

## THE MULTIVOCAL SHARI‘A IN HISTORY AND LITERATURE

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In this age when threats of terrorist attacks are in the U.S. media daily, words relating to Islam often inspire fear and misunderstanding, especially when they are used in relation to governance. Thus, the current stories about al-Shabaab imposing Shari‘a law in southern Somalia are supposed to (and often do) evoke terror in U.S. readers.<sup>1</sup> The media references to Shari‘a imply that it is a monolithic entity that can be slapped on like a sticker or a piece of clothing and that it always results in brutal punishments and female oppression. Political entities that speak positively about Islamic law are branded radical and fundamentalist and may soon find their names on the U.S. list of terrorist organizations. The basic assumption underlying much of the misrepresentation is the classic orientalist dichotomy between West and East such as that articulated by sociologist Max Weber in his writings on Islam, which contrasts “the rational and systematic character of Occidental society, particularly in the field of law, science and industry and the arbitrary, unstable political and economic conditions of Oriental civilizations, particularly the Islamic.”<sup>2</sup> While this understanding has long been discredited in academic circles, it remains the basic paradigm for understanding much of the Muslim world in mainstream media. Implicit in these portrayals is an idea of not only Islam but also Islamic law as irrational and disordered in comparison with Western governance and legal codes.<sup>3</sup> We can learn a lot by moving the discussion away from the hyperbole of mass media and examining the relationship between politics and the Shari‘a through

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<sup>1</sup> See, for example, the following article about the son of a Syrian immigrant to the U.S. who is now fighting with the Shabaab in Somalia. Andrea Elliott, *The Jihadist Next Door*, N.Y. TIMES, Jan. 27, 2010, available at <http://www.nytimes.com/2010/01/31/magazine/31Jihadist-t.html?ref=magazine>.

<sup>2</sup> BRYAN S. TURNER, *WEBER AND ISLAM: A CRITICAL STUDY* 14 (1974).

<sup>3</sup> For example, Lauren Benton discusses the “common representation of qadi legal judgments as arbitrary and disconnected from rational legal reasoning” and asserts that this representation has been proven wrong by academic studies of qadi courts. LAUREN BENTON, *LAW AND COLONIAL CULTURES: LEGAL REGIMES IN WORLD HISTORY, 1400-1900*, at 103 (2002).

other lenses such as those of history and literature. These other lenses should give a more nuanced perspective that does not reduce Islamic law to terrorist ideology.

## I. A HISTORY OF MULTIPLICITY

Historically speaking, the prevailing media perception of the Shari'a is incredibly simplistic and misunderstands the basis of Islamic law and its relationship to political rule. The first salient point is the distinction between Shari'a and fiqh: Shari'a is God's law or translated literally from the Arabic, God's way.<sup>4</sup> There is consensus in the Muslim community that the Shari'a is God's will,<sup>5</sup> and the Qur'an is God's revelation.<sup>6</sup> However, there is not consensus on how humans can discern God's law from the Qur'an and other sources.<sup>7</sup> Thus, fiqh is the human understanding of God's law, which is a product of the struggle, specifically called ijtiḥād, to discern God's will.<sup>8</sup> The media, and often fundamentalist Islamist groups as well, speak about the Shari'a when what they really mean is fiqh, a specific interpretation of the Shari'a. Human beings are by nature fallible, and thus their interpretation of God's law can never attain the level of complete certainty.<sup>9</sup> As a result, in Sunni Islam, there were and still are multiple schools of thought (madhabs) that all use different methodologies to give legal opinions based on the Shari'a. Four of these Sunni schools survive today with their differing rulings on legal issues.<sup>10</sup> All of their rulings are considered valid provided they are the product of sincere ijtiḥād<sup>11</sup> or effort to

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<sup>4</sup> KHALED ABOU EL FADL, SPEAKING IN GOD'S NAME: ISLAMIC LAW, AUTHORITY, AND WOMEN 32 (2001).

<sup>5</sup> *Id.*

<sup>6</sup> MOHAMMAD HASHIM KAMALI, PRINCIPLES OF ISLAMIC JURISPRUDENCE 16 (3d ed. 2003).

<sup>7</sup> The word for consensus of opinion in Islamic jurisprudence is *ijma'*, and Kamali explains that consensus "is extremely difficult to prove" and can only be said to exist about the five pillars of the faith. *Id.* at 228.

<sup>8</sup> ABOU EL FADL, *supra* note 4, at 32. See also MUHAMMAD BAQIR AS-SADR, LESSONS IN ISLAMIC JURISPRUDENCE 17 (Roy Parviz Mottaheheh trans., 2003).

<sup>9</sup> ABOU EL FADL, *supra* note 4, at 39.

<sup>10</sup> For a detailed explanation of the development of madhabs in the Islamic world, including a list of the four surviving schools and reasons for their survival, see WAEL B. HALLAQ, THE ORIGINS AND EVOLUTION OF ISLAMIC LAW 150-77 (2005).

<sup>11</sup> Bernard Weiss, *Interpretation in Islamic Law: The Theory of Ijtihad*, 26 AM. J. COMP. L. 199, 199-200 (1978).

formulate a legal opinion based on the sources of Islamic law.<sup>12</sup> Often, multiple schools were allowed to exist side-by-side in the same geographical and political space, such as under the Mamluk sultanate, which supported all four Sunni schools of thought.<sup>13</sup> Because of human fallibility, multiple fiqh methodologies for deducing the Shari'a response to legal cases coexisted.

