.  

But even measured by the standards of uṣūl al-fiqh, Hallaq is too harsh on modern Islamic legislation: he dismisses modernist techniques such as takhāyyūr as “having been forbidden in Islamic law, for both the jurists and ‘state authorities’” (p. 448), without any express citation in support of that categorical proposition. A fairer claim would be that takhāyyūr, the practice of a muqallīd choosing among the various solutions to a problem proposed by different mujtahids, was a controversial principle. While some uṣūlīs, e.g., al-Ghazālī and al-Shāṭibī, condemned it, others, such as al-ʿIzz b. ʿAbd al-Salām and al-Qarāfī, endorsed it. Even al-Shāṭibī’s objections to takhāyyūr, however, are not consistent with Hallaq’s condemnation of the modern practice. Al-Shāṭibī was especially wary of judges’ use of takhāyyūr insofar as it was a discretionary tool of decision. He rightly feared that takhāyyūr in the hands of corrupt jurists had the potential to subvert equality before the law, with the result that the rich and powerful, or those well connected to the judicial class, would be exempted from the rules that governed the great mass of society. Modern legislation, in principle at least, obviates that defect precisely because it removes case-by-case discretion from the judge and assigns it to the legislator, who exercises discretion on behalf of all. In the final analysis, Hallaq’s critique of modern Islamic legislation and codification echoes that of Schacht and earlier orientalists who questioned its legitimacy as “Islamic law.”  

While much of Hallaq’s dismissal of modern Islamic law appears to be no more than an expression of his hostility to the modern post-colonial state and its oppressive legal institu-


11. See, e.g., Muḥammad Ḥasanayn Makhlūf al-ʿAdawī, al-Muqāranāt al-tashrīʿiyya, ed. Muḥammad Sarrāj (Cairo: Dār al-Salām, 1999); Sayyid ʿAbd Allāh ʿAlī Ḥusayn, al-Muqāranāt al-tashrīʿiyya bayna al-qawānīn al-waḍiʿīyya al-madaniyya wa-l-tashrīʿ al-islāmī, ed. Muḥammad Sarrāj, ʿAlī Jumʿa, and Aḥmad Jābir Badrān (Cairo: Dār al-Salām, 2001). The former was written shortly after the Egyptian government adopted the Napoleonic Code and compared its contents with Mālikī legal doctrine, while the latter was written contemporaneously with the debates surrounding Egypt’s new civil code.  

12. E.g., Oussama Arabi, Chibli Mallat, and Baber Johansen. Hallaq’s bibliography includes references to some of Johansen’s scholarship on premodern Islamic law, but nothing with respect to Johansen’s work on modern Islamic law.  


14. While al-Shāṭibī was concerned about the moral consequences of takhāyyūr, he also recognized that the political consequences of takhīyir were of a different order and posed a graver concern. Al-Shāṭibī (supra n. 13), 4: 141–42 (“wa-ammā mā yataʿašla li biḫi [al-takhīyir] fāṣ ḍāṭiyya bayna ḥaṣṣamayn fā-l-amr ashaddā‘”).  

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It is also a function of his own understanding of Islamic jurisprudence as an epistemic project that functions as an alternative to politics, rather than an epistemic project that is part of a political project. Accordingly, the crowning achievement of Islamic law for Hallaq is *uṣūl al-fiqh*, and the systematic working out by non-political scholars of the practical implications of that discipline’s epistemic commitments. My point of contention with Hallaq centers on the connection between the state and the epistemic commitments of Islamic jurisprudence: for me, the same epistemic commitments that generated Islamic ritual law, law of obligations, property law, family law, tort law, and criminal law also generated a political conception with a specific body of law to govern the “state,” including setting forth conditions pursuant to which public officials could make “rules,” and these rules were distinct from these other bodies of law that governed the conduct of individuals. By contrast, the state for Hallaq is simply extrinsic to Islamic law—Islamic law negotiates with it, and adapts to it, but does not theorize it as part of its own normative discourse. Its exogenous character makes it suspicious, and the morally upright strive to avoid it.

