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OF ISLAMIC LAW

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OF ISLAMIC LAW

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The title chosen for this lecture is deliberately provocative and somewhat misleading. It is not meant to suggest that Islam, or Islamic law, has failed in some general or normative sense. Rather, the lecture will argue that the effort by modern Sunni Muslim Reformers, and their Islamist followers, to generate Islamic legal rulings has failed to achieve the political vision of a powerful and confident Islamic order. The Reformers' political program has failed both because their interpretation of the law has proven inadequate to deliver on its promises and because the instrument through which they chose to impose this interpretation – the institution of the modern state – has proven inappropriate for the purpose. I hope to show here that this failure is due to the fact that the program of the modern Sunni Reformers represents a double rupture with the past: first, the Reformers deliberately chose to sweep away the teachings of the established schools of law; second, they opted for the state rather than society as the means by which to impose their program. These two ruptures have proven to be a source of weakness rather than strength.

What do I mean by reform? As European military and cultural power grew dominant, and overpowered Muslim

populations and territories across the globe in the nineteenth century, many Muslim intellectuals reacted with ideas for reforming Islamic tradition and society. Their main purpose was to regain for Muslims the power and civilizational glory they once enjoyed. As such, their idea of reform cannot be dissociated from the desire for power in all its forms (intellectual, military, industrial, etc.). The Muslim reactions to European dominance broadly fell into three categories, involving three different groups of intellectuals and scholars: the Westernizers, the Traditionalists, and the Reformers. The Westernizers argued that Muslims must learn from Europeans and adopt many of their ways, including their educational and legal systems. By contrast, the Traditionalists rejected European laws and values and clung tightly to their inherited theological and legal tradition, which they claimed lay at the core of Muslim identity. The Traditionalists were not Luddites, however, and they argued that a greater emphasis on education and industry was needed to gain strength. While they too were concerned with the weakness of Muslim societies, they did not see restructuring the law as the avenue for redressing the situation. The third group consisted of the Reformers, who believed that the weakness was due to dynamics over many centuries within Muslim societies, especially in the realm of law, and that the legal system needed revamping to bring the community back to the authentic teachings of Islam.

Inspired by what they saw to be the central role of the state, with its uniform legal code, in European nation-building (viz. France's *Code Civil* and Germany's *Bürgerliches Gesetzbuch*), the Reformers believed the state should be the principal vehicle for imposing their vision of the law.

My lecture will focus primarily on scholars from the Reformer camp, such as Muhammad Rashid Rida (1865–1935) and Ahmad Muhammad Shakir (1892–1958), and their Muslim Brotherhood followers, Hasan al-Banna (1906–1949) and Sayyid Qutb (1906–1966). I will also present the views of their critics in the Traditionalist camp, including those of Muhammad Zahid al-Kawthari (1879–1951) and the contemporary Lebanese intellectual Ridwan al-Sayyid (b. 1949). But before turning to the Reformers, a few words are in order regarding the Westernizers and the Traditionalists.

THE WESTERNIZERS

The Westernizers are represented by men such as Sir Sayyid Ahmad Khan (1817–1898) in British India and the Egyptians Rifa'a al-Tahtawi (1801–1873) and Ali 'Abd al-Raziq (1888–1966). The latter authored one of the defining works of the movement, *Islam and the Foundations of Governance*, in which he attempted to separate religion from politics and for which he was severely penalized. The Westernizers' project emphasized, among other matters, Western education (including for women) and the codification of law through

the adoption of European codes. They believed that the revival of Muslim peoples required an emphasis on universal ethical and philosophical values – values shared by Muslims and non-Muslims alike. This did not mean, however, that the Westernizers were particularly concerned with reforming Islamic law *per se*. If anything, they wished to restrict its practical effects to the greatest extent possible, limiting its reach only to areas such as ritual law.