The implementation of the Shari'a based on fiqh has differed across time and space (as evidenced by the multiple madhabs) as has the relationship between fiqh and political power. Since Sunni Islam has no formal hierarchy of leadership,<sup>14</sup> scholars who met the requisite qualifications could all practice ijtihad and all results of sincere ijtihad were considered valid.<sup>15</sup> This practice is what resulted in the multiplicity of rulings and varied methodologies, which were made more diverse because the early Islamic Empires stretched from modern-day India to Morocco. This multiplicity makes judicial consistency all but impossible, so political rulers going back to the Abbasid caliphate tried to systematize and control the law because, "[S]erious compromises had to be made if this highly creative and idealistic system was to serve as the law of the state..."<sup>16</sup> The scholarly class, the ulama', supported the Abbasid caliphate in return for control over religious functions, specifically religious law.<sup>17</sup> However, when the Abbasids attempted to control religious orthodoxy themselves by implementing a caliphal inquisition (called al-mihna),<sup>18</sup> they met with such resistance in the ulama' that they ultimately had to cede control of the legal system to the ulama', and this control lasted for centuries.<sup>19</sup>

Despite the tension between the ulama' and the Abbasid caliphate, the relationship between fiqh as interpreted by the ulama' and temporal, political power was not frequently addressed in Islamic legal works according to Bernard Weiss, but this lack did not imply disinterest: "Constitutional organization...was thus considered to be

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<sup>12</sup> For further discussion about disagreement in Islamic law, see, e.g., AHMAD ZAKI HAMMAD, *ISLAMIC LAW: UNDERSTANDING JURISTIC DIFFERENCES* 21-26 (1992); TAHA JABIR AL 'ALWANI, *THE ETHICS OF DISAGREEMENT IN ISLAM* 81 (1993).

<sup>13</sup> IRA MARVIN LAPIDUS, *MUSLIM CITIES IN THE LATER MIDDLE AGES* 136 (1967).

<sup>14</sup> BENTON, *supra* note 3, at 102.

<sup>15</sup> ABOU EL FADL, *supra* note 4, at 33, 39.

<sup>16</sup> FRANK E. VOGEL, *ISLAMIC LAW AND LEGAL SYSTEM: STUDIES OF SAUDI ARABIA* 189 (2000).

<sup>17</sup> *Id.* at 188.

<sup>18</sup> MUHAMMAD ABU ZAHRA, *THE FOUR IMAMS: THE LIVES AND TEACHINGS OF THEIR FOUNDERS* 407 (2001).

<sup>19</sup> VOGEL, *supra* note 16, at 189.

among the fundamentals belonging to the sphere of theological discourse...Even though these matters were not discussed in the fiqh books, they were presupposed to underlie all that the authors of those books wrote about.”<sup>20</sup> The constitutional organization of the state and its legitimacy were matters of great theological import; they were fundamental to theories of fiqh interpretation. Temporal rulers’ power was legitimated on the basis of public welfare or *maslaha*<sup>21</sup> while the interpretive work of the *ulama*’ was legitimated based on their relationship to divine texts and the divine law. However, since the fiqh did not cover all issues related to social welfare, the *ulama*’ acknowledged that the ruler could create laws called *qanun* when religious texts did not provided a clear ruling.<sup>22</sup> If the ruler tried to implement any state laws that would violate the *Shari‘a* or harm Islamic social institutions, they had to face the considerable opposition of the *ulama*’. This system is often referred to as *siyasa shar‘iyya* or political governance in accordance with the *Shari‘a*.<sup>23</sup>

In this system of *siyasa shar‘iyya*, the *ulama*’ played a central role. In his book *Muslim Cities in the Later Middle Ages*, Ira Lapidus credits the *ulama*’ with being the most powerful form of social cohesion in Mamluk cities<sup>24</sup> and with playing the vital role of mediator between the Mamluk rulers and their general subjects.<sup>25</sup> Because of their relative independence from political authority, the *ulama*’ became a vital social force in early modern Islamic Empires. They simultaneously challenged political authority in order to maintain their autonomy and worked with political authority to ensure that the governing body enforced some form of Islamic law.<sup>26</sup> The *ulama*’ class functioned both as a check on the political power of emirs, kings, and caliphs<sup>27</sup> and also as part of the political system since some of them worked for the governing body as *qadis* or judges.<sup>28</sup> These *qadi* appointments were filled by the temporal

<sup>20</sup> BERNARD G. WEISS, *THE SPIRIT OF ISLAMIC LAW* 174 (1998).

<sup>21</sup> VOGEL, *supra* note 16, at 173-74. Here, Vogel discusses the theory of *siyaasa shar‘iyya*, which allows rulers to act and even legislate when necessary for the *maslaha*, or public good.

<sup>22</sup> *Id.* at 197.

<sup>23</sup> ANTONY BLACK, *THE HISTORY OF ISLAMIC POLITICAL THOUGHT: FROM THE PROPHET TO THE PRESENT* 154-59 (2001).

<sup>24</sup> LAPIDUS, *supra* note 13, at 113, 130.

<sup>25</sup> *Id.* at 111-13.

<sup>26</sup> *Id.* at 130-31.

<sup>27</sup> Frank Vogel asserts that fiqh after the Abbasid inquisition “promised to act as a restraint on the power of rulers...” VOGEL, *supra* note 16, at 190.