Despite the stereotyped conception of the pious shunning the government, many of the most notable figures in Islamic law (at least among the Sunnis) served in public capacities. While Abū Ḥanīfa and Mālik famously refused to cooperate with the ʿAbbāsids, Abū Yūsuf served as their chief judge (*qāḍī al-quḍāt*) and used that position to fill judicial vacancies throughout the empire with his protégés. Al-Shaybānī, too, served as a judge for the ʿAbbāsids. Both Abū Yūsuf and al-Shaybānī were Abū Hanifa’s leading students and independent authorities in their own right in the emerging Hanafī school. Nor were the early Hanafis unique in serving the state: Sahnūn served as chief judge in Qayrawān and even insisted that all his lieutenants rule according to Medinese legal doctrine; leading Andalusian Mālikī scholars cooperated closely with the Spanish Umayyads; and al-Shāfiʿī served as a judge for the ʿAbbāsids in Yemen. Many of the most prominent jurists of later centuries also served in public office. Among the Mālikīs there comes to mind Abū Bakr al-Bāqillānī, who, in addition to serving as a judge, also served as an ambassador from the Buwayhid ʿAḍud al-Dawla to the Byzantines; Abū Bakr b. al-ʿArabī, who served as judge in Seville; and Ibn Rushd the Grandfather, who served as *gāḍī al-jamāʿa* in Cordoba. Given this willingness among early and later Muslim jurists to accept prominent political positions, Hallaq’s characterization of the juristic enterprise as “private” and unconnected with the state appears problematic.

A fair-minded reading of such early works on public law as Abū Yūsuf’s *Kitāb al-Kharāj* and al-Shaybānī’s two treatises on *siyar* would confirm that early Muslim scholars recognized that the ruler (imām)—as ruler—exercised powers and capacities under the law, not brute force. Exercise of these powers involved skills that were generically different from those involved in the elaboration of the law, meaning that the ruler’s discretion (as well as of other public officials) was different from that of legists. The consequences of the ruler’s *ijtihād*, exercised in the course of discharging the responsibilities of his office, were generically different as well: because a general duty of obedience attached to the ruler’s judgment, political decision-making is conceptually distinct from the “epistemic” judgments of the jurists to which no duty of obedience generally attaches. This difference requires its

own justification, and as Baber Johansen’s work on the concept of ʿiṣma in Ḥanafī fiqh has shown, early Ḥanafī jurists developed a sophisticated theory of the moral basis of the state’s legitimacy that created mutual ties between the ruler and the ruled with important implications for the state’s jurisdictional limitations. ¹⁹ Similarly, later jurists such as al-Qarāfī described the acts of the ruler as a taṣarruf rather than a fatwa, explicitly in order to distinguish the actions of the ruler and other public officials from the actions of muftis, on the one hand, and judges, on the other. ²⁰

This analysis suggests that modern Islamic law need not be viewed as suffering from an “epistemic crisis” that can be solved through a modernized (or post-modernized) uṣūl al-fiqh, but rather that Muslims need a modern theory of an Islamic state that accounts for the category of citizen and what that implies for the jurisdictional claims of Islamic law. Such a theory would have to make clear distinctions between the normative domain of the political judgment of a state of modern citizens and that of an Islamic legal judgment; it would both enable legitimate political decision-making by vesting the state with power to bind those under its jurisdiction while at the same time placing moral limits on the power a state can legitimately wield. An interpretation of Islamic law as purely a cognitive project set against political projects is not helpful in this regard; it leads inevitably to either clerical dictatorship (wilāyat al-faqīh), on the one hand, or alienation (“Muslim rage”), on the other.

4. ESSENTIALISM IN HALLAQ’S NARRATIVE

Hallaq expresses frustration at what he calls “legal Orientalism” in the introduction to his work. His narrative, however, could be criticized as essentializing both the premodern Islamic and the modern legal systems, resulting in an incomplete and misleading analysis of both. His narrative is grounded in a binary framework that assumes the radical incommensurability of the Islamic legal order and the modern legal order. This assumption introduces significant problems in understanding many observed patterns with Islamic legal thought. I will highlight two such difficulties—Hallaq’s assertion that Islamic law does not distinguish between morality and law, and his claim that Islamic law systematically preferred informal dispute resolution to formal litigation. I focus on these two themes because Hallaq identifies them as especially critical in establishing his claim of incommensurability.

4.1. The law and morality distinction

Hallaq claims that Islamic law, unlike the modern law of the nation-state, makes no distinction between law and morality, and, indeed, until the twentieth century, no Muslims made any distinction between the two (pp. 85–86). Stated in this fashion, Hallaq’s claim sweeps too broadly, and could reasonably be read as advancing two propositions that are both mistaken, to one extent or another. The first is that modern law’s legitimacy is purely formal and lacks any connection to a substantive conception of morality. The second is that the legitimacy of premodern Islamic law was purely substantive and it did not differentiate


among its norms based on any formal criteria, and thus could not make an internal distinction between norms that are enforceable through coercive state sanctions and those that are not.²¹

Because of Hallaq’s categorical claims on this issue, many readers will conclude, wrongly, that Islamic law does not differentiate between rules that are subject to enforcement through some political process, for example, and those that are not; they would certainly be surprised on Hallaq’s account of Islam law to discover that Islamic law also makes such distinctions on a principled, and not ad hoc, basis. It is obviously true, as Hallaq points out, that Muslim jurists did strive to categorize all human acts (and omissions) into one of five moral categories (al-ahkām al-taklīf, “rules of obligation”), and that all were equally significant theoretical categories of judgment. But this hardly means that they understood them to be equal from the perspective of a functioning legal system. Indeed, the fact that Muslim jurists also produced another classification of rules, the so-called “positive rules,” al-ahkām al-waḍ‘īyya, is prima facie evidence that they understood a difference between rules of morality and rules that apply in a judicial system. Unfortunately, Hallaq passes over the positive rules, and its significance for Islam as a legal system, without detailed analysis (p. 87).