To date, the Westernizers have not produced a significant intellectual following in the Islamic world, and their ideas can largely be understood to have failed. This is in part due to the fact that the postcolonial governments in many Arab and Middle Eastern countries (e.g., Tunisia, Algeria, Egypt, Syria, Iraq, and Iran) adopted much of their project, albeit without its liberal political values, and later failed to deliver on the promise of empowerment and development. While the Arab defeat during the Six-Day War of 1967 crystallized this failure, there were many other discrete moments of impotence.

The central problem was that the military officers who had usurped power in the post-WWII period claimed to uphold nationalist and secular values, but the ideologies they actually imposed on their citizens amounted to nothing more than fascism. Their brutal authoritarianism and venality led the regimes to lose legitimacy and, with this, the Westernizing project to lose much of its attractiveness to mainstream society. Westernization became widely

regarded as an admission of Muslim defeat, and its proponents were viewed as men intoxicated with the West (the so-called Westoxified, or *Gharbzadegi* in Persian) who had no independent identity. While the 1979 revolution in Iran, which ushered in the Islamic Republic and the ideology of Khomeinism, can be regarded as the most significant and politically successful response to the Westernizing project, the rise of Islamist politics throughout the Arab world from the 1970s onward is as much a response to the same tension.

THE TRADITIONALISTS

The Traditionalists have been relatively more influential intellectually than the Westernizers, but they too can be seen as having failed to realize their vision of Islam, at least with regard to the Arab world. Here they have not had a significant political impact, and their followers remain small in number, unlike in Turkey and India where their followers appear to be more influential.

The writings of the scholar Muhammad Zahid al-Kawthari best capture the Traditionalists' teachings. Kawthari was an aid to the last Shaykh al-Islam of the Ottoman Empire, a staunch defender of the Hanafi school of law, and a prolific writer and editor of manuscripts. He is regarded as one of the most learned scholars of his day. He was also a polemicist who engaged in vigorous and vituperative debate with the Reformist scholars who argued for abandoning the schools of law (*madhahib*). Kawthari's project was to valorize the

richness of the traditional schools of law – especially his own, the Hanafi – and to argue that their preservation was central to Muslim identity, as well as social and political cohesion. In terms of politics, he saw the caliphate – the unitary Islamic state that was represented by the Ottoman state – as the ideal form of government. He objected to the idea that Islamic law needed revamping or that the state should be used instrumentally for achieving this end. The traditional scholars were the custodians of Islamic law; and the revitalization of Muslim society, however necessary, did not require legal reform. The government’s business was to look after the political interests of the community and to maintain order. Kawthari argued that if Muslim power was to be regained, reform or “renewal” of the law was the worst avenue to follow. Here is how he forcefully made his case in a book on the reform of the law of marriage:

The reform of the law of marriage and divorce as well as all other Islamic laws is a very easy feat for the one who has no fear of God in his heart, is ignorant of the abilities of the founder Imams of the law schools and the proofs they used for their opinions, and is excessive in arrogance and egotism. This renewal [of the law that the Reformers desire] will not raise the Muslim community to the level of other advanced and wise nations, and it is not what will allow Muslims to produce planes, cars, fleets [of ships], submarines, commercial hubs and industrial firms. Rather the beneficial renewal that will raise Muslims is competition with

other nations over the discovery of the universe’s secrets, the embedded power that God has placed in metals, plants, and living creatures...¹

Kawthari warned that attacking the legal tradition, as the Reformers sought to do, would not only eviscerate twelve hundred years of diligent and earnest effort by the best minds of Islam, but also lead to terrifying consequences: strife between Muslims and interpretive chaos. Reading about the violence that envelops so much of the Muslim world today, one cannot help but sense that Kawthari was offering a prescient warning. What the Reformers wished to accomplish amounted to a self-inflicted form of disemboweling that would ultimately destroy the coherence of the Muslim community and obliterate its identity.