<sup>28</sup> BENTON, *supra* note 3, at 102. Here, Benton describes the “...peculiar role that *qadis* played as both judges and administrators in Islamic empires from the time of the Umayyads and on.”

rulers with prominent ulama', who could rule on issues as they saw fit. If the ruler disagreed with a certain qadi, he could simply replace the qadi. Antony Black refers to the mediatory position of qadis as "the keystone of [the] interlocking of state and religion."<sup>29</sup> The qadis as both prominent ulama' and government functionaries existed in a space between the state and religion, between dependence and autonomy.

The Ottoman Empire, in particular, is a good case study in this context because for centuries it manifested this traditional relationship and tension between the ruling power, the qadis, and the ulama', and it was also the site of their eventual marginalization from the political realm. In the early and middle Ottoman periods, the state appointed religious scholars as judges or qadis, and each administrative province had a qadi as the judicial functionary of the state alongside a military governor (bey or pasha).<sup>30</sup> In theory, the qadi was supposed to make legal judgments based on both fiqh and qanun law given by the Sultan while the governor was to implement and enforce only the qadi's judgments. As Lauren Benton explains, "The bey was not to inflict punishment without the qadi's judgment, and the qadi could not carry out any punishments."<sup>31</sup> The qadis thus acted as a check on the governors and vice versa and embodied the boundaries between the religious scholars and the governing power.

This system was meant to keep local governors from abusing their power by arbitrarily punishing or torturing local citizens,<sup>32</sup> but the system worked only sometimes since qadis could do little in the face of the military power of the local governors. Yet, qadis could refer problems to the Sultan or at least to the Sheikh al-Islam,<sup>33</sup> who held one of the most powerful positions in the Ottoman administration. The Sheikh al-Islam governed the religious affairs of the state and was often one of the most prominent ulama' of the period; he eventually gained the power to appoint all other senior qadis.<sup>34</sup> Qanun laws had to be certified

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<sup>29</sup> BLACK, *supra* note 23, at 201.

<sup>30</sup> BENTON, *supra* note 3, at 111.

<sup>31</sup> *Id.*

<sup>32</sup> MOSHE MA'OZ, OTTOMAN REFORM IN SYRIA AND PALESTINE, 1840-1861: THE IMPACT OF THE TANZIMAT ON POLITICS AND SOCIETY 154 (1968).

<sup>33</sup> In this work, I will be using the Arabic terminology for Ottoman administration with the Turkish following in parentheses where necessary. While it would often be more appropriate to use the Turkish, the novel I examine in the second half of this work uses the Arabic versions. Thus, for purposes of consistency in the paper, I will use the Arabic terms throughout.

<sup>34</sup> BLACK, *supra* note 23, at 200-02.

by the Sheikh and other ulama' as consistent with the Shari'a.<sup>35</sup> Through the position of Sheikh al-Islam, the qadi appointments, and their own social prominence, the scholarly class maintained its jurisdiction over religious law for centuries and played an important role in implementing some secular state law as well.

During the 16<sup>th</sup> century, in the reign of Sultan Suleiman I, who is known as the legislator in Turkish and Arabic,<sup>36</sup> the Sultan reformed the legal system by establishing huge numbers of new laws or qanun to try to standardize the legal system of the Empire and eliminate rampant corruption.<sup>37</sup> Antony Black asserts that this legal code was a fundamental feature of the Ottoman Empire: "The greatest innovation of the Ottoman Empire was the development of non-religious law..."<sup>38</sup> Not only did Suleiman create a qanun legal code, but he was also famous for commanding qadis to apply only particular fiqh rulings in order to further regulate the legal system.<sup>39</sup> One of the reasons for Suleiman's standardization was that qadis in the Empire were rotated and were not paid regular salaries but were paid a fee by the winner of each legal case.<sup>40</sup> This system allowed for and even encouraged corruption and abuse of power at the expense of the common people, who were deemed the Sultan's property.<sup>41</sup> Many of the new qanun laws, therefore, favored the common people and attempted to limit their oppression.<sup>42</sup> Despite Suleiman's efforts, the ulama' did not support the rising status of qanun law in relation to religious law and the usurpation of their autonomy, so by the end of Suleiman's reign and after his death, the Sheikh al-Islam began to invalidate some of the qanun laws that conflicted with the scholars' interpretation of the Shari'a.<sup>43</sup> This action shows that the ulama' wanted to reassert their authority and reaffirm their right to independent ijihad and multiple fiqh methodologies.

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<sup>35</sup> 3 MARSHAL G.S. HODGSON, *THE VENTURE OF ISLAM: CONSCIENCE AND HISTORY IN A WORLD CIVILIZATION* 109 (1974).

<sup>36</sup> CAROLINE FINKEL, *OSMAN'S DREAM: THE STORY OF THE OTTOMAN EMPIRE, 1300-1923*, at 448 (2005).

<sup>37</sup> VOGEL, *supra* note 16, at 206-07.

<sup>38</sup> BLACK, *supra* note 23, at 210.

<sup>39</sup> VOGEL, *supra* note 16, at 318.

<sup>40</sup> MA'OZ, *supra* note 32, at 156.

<sup>41</sup> See BLACK, *supra* note 23, at 202-03.

<sup>42</sup> *Id.* at 211-12.

<sup>43</sup> *Id.* at 214.