These rules, however, differ precisely from the rules of obligation because they do not address human conduct and they thus lack the moral component of the rules of obligation. Instead, they are concerned solely with the objective consequences of human acts within a general system of legal rights, answering questions such as whether a defective sale can transfer title, and if not, what are the obligations of the possessor with respect to an object obtained pursuant to a defective sale. The positive rules—not the rules of obligation—represent the fundamental concern of legal treatises.²² While there is some relationship between the rules of obligation and the positive rules, it is neither a necessary nor a direct relationship, as the jurists’ treatment of the triple divorce (al-ṭalāq al-bid‘ī) makes clear: while it is forbidden (harām) as a matter of the rules of obligation, as a matter of the positive rules such a divorce is nevertheless valid, effective, and binding.²³ Functionally, then, it seems that Muslim jurists, through the distinction between rules of obligation and rules that determine the consequences of that conduct, recognized a distinction between rules that address individuals’ morality and rules that regulate their secular life.

Other legal principles also evince awareness by Muslim jurists of a distinction between law and morality. Jurists distinguished between rules that apply as between an individual and God and rules that are judicially enforceable, even though both types of rules were equally obligatory from the perspective of the rules of obligation. The Ḥanafī jurists, for example, make regular distinction in their furūʿ works between a rule that applies as a matter of religious conscience, known as the rule given by fatwa (also referred to as diyānatan in Ḥanafī works), and the rule that applies in litigation, qaḍā‘.

²¹. Hallaq could be read as arguing only that Islamic law rejects legal positivism. That would be a more defensible claim, but if that was his intention, it makes less persuasive his claim of incompatibility. Islamic law is hardly unique in its rejection of Austinian-style legal positivism. Indeed, one might take the view that constitutional democracy, with its ideals of fundamental rights which are enforceable by an independent judiciary, is stark evidence of the anti-positivist assumptions of at least some modern legal systems. In any case, whether an immoral law can be a law remains contentious among modern non-Muslim philosophers of law, thus rendering his assumption that modern law must inevitably be positivist controversial.

²². See, e.g., Ahmad al-Ṣāwī, Bulghat al-sālik, on the margin of al-Dardīr, al-Sharḥ al-ṣaghīr, ed. Muṣṭafā Kamāl Waṣfī (Cairo: Dār al-Maʿārif, 1972), 2: 331, beginning his chapter on marriage by saying “Marriage is supererogatory (nudiba al-nikāḥ),” although it may become obligatory (wājib) or forbidden (harām) depending on circumstances.

²³. Ibid., 537–38.
One such case is the Ḥanafī treatment of a mother’s obligation to nurse her infant children. For the Ḥanafīs, this rule applies as a matter of religious observance, i.e., diyānatan, but it is not judicially enforceable, qaḍāʾan. Ḥanafīs argue that courts cannot apply this rule because the mother may have a legitimate cause excusing her from performing this obligation. On the other hand, if the mother raises a claim for compensation for nursing, then the court may compel her to nurse her infant children. In this circumstance, her claim for compensation is an effective admission that she is capable of discharging the obligation and thus estoppel prevents her from also claiming an excuse from this obligation. Distinctions between moral obligations under the rules of obligation, and obligations under the positive rules, moreover, are also evidenced in legal principles such as the non-enforceability of unilateral promises—despite their morally obligatory character—and the principle of immunity for violations of the law that take place in enemy territory against an enemy national (ḥarbī).

While Hallaq may have intended only the more modest interpretation of his proposition, i.e., that Islamic law is inconsistent with legal positivism, his unqualified language could very well lead readers to assume that he meant the proposition literally. In the current context of irrational hostility toward Islamic law, such a misunderstanding is extremely dangerous: it suggests that Muslims with serious commitments to Islamic law are incapable of making a distinction between their moral commitments and what can legitimately be enforced as a matter of politics, thus reinforcing the stereotyped notion of the impossibility of any reconciliation between Islamic and non-Islamic commitments.