THE REFORMERS

Who were the Reformers that Kawthari loathed so much and what was their project about? Amongst the most influential Sunni Reformers were the Syrian Muhammad Rashid Rida and the Egyptian Ahmad Muhammad Shakir. Their project can be described as an attempt to rid Muslim belief and practice of the evils of *taqlid* – the adherence to the rules of the established schools of law. They sought to

¹ Muhammad Zahid al-Kawthari, *al-Ishfaq ‘ala ahkam al-talaq fi al-radd ‘ala “Nizam al-talaq” alladhi asdarahu al-ustadh Ahmad Shakir al-Qadi* (Cairo: Matba‘at Majallat al-Islam, n.d.) (author’s translation).

replace *taqlid* with a form of independent reasoning that would allow Muslims once again to interface directly with the proof-texts of revelation, which are the verses of the Qur'an and the statements of the Prophet with probative legal content. The bulk of such material can be found in the traditions of the Prophet Muhammad (*hadith*), and the practice of independently deriving legal rulings from such sources is referred to as *ijtihad*. The Reformers excoriated the fanaticism that the followers of the legal schools (*madhahib*) developed over time for their particular rules and the scholars who had formulated them. The Reformers' writings are filled with satirical anecdotes about the fanatical attachment many had developed for the rulings of the schools, so much so that the underlying principles of the law had been forgotten and were now replaced by the superfluous and superficial aspects of the teachings and judgments. Rashid Rida, for example, mentions Hanafis hitting other Muslims during the prayer because they did not adhere punctiliously to their rituals. There is truth to the claim that the schools of law had become overly insular and, more importantly, that the individual believer and scholar had difficulty ascertaining the basis for any given ruling among the confusing welter of opinions in the standard legal manuals and commentaries.²

² I have recently written about this in detail. See Bernard Haykel and Aron Zysow, "What Makes a Madhhab a Madhhab: Zaydi Debates on the Structure of Legal Authority," *Arabica* 59 (2012): 333–71.

Rida sought to get through this scholastic jumble of opinions and offer an alternative to what he saw as the fanatical attachment to the schools in order to empower Muslims. This sentiment toward the schools of law was, he argued, alien to Islam's original message. More importantly, it placed a distance between the believer and God's revelation. Furthermore, it weakened Muslims by dividing them into mutually exclusive groups at odds with one another. Here is how he expressed this:

*In sum, it is attested in the apodictic texts of revelation and in the consensus of the community that it is a great sin for Muslims to be divided among schools of law and in their opinions, not to mention the fanaticism of each group for its particular school whether on matters of creed or law...the harmful and evil consequences of such division (tafarruq) is mentioned in the history books and has led in these days to the weakening of the Muslims, the disappearance of their political rule and the domination of the foreigners over their territories.*³

Furthermore, strict *taqlid* was, according to Rida, inconsistent with the spirit of the modern age, in which independence of opinion and understanding prevailed among educated people who had little or no knowledge of the religious sciences. Given this, the insistence that God's religion was to

³ Muhammad Rashid Rida, introduction, *al-Mughni*, vol. 1 by Ibn Qudama (Beirut: Dar al-Kitab al-'Arabi, 1983), 16 (author's translation).

be found exclusively in the rulings of the traditional schools of law had become a reason for rejecting Islam as well as a reason for apostasy and atheism.

Rida was not original in making the case for reforming Islamic law, but the thrust of his project and the verve with which he pursued it had profound legal and political consequences. To strengthen his message, Rida deliberately edited specific premodern manuscripts and revived particular teachings that, while influential, had always represented a small minority of Muslim legal opinion in the past. The views and texts he highlighted were those of Ibn Hazm (994–1064), the strict-constructionist Zahiri scholar, and those of Salafis like Ibn Qudama (1147–1223), Ibn Taymiyya (1263–1328), and Muhammad al-Shawkani (1760–1834). He repurposed the ideas of these premodern scholars for his reformist project.