## II. MANY VOICES BECOME ONE

It was only in the failing Ottoman Empire that the balance of power between the scholarly class and the state began to change.<sup>44</sup> With the economic and military decline of the Ottoman Empire in the 18<sup>th</sup> and 19<sup>th</sup> centuries CE, the Sultan and the social elites began to search for reforms that would help them regain prominence in the world.<sup>45</sup> After all, in little more than a decade at the beginning of the 19<sup>th</sup> century, the Empire lost Greece, Algeria, Egypt, and land on the Russian frontier, as well as sustained a large naval defeat at the hands of France, Britain, and Russia.<sup>46</sup> This mood of reformation led to the period known as the Ottoman Tanzimat, meaning reorganizations or readjustments.<sup>47</sup> The word is often translated in the singular in historical works, but the word is actually in plural form, so it implies many arenas of reorganization. Erik J. Zürcher characterizes the reforms as an attempt to transform “scribal institutions into something resembling a modern bureaucracy,” so the Empire could compete with European expansion.<sup>48</sup> The reforms touched almost all aspects of life including taxation, education, the military, and law<sup>49</sup> and were widely seen as an attempt to appease the European powers, so that they would help defeat Mohammed Ali (Mehmet Ali), the Egyptian governor who had taken over most of the Levant.<sup>50</sup> The Empire wanted military help expelling him from the region, and the British ultimately wanted the European powers to leave the Ottoman Empire intact as a buffer against Russian expansionist tendencies rather than divide it up between them.<sup>51</sup>

Most historians mark the beginning of the Tanzimat reforms with the Hatt-i Sharif of Gülhane (The Noble Edict of Gülhane) in 1839.<sup>52</sup> This edict was not a piece of legislation but “a statement of royal intent the sultan issued to his subjects.”<sup>53</sup> One of the most significant

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<sup>44</sup> NOAH FELDMAN, *THE FALL AND RISE OF THE ISLAMIC STATE* 81 (2008).

<sup>45</sup> *Id.* at 59.

<sup>46</sup> *Id.*

<sup>47</sup> HANS WEHR, *A DICTIONARY OF MODERN WRITTEN ARABIC* 1147 (J. Milton Cowan ed., 4th ed. 1994).

<sup>48</sup> ERIK J. ZÜRCHER, *TURKEY: A MODERN HISTORY* 50 (3d ed. 2004).

<sup>49</sup> HODGSON, *supra* note 35, at 250. Hodgson discussed the Tanzimat as “a generalized adoption of Modern Western ways” on the page cited above.

<sup>50</sup> ZÜRCHER, *supra* note 48, at 51-52.

<sup>51</sup> *Id.* at 50.

<sup>52</sup> FINKEL, *supra* note 36, at 447-48.

<sup>53</sup> WILLIAM L. CLEVELAND, *A HISTORY OF THE MODERN MIDDLE EAST* 83 (3d ed. 2004).

portions of the edict was a declaration of the equality of Muslims and non-Muslims before the law, especially in terms of taxation and military conscription, for the first time in Ottoman history.<sup>54</sup> This act pleased the Europeans as they were increasingly involving themselves in Ottoman affairs on behalf of specific non-Muslim minority communities.<sup>55</sup> William L. Cleveland, however, asserts that the goal of this edict was more than pacifying Europe; it was to “create the notion of a common Ottoman citizenship...which would in theory replace the religious ordering of society in which Muslims were dominant.”<sup>56</sup> The edict of Gülhane was supposed to help build nationalist feelings in an Empire with significant Christian, Jewish, Druze, and other religious minority groups that were growing discontented under Ottoman rule.<sup>57</sup> Only a unified Empire could rebuild itself in the face of so many superior military and economic powers. Nevertheless, if the edict was even in part meant to appease Europe, it worked because soon after its declaration, the British military bombarded Beirut and helped force Mohammed Ali out of Syria and Lebanon.<sup>58</sup>

While the prologue to the Edict of Gülhane referenced the Shari‘a and claimed to be an effort to preserve it, in fact, the edict began the process of its decline.<sup>59</sup> By the 1840s, the Ottoman administration had issued a new penal code based on French civil code<sup>60</sup> and established secular appellate courts called the nizamiye<sup>61</sup> to handle all cases with non-Muslims<sup>62</sup> and all criminal or economic law cases based on the new penal code. Each province had a new secular court or council called the majlis (meclis), which was made up of local notables and ulama’.<sup>63</sup> The majlis often functioned as an appeals court for the Shari‘a court system, which limited even further the jurisdiction of Islamic law.<sup>64</sup> If a litigant

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<sup>54</sup> FINKEL, *supra* note 36, at 447-48.

<sup>55</sup> For example, the Crimean War between the Ottoman Empire and Russia began when Russia gave an ultimatum demanding the right to interfere in Ottoman affairs on behalf of the Orthodox Christians within the Empire. Each local religious minority came to be supported by different European powers who would attempt to influence Ottoman administration on their behalf. See CLEVELAND, *supra* note 53, at 88.

<sup>56</sup> *Id.* at 83.

<sup>57</sup> *Id.*

<sup>58</sup> ZÜRCHER, *supra* note 48, at 52.

<sup>59</sup> CLEVELAND, *supra* note 53, at 83.

<sup>60</sup> *Id.* at 84.

<sup>61</sup> *Id.*

<sup>62</sup> ZÜRCHER, *supra* note 48, at 61.

<sup>63</sup> MA’OZ, *supra* note 32, at 156.