4.2. Islamic alternative dispute resolution and customary law

Hallaq argues that Islamic law is distinguished structurally from modern law because (1) it systematically preferred consensual modes of dispute resolution over winner-take-all models of litigation, and (2) it preferred the development of bottom-up customary solutions to “top-down” statutory solutions imposed by the state that would apply to everyone within society. These two principles of norm generation and dispute resolution are in turn motivated by the deeper aim of the law to preserve social harmony by restoring each disputing party to its rightful position in society, and by reluctance to engage in instrumental social engineering through the law. The Islamic goals of social harmony and stability contrast with the dispute resolution mechanisms and the mode of norm-creation in the modern nation-state because its institutions coercively impose the state’s solutions on parties without regard to social harmony or stability, and channel disputes into litigation which produces binary results without regard to whether the outcome will restore the parties involved to their proper social position. One of the costs of the modern legal system (whose logic is entirely instrumental) is that “morality and social ethics are strangers” (p. 160), whereas in the system of mediation advanced by Islamic law “morality and social ethics [were] intertwined” (p. 159).

25. Ibn Rushd (the Grandfather), al-Bayān wa-l-taḥṣīl (Beirut: Dār al-Gharb al-Islāmī, 1984), 4: 377, explaining that the husband is morally but not legally bound to fulfill a promise to his wife not to prevent her from attending the mosque.
26. al-Sharḥ al-ṣaghīr (supra n. 22), 2: 276: a Muslim soldier who intentionally kills an enemy noncombatant has committed a sin (dhanb) for which he must seek God’s forgiveness, but otherwise is not obliged to pay an indemnity (diya), compensation for loss (qīma), or undertake penance (kaffāra).
Hallaq’s claim that Islamic law was systematically predisposed to promoting consensual rather than winner-take-all outcomes in its dispute resolution mechanisms is problematic in part because it does not take into account the substantive doctrines of Islamic law regarding settlement. There is no reason to doubt that parties in premodern Muslim societies often resolved their disputes consensually, often with the support of the court, if only because most disputes in all legal systems (at least legal systems that recognize that individuals enjoy wide areas of personal autonomy) are resolved consensually. Nevertheless, relevant background law often determines the parameters of possible settlements, a fact that gives rise to the expression “bargaining in the shadow of the law.” Accordingly, the possibility of judicial intervention often imposes substantial limits on the contours of reasonable settlements. Just as the content of the substantive law governing the parties’ dispute will have a significant influence on the terms of their settlement, so, too, does the law of settlement itself. So while it is certainly true that Islamic law encourages parties to settle, parties’ consent is not the exclusive element in the law governing settlements; it is substantive law, not social practice, custom, or the parties’ consent, that in the final instance determines the parameters of permissible settlement, and sometimes this law does not permit settlement of claims.

Hallaq, however, does not explore the substantive limits of settlement in Islamic law, nor does he even allude to their existence; non-specialist readers of *Sharīʿa* would not know that settlements were categorically inadmissible in many areas of the law (and not just the ḥudūd). A woman who knew her husband had irrevocably divorced her, for example, could not agree to waive a claim of divorce and resume marital life with him, on the assumption that both parties wished to resume marital life. Without such an account, however, it is impossible to assess the significance of settlement in Islamic law, much less determine whether its theory of settlement is normatively distinctive.

Hallaq’s failure to distinguish between legitimate and illegitimate settlement, moreover, renders his discussion of customary law highly problematic, if not misleading. His account of customary law is important in his narrative because he cites it as evidence that Islamic law’s desire to preserve harmony and restore social equilibrium was systematically a more important goal than its desire to achieve what it believed were just outcomes, whether between particular parties or within a particular group generally. Instead of Hallaq’s emphasis on social harmony, a more plausible explanation for Islamic law’s willingness to encourage lawful settlements and its willingness to enforce legally permissible rules of customary law is that Muslim jurists believed that settlements and resort to customary law *in those cases where Islamic law deemed them to be permissible* were more likely to result in a just outcome than a judge’s verdict that ignored either the parties’ wishes or the relevant custom; there is no evidence that Muslim jurists ever gave normative recognition to a custom that contradicted a mandatory provision of Islamic law except as a concession to an inhospitable social reality.