Two important, and perhaps unintended, developments resulted from Rida's efforts. First, he initiated a process for rejecting the epistemology of traditional legal rulings, most of which had been built by analogical reasoning (*qiyas*). The bulk of the premodern Islamic legal tradition is based on analogical arguments that are rooted in probabilistic reasoning, which allows for a multiplicity of opinions. Because of this, the products of juristic opinion have a contingent quality where one can find differing but equally valid views on any given matter within any of the schools of law, let alone among them. Many moderns, like Rida, found this strikingly

untidy quality of the inherited legal tradition unsatisfying, and certainly felt that this was not well suited for a society in the twentieth century. Instead, Rida desired greater uniformity and standardization. To achieve this, he felt it was important to cite probative texts from revelation, especially from the *hadith* corpus, when elaborating a legal opinion. Furthermore, Rida believed that the Shari'a had an answer to all contingencies and that its textual sources were perspicuous. In other words, the Shari'a was so comprehensive that its rulings could apply to all aspects of life.

The second development relates to Rida's heavy reliance on juristic principles that were seen as weak and marginal in the premodern Islamic legal tradition because of their highly subjective and textually unfounded characteristics. In the absence of an appropriate proof-text, Rida would often resort to using the concepts of public welfare (*maslaha*) and the "purposes of the law" (*maqasid al-shari'a*) to justify his conclusions. These principles allow the jurist to deem something permissible if it serves the welfare of the community or if it serves one of the purposes of the law, such as the preservation of life, religion, reason, lineage, and property. Among contemporary legal Reformers, this has become an important way not only to expand the scope of Islamic law but also to contravene long-held opinions of the schools. One example of this was when Rida deemed it permissible for Muslims to take out insurance policies, a practice

that would have been considered prohibited by the classical tradition because of its excessively speculative nature. The majority of the traditional scholars considered *maslaha* and *maqasid* to be appropriate bases for ruling only in extreme cases because of their subjective nature or, put differently, their jurisprudentially unprincipled moorings. The classical jurists did not resort to these principles systematically or regularly, unlike the modern Reformers who are primarily concerned with using the law to bring Muslim society up to date with, what they consider to be, contemporary norms and practices.

The next person I would like to focus on is Ahmad Muhammad Shakir, the prolific author, text editor, and judge from Egypt. He is perhaps best known for editing the *Risala* of Imam al-Shafi'i, arguably the first and most important work in the field of Islamic jurisprudence. Shakir depicts himself as following in Rida's intellectual lineage, but he clearly had much more developed views on the *hadith* sciences, modes of applying law, and role of the state in implementing Shari'a. He remains hugely influential today among a variety of circles. He is especially popular with the Salafi-jihadis, although he eschewed revolutionary violence. The Muslim Brotherhood also draws inspiration from his views, though it is less invested in the intellectual and scholarly project that Shakir championed.

My particular interest in Shakir lies in a series of long essays he wrote on the role of positive law (i.e., Western-based law) and the importance of applying Islamic law. In these essays, he excoriated judges who applied Western law because he believed it had a pernicious effect on Muslims by pulling them away from the faith and leading them to outright unbelief. He could not conceive of Muslims living in a non-Islamic legal environment. Instead, Shakir advocated for a virtuous Islamic order where the state plays a central role in implementing Islamic law. In Shakir's view, state institutions should be ordered by scholars that have formed a higher committee (*lajna 'ulya*) and who engage in forms of collective *ijtihad* (independent judgment) to apply and develop rules of Islamic law for the people.

Shakir idealized the Islamic past and painted a glowing picture of how Islamic law used to be applied. Unlike the Westernizers who reluctantly conceded a role for Islamic law only in personal status matters or rituals, Shakir sought to implement the full panoply of Islamic legal rulings. In particular, he saw the penal regulations of the Shari'a as having many social benefits. As one example, Shakir points to how much safer the Hijaz in Arabia became after Saudi Wahhabis conquered it in 1925 and began to apply Islam's penal regulations. But like Rida, Shakir was hugely concerned about the political weakness of Muslims. He, more than any scholar I

know, makes the argument that implementing Islamic law through the state while rejecting Western law is the panacea that will reverse his community's political fate.⁴