<sup>64</sup> *Id.* at 155 (citations omitted).

was unhappy with the religious court's ruling, he could appeal to the majlis for a ruling based on secular law. In fact, then, if not explicitly, the new penal code abolished Islamic hudud crimes and punishments, those prescribed in the Qur'an.<sup>65</sup> The Shari'a and the ulama' who interpreted it had lost their prominent social position, and "[their] scope was limited almost completely to family law..."<sup>66</sup> The Edict of Gülhane proclaimed itself to be saving the Empire by moving its legal system into accord with the Shari'a,<sup>67</sup> but the edict and its succeeding acts began a secularization of Ottoman administration<sup>68</sup> that actually severely limited the Shari'a and displaced the ulama' as social leaders and social cohesion.

The legal reforms continued as did the marginalization of the scholars and the loss of their independence. The climax of legal reforms came in 1869 when the Ottoman government began the process of codifying even civil law.<sup>69</sup> They did so with the help of prominent ulama' who based the code on their favored school of Islamic law, the Hanafi school.<sup>70</sup> The final product of the codification process was the Majalla (Mecelle),<sup>71</sup> a set of standard rules to be applied in legal cases throughout the Empire. While the Majalla was based on Hanafi fiqh, it was organized and arranged based on European legal codes.<sup>72</sup> According to Knut Vikor, it was not an attempt to define broad legal principles but a long list of separate rules.<sup>73</sup> The ulama' went along with this codification process with little resistance even though it drastically reduced their independence because they did not seem to understand the implications of the reforms.<sup>74</sup> Noah Feldman argues that the Majalla codification "sounded the death knell for the role of scholars as keepers of the law."<sup>75</sup> The religious scholars now had no autonomy from the state, no freedom to practice their own ijihad to produce legal rulings, and no ability to

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<sup>65</sup> For a good description and discussion of hudud crimes, see Muhammad Salim Al-'Awwa, *The Basis of Islamic Penal Legislation*, in *THE ISLAMIC CRIMINAL JUSTICE SYSTEM* 127-47 (M. Cherif Bassiouni ed., 1982).

<sup>66</sup> ZÜRCHER, *supra* note 48, at 61.

<sup>67</sup> FINKEL, *supra* note 36, at 448.

<sup>68</sup> CLEVELAND, *supra* note 53, at 83.

<sup>69</sup> FELDMAN, *supra* note 44, at 62.

<sup>70</sup> *Id.* at 67.

<sup>71</sup> *Id.* at 62.

<sup>72</sup> CLEVELAND, *supra* note 53, at 84.

<sup>73</sup> KNUT S. VIKOR, *BETWEEN GOD AND THE SULTAN: A HISTORY OF ISLAMIC LAW* 231 (2005).

<sup>74</sup> FELDMAN, *supra* note 44, at 65.

<sup>75</sup> *Id.* at 63.

follow a school other than the Hanafi School. This development according to Feldman was something new in the history of politics and the Shari'a: "What had remained for centuries in the hands of a quasi-independent class of scholars now passed into the ambit of the state."<sup>76</sup> The Shari'a, which had been multiply interpreted by many independent fiqh scholars, now spoke with one voice, that of the temporal power embodied in the Ottoman Sultan.

Feldman argues rather convincingly that with the legal codification of the Majalla, the ulama' scholarly class became obsolete because qadis no longer had to know the history and works of Islamic jurisprudence; they only had to know the ruling in the Majalla code.<sup>77</sup> Their power of independent legal ruling was gone except in the area of family law.<sup>78</sup> The power of the ulama' to declare and interpret law passed not to a legislative body but to the Sultan himself, whereby Muslim countries lost "the class of persons whose job for centuries had been to offer a site for that resistance" to executive power.<sup>79</sup> While Islamic schools still existed, their graduates had difficulties competing with students trained in the European style in the new, secular, government schools: "The favored new elite of French knowers, small though it may have been, exercised an increasing dominance in the direction of the affairs of the state, whereas the religiously educated found their once respected training to have limited application."<sup>80</sup> The new elites were not the ulama' but those local people who knew European languages, had studied in Europe, or had business relationships with the Europeans.<sup>81</sup> Since many of these elites were trained in government schools and eventually found work in the Ottoman bureaucracy, they were not capable of offering genuine resistance to the power of the Sultan.<sup>82</sup> They did not have the same kind of social prestige as the ulama' based on their relationship to the sacred and divine; the new elites established prestige simply through wealth and power.

Many of the new elites came from non-Muslim groups in the Empire since the Edict of Gülhane gave them legal equality with

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<sup>76</sup> *Id.*

<sup>77</sup> *Id.* at 62-63 and 83.

<sup>78</sup> ZÜRCHER, *supra* note 48, at 61.

<sup>79</sup> FELDMAN, *supra* note 44, at 91.

<sup>80</sup> CLEVELAND, *supra* note 53, at 101.

<sup>81</sup> *See* ZÜRCHER, *supra* note 48, at 66.

<sup>82</sup> Noah Feldman explains that this new class of Ottoman subjects educated in the Western style came to see the law as coming from government rather than from God or the religious scholars. FELDMAN, *supra* note 44, at 69.