That the epistemological limitations of adjudication drove Muslim jurists’ preference for settlements is at least partially confirmed by a statement in Ibn Farḥūn’s treatise on adjudication, that while the judge should encourage the parties to settle their dispute when he cannot determine what really happened, if the correct legal outcome becomes manifest to him, he should decide the case according to applicable law. Only in exceptional circumstances

29. Ibn Farḥūn, *Tabṣirat al-ḥukkām fi ʿusūl al-aqḍiya wa-manāḥij al-aḥkām* (Cairo: al-Qāhira al-Ḥadītha li-l-Ṭibāʿa, 1986), 1: 43, quoting an Andalusī jurist for the proposition that “if the judge cannot determine the truth [of the parties’ claims], he should order them to settle their claims consensually, but when it is clear to him what the law requires, he should not permit settlement, but rather he should judge according to it” (*idhā ashkala ʾalā al-qāḍi*)
should the judge refrain from applying the law when the facts are clear, according to Ibn Farḥūn, as, e.g., in a dispute involving close relatives, in cases involving parties who are both “respectable” (min ahl al-faḍl), or when there is substantial risk that the conflict between the litigants will escalate if the judge enforces the law (in khāshiya min tafāqqum al-amr bi-infādh al-hukm bayna al-khaṣmayn). 30

Hallaq’s discussion of law and society uses an exceptional legal principle to obscure the fact that Islamic law was a demanding law; it did not simply accede to whatever the parties wanted or, on a larger scale, what social harmony required. It had its own minimum standards of justice that it expected all persons under its jurisdiction to comply with, including non-Muslims in the proper cases. 31 Hallaq’s repeated insistence on the centrality of custom, harmony, and restoring individual disputants to their social positions without regard to an abstract conception of rule-based justice comes dangerously close to affirming that a kind of Kadi-Justiz was operative in Islamic law, even though Hallaq in his other writings has demonstrated that Muslim jurists did in fact spend substantial effort in producing abstract general rules. 32

Closely related to the question of settlements and customary law is the role Hallaq assigns to arbitration in Islamic dispute resolution; he emphasizes its importance as an alternative to winner-take-all litigations, but gives short shrift to the formal legal doctrines that govern arbitration under Islamic law (pp. 347–48). The substantive differences among the Sunni schools of law regarding the scope, limits, and effects of arbitration, however, provide substantial insight into their different conceptions of Islamic law as a system of private and public law, as well as the particular competencies of the Islamic state in its administration.

At opposite ends of the spectrum were the Ḥanafīs, who did not accord any deference to the legal conclusions of the arbitrator, and the Ḥanbalīs, who accorded arbitrators all the powers of a judge, including the power to impose and enforce ḥudūd penalties. The Mālikīs and Shāfiʿīs staked out intermediate positions between the dominance of the public law paradigm of arbitration among the Ḥanafīs and the Ḥanbalī willingness to privatize even the most basic functions of criminal law. 33 Careful explication of the implications of these various

30. Ibid.
31. al-Sarakhsī, Kitāb al-Mabsūṭ, 2nd ed. (Beirut: Dār al-Maʿrīfā, 1913), 10: 155, stating that an agreement of dhimma with a non-Muslim king, which purported to permit him to continue to apply his own laws that gave him the power, inter alia, to kill his own subjects arbitrarily, was void.
32. In a particularly problematic passage Hallaq states that Islamic law did not view individuals generically, nor did its rules apply equally to “all, for individuals were not seen as indistinguishable members of a generic species, standing in perfect parity before a blind lady of justice. Each individual and circumstance was deemed unique, requiring ijtihād that was context-specific. This explains why Islam never accepted the notion of blind justice” (p. 546). This is virtually a restatement of Weber’s claim that Islamic law never established formally rational abstract rules and instead was concerned only with substantive rationality as determined on a case-by-case basis. Hallaq’s more careful arguments in Authority, Continuity, and Change in Islamic Law (Cambridge: Cambridge Univ. Press, 2001), 94–98, 114, provide powerful evidence refuting both Weber’s general claims, and Hallaq’s specific claims in this book, regarding the particularistic nature of Islamic law.
33. For the Shāfiʿīs, see al-Shirbīnī, Muḥtār al-muḥtāj, ed. Ḥusayn Muḥammad Muʿawwad and ʿĀdil Ahmad ʿAbd al-Mawjūd (Beirut: Dūr al-Maʿrifā, 1913), 4: 277–283; for the Ḥanafīs, Ibn ʿĀbidīn, Radd al-muḥtār ʿalā l-durr al-mukhtār, ed. Ḥusayn Muḥammad ʿAlī (Beirut: Dūr al-Maʿrifā, 1913), 4: 277–283; for the Ḥanbalīs, Muhammad ʿAbd al-Qādī al-Sāʿūdī, Ṣulḥ al-maṣūr, ed. Muḥammad ʿAbd al-Qādī al-Sāʿūdī (Beirut: Dūr al-Maʿrifā, 1962), 16: 537–538 (scope of arbitration limited to monetary claims) and 543 (enforcing judge can overturn arbitrator’s judgment
opinions regarding the validity and enforceability of arbitration would have given the reader a more precise understanding of how Muslim jurists understood the powers of both the state and private persons to apply the law; it would have also demonstrated that alternative dispute resolution mechanisms such as arbitration were, as a normative manner at least, subject to the supervision of the Islamic legal system.