The argument about the centrality of the state in imposing Islamic law has been taken up by many others, including the Indo-Pakistani Islamist intellectual Abu al-A'la Maududi and the Egyptian ideologues of the Muslim Brotherhood. Admittedly, these thinkers have done so in a less refined and more opportunistic fashion than Shakir, and with the aim of capturing power for themselves. So we see, for example, Maududi, in a chapter entitled "How to Introduce Islamic Law in Pakistan," write the following:

...it is the state which should play a positive role in the establishment of the Islamic system of life. When the state is our own and we have placed at its disposal all the resources of our country, there is no reason why we should go elsewhere to fetch the architects of the Islamic social order. ...the first step towards our destination would be to Muslimise (convert to Islam) the state which is still based on and working according to the same secular bases on which it did during the British period.... That the basic law of the land is the Islamic Shari'a... That all those existing laws which may be in conflict with the Shari'a shall in due course

⁴ See Ahmad Muhammad Shakir, *al-Kitab wa-l-sunna yajib an yakuna masdar al-qawanin* (Cairo: Maktabat al-Sunna, n.d.) and Ahmad Muhammad Shakir, *Hukm al-jahiliyya* (Cairo: Maktabat al-Sunna, n.d.).

*be repealed... and no law which may be in any way repugnant to the Shari'a shall be enacted in future... That the State, in exercising its powers, shall not be competent to transgress the limits laid down by Islam.*⁵

Likewise, Hasan al-Banna, the Egyptian founder of the Muslim Brotherhood, saw Islamic law as central to the political and social order he sought to bring about. He writes:

*This body of law must be derived from the prescriptions of the Islamic Sacred Law, drawn from the Noble Qur'an, and in accordance with the basic sources of Islamic jurisprudence. For the Islamic Sacred Law, and the decisions of the Islamic jurists are all-sufficient, supply every need, and cover every contingency, and they produce the most excellent results and the most blessed fruits. If the punishments prescribed by God were carried out, they would be a deterrent dismaying even the hardened criminal, restraining even the habitual thug, and relieving governments of the annoyance of worthless experiments.*⁶

Ideologues like al-Banna invoke the inherited prestige of the Shari'a to legitimize their political program, but at no point do they admit that it remains, as system of law for a modern state, an unfinished project. Much as the Reformers

⁵ Sayyid Abul A'la Maududi, *The Islamic Law and Constitution*, trans. Khurshid Ahmad (Lahore: Islamic Publications, 1960), 107.

⁶ Hasan al-Banna, *Five Tracts of Hasan al-Banna*, trans. Charles Wendell (Berkeley: University of California Press, 1978), 89.

have claimed that they are producing a system that is apt for running a modern state, theirs remains a rudimentary and far from complete endeavor. This can be seen, for example, from the writings of Yusuf al-Qaradawi, the Qatar-based Muslim Brotherhood scholar who is in his 80s and appears regularly on Al-Jazeera television. Al-Qaradawi is one of the intellectual pillars of the Reformist project. He keeps promising to produce a jurisprudence (*usul al-fiqh*) that will undergird his legal rulings and supplant the traditional system, but it has yet to materialize. Instead, all al-Qaradawi has managed to accomplish is the creation of a global personality cult focused on him and bolstered by his many publications and media appearances. It is as if he is telling the Muslim public to trust him that such a reform of Islamic law is possible because he personally assures them that it is and that he will accomplish this eventually. By contrast, political activists like al-Banna or Maududi do not bother with such details, not least because it would unnecessarily complicate the vision and program they wish to impose. It remains for those following the Islamists to take them at their word, namely that, once in power, they will be able to run a political order on the basis of the Shari'a.

Sayyid Qutb, the most famous of the ideologues of the Muslim Brotherhood, would also insist that the application of Islamic law is the *sine qua non* marker of legitimate Islamic rule and that the state's principal role is to enforce this law.

For the Reformers and their Islamist followers, applying Islamic law has become the central method of establishing the desired social and political order, and the state is seen as the only mechanism for enacting this change. The Shari'a will provide all the answers, though how exactly is never fully explained. In this formulation, the Reformers and Islamists have engaged in a project that, on the one hand, overemphasizes the role law can play in reforming society, and, on the other, relies exclusively on an institution – the state – that has stood in uneasy tension for many centuries with Islamic law and its jurists.