Muslims.<sup>83</sup> This equality was only theoretical, and attempts to put into practice these equal rights were often met with fierce resistance from local populations<sup>84</sup> such as the 1860 Damascus massacre of thousands of Christians.<sup>85</sup> Yet, the non-Muslims still grew confident enough to increase their business contacts with Europeans, which gave them a distinct advantage economically and when competing for administrative positions.<sup>86</sup> The Ottoman Empire was now only Islamic in name because there was no longer a body of religious elites to legitimate its governance on Islamic grounds nor courts relying on independent Islamic fiqh. Power was centered more and more in the local representatives of the European powers and their mostly non-Muslim employees and supporters. The force of independent Islamic jurisprudence had been sapped before the scholars really understood what had happened.<sup>87</sup> As Caroline Finkel explains, it was only in hindsight that people understood the implications of the Tanzimat reforms: "As the old order passed and people came to realize what had been lost during the Tanzimat decades, they felt themselves stranded in unfamiliar terrain where their cultural values no longer had their former currency."<sup>88</sup> People living the reforms did not understand their future implications. The ulama' and society at large had not initiated these reforms; they had been a top-down reorganization imposed from above to try to modernize the Ottoman Empire.<sup>89</sup> The scholarly class, in particular, was affected by the Tanzimat reforms, but Noah Feldman argues that the marginalization of the ulama' from juridical control dramatically affected the entire society.<sup>90</sup> Because the ulama' had traditionally been the check on executive power, their loss meant a move to totalitarian governance that continues in much of the Middle East today.<sup>91</sup>

While Feldman's argument at times lacks complexity and nuance, his basic thesis helps explain how the desire to return to Islamic law in many Muslim countries is often driven by a desire to end totalitarian regimes. The references to Shari'a so often cited by U.S.

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<sup>83</sup> FINKEL, *supra* note 36, at 447-48.

<sup>84</sup> MA'OZ, *supra* note 32, at 22-29.

<sup>85</sup> CLEVELAND, *supra* note 53, at 91.

<sup>86</sup> *Id.* at 90.

<sup>87</sup> FELDMAN, *supra* note 44, at 64-66.

<sup>88</sup> FINKEL, *supra* note 36, at 478.

<sup>89</sup> ZÜRCHER, *supra* note 48, at 66-67.

<sup>90</sup> FELDMAN, *supra* note 44, at 81.

<sup>91</sup> Noah Feldman describes this process as a move to an "unchecked executive dominating" the government system. *Id.* at 88.

media as indictments of fundamentalism and as markers of terrorism can actually be read in many cases as a desire for justice, equality, and transparency in governance. And even in cases where groups calling for the return to Shari'a are fundamentalists, the above history has shown us that the interpretation of Shari'a has been a contested, multivocal terrain for most of the history of Islamic Empires, and the interpreters of the law, the ulama', have been a force of cultural resistance and local power. Only in the nineteenth-century Ottoman Empire and under colonial rule in other Muslim territories was the multivocality and creative power of Islamic law reduced to a univocal, fixed penal code.<sup>92</sup> The movement from a plural legal order to a state-dominated one, to use Lauren Benton's terminology,<sup>93</sup> was only solidified in the Ottoman Empire with the Tanzimat era. The state ultimately won out in the tension between Islamic jurisprudence (fiqh) and temporal, political power (siyasa).

### III. THE MULTIVOCALITY OF LITERATURE

We have seen the multiple nature of the interpretation of the Shari'a in most of Islamic history until the late Ottoman period, and history has helped nuance modern media perspectives of Islamic law. If we switch lenses and look instead at a literary text, we may be able to further refine the discussion. What, if anything, can we learn from a literary representation of the relationship between Islamic jurisprudence and political rule? Literature may seem like a strange place to go to illuminate this relationship. Literature speaks in very different ways than history; it speaks on an individual human level rather than on a grand historical level. History is sometimes much more like the Ottoman Majalla, a catalogue of events, dates, and people, than like the flexibility and fluidity of earlier Islamic legal systems. The novel, in particular, functions very differently. Russian literary theorist Mikhail Bakhtin characterizes language in general as dialogic, meaning that "[a]ny utterance—the finished, written utterance not excepted—makes response to something and is calculated to be responded to in turn."<sup>94</sup> Bakhtin argues that the novel makes this dialogic nature of language more

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<sup>92</sup> *Id.* at 86-87. Noah Feldman alludes to the authoritarian systems put into place or supported by European colonialism in the Middle East as leading to a similar decline of Islamic law as that in the Ottoman Empire, but he never directly states this idea.

<sup>93</sup> BENTON, *supra* note 3, at 8.

<sup>94</sup> MIKHAIL BAKHTIN, *THE BAKHTIN READER: SELECTED WRITINGS OF BAKHTIN*, MEDVEDEV, VOLOSHINOV 35 (Pam Morris ed., 1994).

pronounced because novels already have authors, characters, narrators, and readers who are at times overtly in conversation with each other, and they can also include excerpts or parodies of other literary genres.<sup>95</sup> Bakhtin describes, “The language of the novel is a *system* of languages that mutually and ideologically interanimate each other. It is impossible to describe and analyze it as a single unitary language.”<sup>96</sup> Some modern novels such as those of Dostoyevsky, in Bakhtin’s formulation, are not only dialogic but polyphonic because they give voice to many perspectives.<sup>97</sup> Polyphony does not mean a large number of characters, but that even if there is only one character, the author manages to make the character speak truly from his or her own perspective and not from that of the author.<sup>98</sup> If we follow Bakhtin’s descriptions of the novel, the novel as form actually mirrors the historical multivocality of Islamic jurisprudence. The novel, then, is the perfect place to continue our examination of the relationship between the implementation of the Shari‘a and temporal, political power as well as the effects of this interaction on people’s daily lives.