To make an analogy to the United States constitution, Muslim jurists’ reasoning tolerated these other modes of dispute resolution and norm creation, but always subject to an implicit “Islamic law supremacy clause,” whereby Islamic law could judge the legitimacy of the decisions of inferior legal orders, but those inferior legal orders could not challenge the legitimacy of the controlling (superior) Islamic law norms. Placing customary law, law promulgated by rulers, and informal dispute resolution mechanisms under a conception of an Islamic “supremacy clause” would simultaneously allow the researcher to take into account the importance of social context while at the same time tying that background social context to the relevant normative categories of the law.

4.3. Conclusion

Hallaq’s narrative depends upon establishing a series of essential binary oppositions between Islam and modernity, and to that extent resembles the essentialism of classical orientalism. The primary difference, of course, is where he places value: whereas orientalist narratives of Islamic law expressed a triumphalist and condescending tone toward its Islamic subject, Hallaq engages in a reversal of value: it is modernity that is flawed, not Islam, and the fact that modernity was able to displace traditional Islamic orders is certainly something to regret, not celebrate. One may sympathize with the broad outlines of this narrative while at the same time be apprehensive that the narrative’s structure obscures important features of Islamic law that do not fit comfortably within the binary oppositions that Hallaq uses. As Ebrahim Moosa has noted, one of the gravest flaws of legal orientalism was its “anti-empiricism,” its simple refusal to acknowledge the validity of changes in Muslims’ understanding of Islamic law, even though it was taking place all around them, because such changes were simply impossible. Any critical narrative of the historiography of Islamic law—of which Hallaq’s Shari‘a is certainly one—should not make the same mistake, even if it is in a direction favorable to Islamic law.

5. ERRATA

While sections 3 and 4 of this review focused on interpretive issues Shari‘a raises, the book also contains factual errors that require correction. I draw attention only to those errors that have, or could have, a significant impact either on the way Islamic law as a jurisprudential system is understood or on the narrative coherence of Shari‘a, or that misstate a central element of substantive legal doctrine.

Hallaq’s discussion of the jurisprudential controversy regarding taswīb, i.e., whether the results of ijtihād are infallible, and his discussion of who qualifies as a reliable transmitter if it is not in conformity with judge’s madhhab because the arbitrator’s judgment does not resolve the controversy (lā yarfa‘ khilāfan); for the Hanbalis, Ibn Qudāma, al-Muqni‘ fi fiqh al-imām Aḥmad b. Hanbal, ed. Maḥmūd al-Arnāʾūt and Yāsīn Maḥmūd al-Khaṭīb (Jedda: Maktabat al-Sawādī, 2000), 477–78; and for the Mālikīs, al-Sharḥ al-ṣaghīr (supra n. 22), 4: 198–200.

of Prophetic *ḥadīth*, are two substantial jurisprudential errors. On the question of *taṣwīb* he states, “In theory and logic, however, a given problem can have only one correct solution, irrespective of whether or not the community of jurists knows which one it is” (p. 82). This is puzzling because if this were an accurate account of the controversy, it is hard to understand the controversy. In fact the *muṣawwiba*, the party who asserted that *ijtihād* in fact was infallible, denied explicitly the notion that “a given problem can have only one correct solution.” Al-Ghazālī, for example, sarcastically mocked Abū ʿĪsā al-Shīrāzī as a simpleton for his rejection of *taṣwīb*. 35 Although the controversy over *taṣwīb* is only one issue in Islamic jurisprudence, it could reasonably be viewed as one having significant importance relative to the question of Islamic reasoning and pluralism. And while *taṣwīb* is certainly not the only route that might lead a Muslim to endorse pluralism, it would be most unfortunate if the fact that a substantial group of Muslim jurists adopted a fairly narrow view of the scope of divine law was unintentionally suppressed.