Like all premodern states, the Islamic state of the past was nothing like the intrusive and all-controlling modern states of the present. Moreover, the Muslim jurists who were the producers and purveyors of Islamic law in the past typically had a close and symbiotic relationship with the masses and a subtly antagonistic relationship with the ruler. The jurists often saw the latter as a source of corruption that undermined Islamic principles and law, either because of *Realpolitik* or because of the ruler's personal failings. Perhaps because of the threat posed by the West to Muslim societies or because they have been deeply influenced by the modern vision of the state and its role in society, modern Islamic scholars and ideologues have chosen to ignore these facts about the history of the state and its problematic relationship to the Shari'a.

Men like Shakir, Qutb, Yusuf al-Qaradawi, and even the

Shi'i Ayatollah Khomeini have a radically different vision of the state. For them, the state is the instrument for implementing the law and revivifying the Muslim community from its powerless position in the world today. Very few are the voices of opposition to this state-centered vision. One of them is the Lebanese intellectual and scholar Ridwan al-Sayyid. Al-Sayyid sees a calamity befalling Muslim societies where Islamists have come to power after the uprisings of the Arab Spring. In his numerous writings, in books, articles, and op-eds, al-Sayyid argues that for centuries Islamic beliefs and practices were determined by the community (*jama'a*) and not by the state. The meaning of Islam was explicated by the societies in which the jurists lived and developed their views. And because it was a societal and collective enterprise, it was open to a multiplicity of views and to a degree of tolerance for difference. For al-Sayyid, the great danger today lies in giving the state, with narrow-minded Islamists at its helm, the exclusive right to determine the content and contours of Islamic law. He presents the case of Iran under the Islamic Republic as an example of this phenomenon. The Ayatollahs' regime, according to al-Sayyid, has tarnished the religion's reputation and alienated people from the law by imposing it from above. Al-Sayyid's fear is that the same will happen now in the Sunni Arab world, and people will turn away from Islam altogether.⁷

7 For an exposition of these views, see, e.g., Ridwan al-Sayyid,

Al-Sayyid's views on Islamic law are rooted in a deep understanding of its pre-modern history. Here, as in Kawthari's vision, the state plays an important role in defending the Muslim realm and establishing order. For al-Sayyid, however, the formulation of the law should be the purview of private specialists: the jurists. It was they who preserved Islam and maintained its rich, varied, and tolerant legal heritage — often in spite of and in opposition to the ruler. Without them and without rooting the interpretive enterprise in society rather than the state, Islam would not have survived. In arrogating for the state the exclusive right to determine the law, the Reformers would be breaking with centuries of legal practice. For the more traditionally minded scholars, like Kawthari and al-Sayyid, there is a double irony in the idea that state monopolization of law is the means through which Muslims should regain their lost power. First, the modern state will strip Islamic law of all its diversity and richness and, in so doing, endanger the core of Muslim identity. Second, it will do so while fulfilling a role it was never meant to perform.

The picture presented in this lecture is a bleak one. The Westernizers, the Traditionalists, and the Reformers/ Islamists have all failed to produce a political and social order that gives Muslims a sense of place and pride in the world. The multiple failures have to do with many different

“al-Dawla al-islamiyya al-haditha fi mu'tamar 'Amman,” *Al-Sharq Al-Awsat*, 30 Aug. 2013.

factors. In the specific case of the Reformers and Islamists, it is their particular vision of the role of the state and what the Shari'a can accomplish that represents a radical break with the past – one that leaves Muslims without historical landmarks and inevitably leads to the interpretive chaos that Kawthari foresaw. The wanton violence of the Salafi-Jihadis who are directly inspired by the Reformists, for example, can be seen as a direct consequence of this break with the past. It can be a terrible thing to throw the baby out with the bathwater.

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