British-Lebanese author and lawyer Nabil Saleh’s *The Qadi and the Fortune Teller* illuminates this relationship in a time of historical transition: the Ottoman Tanzimat.<sup>99</sup> The novel is set in Beirut in 1843 (1259 Hijri),<sup>100</sup> and it is framed as the ten-month journal of a local qadi. 1843 is four years after the Hatt-i Sharif gave Muslims and non-Muslims equal rights,<sup>101</sup> three years after the British bombarded Beirut to expel the Egyptian powers,<sup>102</sup> and right in the middle of numerous changes to the penal code and legal system. However, 1843 is before the Majalla completely codified the legal system in the Empire.<sup>103</sup> Saleh’s novel, then, is situated in the precarious moment of transition when the qadis and the ulama’ in general are progressively losing their prestige and power, when the plural legal order is changing to a state-dominated one.

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<sup>95</sup> Mikhail Bakhtin, *From The Dialogic Imagination, in* THEORY OF THE NOVEL: A HISTORICAL APPROACH 333 (Michael McKeon ed., 2000).

<sup>96</sup> *Id.*

<sup>97</sup> BAKHTIN, *supra* note 94, at 89.

<sup>98</sup> *Id.* at 93.

<sup>99</sup> NABIL SALEH, *THE QADI AND THE FORTUNE TELLER* (2008).

<sup>100</sup> I include the dates according to the Islamic or hijri calendar in parentheses throughout this section because the novel itself uses this version of dating.

<sup>101</sup> The Hatt-i-Sharif was declared in 1839. FINKEL, *supra* note 36, at 447.

<sup>102</sup> The bombardment of Beirut took place in 1840. ZÜRCHER, *supra* note 48, at 52.

<sup>103</sup> The Majalla was compiled between 1869 and 1876. FELDMAN, *supra* note 44, at 62.

Bakhtin would characterize this state-dominated legal order as monologic, speaking with a single, unitary voice; it is “isolated, finished...divorced from its verbal and actual context and standing open not to any possible sort of active response but to passive understanding.”<sup>104</sup> The monologic voice is of the dictator, of totalitarian systems, which we see the Ottoman Empire becoming by the turn of the century. The novel, however, is not usually monologic, and we see this easily in Saleh’s novel, which is composed of a multiplicity of voices. The preface and postscript are narrated by an anonymous narrator who is not the author,<sup>105</sup> and the rest of the text is the qadi’s diary, which is naturally written in his own voice.<sup>106</sup> Besides the author, narrator, and qadi, the novel includes the voices of numerous other characters since the qadi sometimes records conversations. The diary is also interspersed with twenty-two Qur’anic verses that the qadi cites in relation to his life and work,<sup>107</sup> which constitute yet another separate voice. This novel, then, is both dialogic and multivocal; it is opposed to the monologic voice of the Ottoman Sultan.

#### IV. THE QADI’S POWER

At the beginning of the novel, the legal system of the Empire is not yet monologic, and the qadis have not lost all power. Qadi Abu Khalid opens the first chapter of his diary with the phrase that begins each sura or chapter of the Qur’an (except sura IX), which the novel’s English translates to “In the name of God, Most Gracious, Most Merciful.”<sup>108</sup> This phrase, the *basmala*, is often used at the beginning of a new task or undertaking to call down God’s blessing.<sup>109</sup> The Qadi thus begins his diary in accordance with Muslim tradition, and he seems filled with hope. To write a diary is already to presuppose one has interesting or important enough things to say that they should be committed to paper. Abu Khalid proceeds to write about his life and work for ten months, and each month constitutes one chapter of the novel.

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<sup>104</sup> BAKHTIN, *supra* note 94, at 35.

<sup>105</sup> SALEH, *supra* note 99, at 1-5, 143.

<sup>106</sup> The first word of the body of the diary is “I,” which immediately indicates the first-person perspective. *Id.* at 9.

<sup>107</sup> For example, the qadi cites sura LII of the Qur’an to remind himself that he need not worry about the future: “Truly it is He, the Beneficent, the Merciful.” *Id.* at 11.

<sup>108</sup> *Id.* at 9.

<sup>109</sup> B. Carra de Vaux, *Basmala*, ENCYCLOPAEDIA OF ISLAM (P. Bearman et al. eds., 2d ed. 2010), available at [http://www.brillonline.nl/subscriber/entry?entry=islam\\_COM-0102](http://www.brillonline.nl/subscriber/entry?entry=islam_COM-0102).

It is clear from his words that he, as a qadi, is still highly respected in Beirut. He describes walking through the city streets one day: "I do not mind street cacophony, sometimes I even enjoy it; or could it be that in reality I enjoy the respectful greetings that I attract whenever I leave home? Would such a place... still seem gratifying if I were not an eminent member of its community?"<sup>110</sup> Abu Khalid is respected by the city's residents and thrives on that respect. The preface's narrator also describes Abu Khalid's education at the hands of a sheikh as something prestigious, for which his parents had to make great sacrifices.<sup>111</sup> Eventually, his sheikh "honoured him with a licence to teach Islamic jurisprudence," and his mother "shed abundant tears of pride and joy" when Abu Khalid was appointed as a qadi.<sup>112</sup> His traditional education is still beneficial and prestigious because the state, secular schools are just being formed at this period.<sup>113</sup> His status as a religious scholar also allows him to meet the local mufti (a Shari'a scholar) in the public baths and sit next to him to talk.<sup>114</sup> Furthermore, Abu Khalid has a position on Beirut's majlis council, the new secular court, since he is one of the leading ulama' of the area. Qadis may be waning in influence, but they are still prominent figures in society.