Hallaq’s conclusion as to Sunni conceptions regarding the reliability of *ḥadīth* transmitters also has important implications for how Islamic jurisprudence, and its capacity for toleration, is understood. Hallaq claims that for Sunnis “[a narrator of *ḥadīth*] must not have been involved in dubious or ‘sectarian’ religious movements . . . This last requirement clearly suggests that the transmitter must be seen to be loyal to Sunnism, to the exclusion of any other community” (p. 95). Ibn al-Ṣalāḥ stated in his *al-Muqaddima*, however, that not only did master *ḥadīth* scholars narrate *ḥadīth* from sectarians, “their books are replete with transmissions from non-proselytizing heretics (*mubtadiʿa*), and the Ṣaḥīḥs [of al-Bukhārī and Muslim] have many of their *ḥadīths*.” 36 Indeed, Ibn al-Ṣalāḥ’s commentator, al-Balqīnī, went even further: he claimed that *ḥadīth*-masters such as al-Bukhārī and Muslim narrated from even proselytizing heretics on condition that they were not known to lie in service of their heresies. 37

Hallaq does not provide a citation for this proposition which, if true, would condemn the corpus of *ḥadīth* literature as a sectarian venture. The medieval Sunni *ḥadīth* scholars, however, explicitly refuted the doctrine Hallaq attributes to them. This might appear to be a minor, yet understandable mistake in the highly technical area of *ḥadīth* criticism, and given the wider context of *Sharīʿa* as a general survey of Islamic law, it perhaps should be overlooked. However, because this claim is highly relevant to modern concerns, such as the capacity of Sunni Muslims to accept pluralism and tolerate others, it should be corrected. Were Hallaq’s characterization of Sunni *ḥadīth* criticism correct, we would be considerably less sanguine regarding that possibility than we would be if the more tolerant position Ibn Ṣalāḥ and al-Balqīnī ascribe to the tradition is accepted as true. Accordingly, it is critical that due care be taken to present accurately even fine details of doctrine, especially when those details are potentially relevant to current debates.

A factual error (in the form of an omission) with important consequences to the narrative of *Sharīʿa* relates to the law of maintenance, and its relationship to the extended family. Hallaq describes the rule governing the law of maintenance as being based on a “general rule . . . that those relatives who stand to inherit from the person in need must offer support in proportion to the share of each in his or her estate” (p. 289). Significantly, however, the

35. *al-Mustasfā* (supra n. 13), 55. He even declared those jurists who believed that a unique solution existed for each legal problem to be sinners! Ibid., 347–48.
Mālikīs rejected this rule, a fact that Hallaq omits. They instead recognized only very narrow grounds for inter-familial claims of maintenance: a wife against her husband; a slave against his master; a minor child against his father; and parents in their old age against their adult children, if the former were insolvent. Notably absent is any maintenance obligation between siblings, much less one that involves an individual’s wider agnate group (ʿaṣaba). This rather narrow scheme of maintenance, I suggest, casts important doubt on, or at least relativizes, Hallaq’s claims regarding the centrality of the extended family to premodern Islamic law and society.

To be sure, Hallaq is careful to point out in his introduction to part two that to give a complete account of each school of law’s views on each area of law included would be impossible. Given the author’s claim regarding the centrality of the extended family to premodern Islamic conceptions of governance, and his claim that its legal erasure was one of the central goals of the modern state, however, this omission reduces the persuasiveness of Hallaq’s broader argument about the extended family’s importance. Accordingly, the different legal positions regarding maintenance should have been addressed in connection with the author’s broader claims about the extended family and its role in premodern Muslim society.

In raising the dissenting Mālikī maintenance scheme, I wish to make the broader point that different normative conceptions of the family existed within Islamic law, and these differences had broader normative consequences that were reflected in other areas of the law, such as the doctrine of kafāʿa (social equality) in marriage: given the thicker economic relations that Ḥanafī law creates among members of an extended family, it is perhaps unsurprising that the family in Ḥanafī law enjoys greater privileges in arranging the marriages of its female members through an expansive concept of kafāʿa than the family in Mālikī law. After all, if the marriage fails in the Ḥanafī system, the divorced female again becomes economically dependent upon her extended family. Mālikī law, by contrast, adopts a radically egalitarian conception of kafāʿa in which all free Muslim men are the peers of Muslim women, and does not impose maintenance obligations on the extended family of women in the event of divorce, thus suggesting a link between maintenance obligations, notions of social equality, and freedom of women to select their marriage partners.

Inattention to these differences can also lead to erroneous conclusions regarding modern legislative reforms. A case in point is Hallaq’s discussion of a recent change to Moroccan family law making it clear that guardianship was “the woman’s right” (and not that of the father or other guardian). Hallaq claims that this reform is disingenuous because, “In the fiqh corpus, the guardianship of the senior male agnate amounted to a representational right whereby the interests of the family and the group would be considered together with the marital interests of the ward” (p. 462). This comment, however, would only be true if the relevant background norm was Ḥanafī law, which gave the woman’s ʿaṣaba the right to annul her marriage to a male who is not her peer (ghayr kuf) if she married him without its knowledge and consent. Mālikī law, however, has no comparable provision. Accordingly, given Morocco’s Mālikī heritage, there is nothing anomalous in the Moroccan reform; it simply makes clear a principle that had already been recognized in Mālikī jurisprudence—that the

38. al-Sharḥ al-ṣaghīr (supra n. 22), 2: 750–53, discussing maintenance obligations whose legal cause is kinship.
guardian must act for the benefit of his ward, not his own self-interest or the benefit of the family.  

Finally, Hallaq’s discussion of the law of pledges (ruhūn) misstates the central element of this area of the law—the relationship of the creditor’s possession of the collateral to his claim of priority to the pledge. Hallaq claims that a debtor who had pledged property to a creditor as security for a debt was permitted to retain possession of the pledged property (p. 267). The actual rule, however, required the creditor (or an agent of the creditor) to take, and maintain, possession of the collateral in order for the creditor to maintain his priority to that asset. The creditor’s possession of the collateral would, as a legal matter, be defeated if the pledge returned to the debtor’s possession, with the result that the creditor would lose his priority to the collateral. While minor in the overall context of this work, this error is significant because it attributes to the premodern Muslim jurists a rule that would have been preposterous in their social world, one that lacked the centralized recording and notice system for security interests that has come to prevail in modern commercial societies. A modern commercial lawyer reading Hallaq’s description of the law of pledges would conclude that the Islamic law of pledges was irrational, a perception that, unfortunately, at times infects the attitude of non-Muslim judges toward Islamic commercial law.

6. Conclusion

Hallaq’s latest book goes well beyond previous English-language surveys of Islamic legal history. Unmatched in scope and breadth, it should become the standard English-language introduction to the subject for the foreseeable future. Highly readable and written in an engaging style, it will be especially useful for teachers of introductory courses to Islamic law. Nevertheless, readers of this work must approach Hallaq’s broader themes with some caution. Hallaq’s reliance on binary oppositions between the premodern world in which Islamic law flourished (the world described in part one) and the modern world that destroys it is problematic and at times misleading. Particularly questionable are his assumptions about the state and its relationship to Islamic law: in part one the state is virtually invisible, while in part three the state is the dominant actor. These assumptions about the political character of the state and its relationship to Islamic law at various stages in Islamic history, however, make no reference to the writings of Muslim jurists about the legal character of the state or its relationship to Islamic law. This omission results in prematurely categorical conclusions regarding the nature of state-society relations, and it thus weakens his arguments regarding the various dispute-resolution institutions that existed in various times and places in Muslim societies, and the norms applied by those institutions and their relationship to Islamic law.

40. See, e.g., Mālik b. Anas, al-Mudawwana al-kubrā (Beirut: Dār Ṣādir, 1970), 2: 155, quoting Ibn al-Qāsim for the proposition that a father’s decision to marry his minor daughter, whether for an amount less than or greater than her fair dower, binds her, provided that he made that decision exclusively for her benefit (fa-arā annahu in zawwajahā al-aba bi-aqalla min mahrī mithlihā aw bi-akthara fa-inna dhālika jāʾiz idhā kāna innamā zawwajahā ‘alā wajh al-naẓar lahā).

41. In Mālikī law this concept is known as jawalān yad al-rāhin. See, e.g., al-Dardīr (supra n. 22), 3: 313 (establishing the requirement of possession in order for the creditor to perfect his interest in the collateral) and 307 (stating that return of the pledge to the debtor’s possession voids the pledge).

law, whether in the premodern or modern periods. It also leads to a static and essentialized conception of the relationship of Islamic law, on the one hand, and the normative conception of an Islamic state, on the other hand, with the inevitable conclusion that modern Muslim theories of both are bound to be illegitimate.

Students of Islamic legal history no doubt have much to learn from social theory and the social sciences, and Hallaq’s attempt to incorporate their insights into his book are commendable. These methods, however, cannot replace careful analysis of the relevant legal texts themselves, which must continue to anchor the scholarly enterprise of determining the contours of historical Islamic law and its ever-changing manifestations in various Muslim and even non-Muslim societies throughout history. Law, as a discipline, is neither purely theoretical nor purely empirical: it occupies an intermediate position in which its theoretical norms both shape, and are shaped by, social practice. Without an adequate understanding of relevant legal doctrine scholars assume a substantial risk of misinterpreting their otherwise ambiguous social data. In the case of Hallaq’s claims about the inherently contradictory relationship between the ethos of Islamic law and that of the modern state, for example, readers are simply left to take him at his word because he does not explore the legal treatment of the state.

Hallaq’s static reading of Islamic law and its relationship to the political suggests a bleak future for Muslims: either rage or passive despair. Surely, before such pessimistic theories become more widely accepted, and especially in light of the remarkable developments that have come to be known as the “Arab Spring” of 2011, we should demand that Hallaq provide his readers more evidence for these conclusions than he has in *Sharīʿa*. 