The position of qadi is still influential enough that the British dragoman, Mr. Saba, requests Abu Khalid's assistance and advice numerous times. A dragoman was a local person who served as translator, guide, and official of a European power.<sup>115</sup> The position brought with it the legal protections and tax-exempt status of the foreigners, and thus a dragoman was a prestigious functionary of the foreign government.<sup>116</sup> The dragoman comes to ask for Abu Khalid's assistance in numerous cases, some as simple as changing the wording on a burial certificate to please the widow of a local Christian man.<sup>117</sup> However, most often, Mr. Saba wants Abu Khalid to use his position to influence the politics of Mount Lebanon. At the time, the Maronite Christians and the Druze were in conflict, and the European powers had

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<sup>110</sup> SALEH, *supra* note 99, at 31-32.

<sup>111</sup> *Id.* at 4.

<sup>112</sup> *Id.*

<sup>113</sup> ZÜRCHER, *supra* note 48, at 62-33. (discussing some of the secular schools of the Tanzimat reform era such as the schools formed for adolescent boys between the ages of 10 and 15).

<sup>114</sup> SALEH, *supra* note 99, at 10-11.

<sup>115</sup> RODERIC H. DAVISON, *NINETEENTH CENTURY OTTOMAN DIPLOMACY AND REFORMS* 309 (1999).

<sup>116</sup> *Id.*

<sup>117</sup> SALEH, *supra* note 99, at 27.

endorsed a settlement that left one half of the mountain to the Maronites and the other half to the Druze.<sup>118</sup> The French opposed this division as they supported the Maronites and wanted them to control the entire mountain.<sup>119</sup> One of the favors the dragoman requests is that Abu Khalid refuse to try any cases from the mountains, so that the mountain people accept the new status quo. He explains, "Abu Khalid, it is in your power to contribute to the stability of this part of the Empire... Chiefly what you can do is to send back to their natural judges any litigants from the Mountains who solicit the jurisdiction of your court."<sup>120</sup> The dragoman requests favors of the qadi because the qadi has not lost all of his autonomy or his power. He can still influence Lebanese politics with his rulings.

Besides showing the enduring prestige of the qadi's position, the novel also points out the continuing (but reduced) power of Islamic jurisprudence. The qadi's rulings show the creativity and flexibility of fiqh interpretation of the Shari'a. In one instance, a young boy has accidentally killed another, and the victim's father is demanding the *quesas*<sup>121</sup> penalty (spelled *kassas* in the novel), which is a penalty of equivalence; in this case, equivalence would mean the death penalty.<sup>122</sup> The British are trying to avert the death penalty, and the qadi advises them to speak to the victim's brother. The brother as one of the heirs may accept the *diyya*, monetary compensation for injury, and then the death penalty will no longer be possible since a death penalty cannot be divided.<sup>123</sup> The qadi is able to both avert a harsh punishment and keep the victim's father's pride intact. The qadi's creative legal maneuvers are best exemplified in interactions with his best friend, Abu Kasim, a wealthy merchant. Abu Kasim wishes to establish a *waqf*, a charitable foundation, with some of his wealth, but he worries that his son will dissolve it after his death.<sup>124</sup> The qadi devises a plan to ensure the continuance of the *waqf* in which he will rule according to two companions of Abu Hanifa, whose legal school was that chosen by the Ottoman Empire, that a *waqf* establishment is binding.<sup>125</sup> Abu Khalid

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<sup>118</sup> *Id.* at 2.

<sup>119</sup> *Id.* at 101-02.

<sup>120</sup> *Id.* at 102.

<sup>121</sup> M. Cherif Bassiouni, *Qesas Crimes*, in *THE ISLAMIC CRIMINAL JUSTICE SYSTEM* 203-05 (M. Cherif Bassiouni ed., 1982).

<sup>122</sup> SALEH, *supra* note 99, at 15.

<sup>123</sup> *Id.* at 16.

<sup>124</sup> *Id.* at 33.

<sup>125</sup> *Id.* at 34.

finds a similar way to secure his friend's purchase and ownership of a new home.<sup>126</sup> He is able to rule in flexible ways because the laws of the Empire have not been completely codified. The multiplicity of interpretations of the Shari'a allow him to find ways to guarantee his friend's charitable endowment, avert the death penalty from a young boy, and ensure Abu Kasim's new home purchase.

The Shari'a appears in the qadi's diary to be not only flexible but also an articulation of general goals and principles. These general principles should theoretically make it even more flexible and adaptable to the rapid modernization of the Ottoman Empire. Abu Khalid speaks only once of these general principles in the context of explaining Islamic finance to his business manager: "The objective of the *sharia*,' I said, 'is to prevent exploitation of the weak by the strong and to protect human beings from their own folly and extravagance.'"127 This statement of a broad objective of the Shari'a implies that there are broad objectives one can find in the Qur'an that can be used to deduce legal rulings. This implication is echoed in the Qur'anic verses the qadi continually cites. Only two or maybe three of the twenty-two are even tangentially related to legal issues. The rest describe general principles of mercy, purity, kindness, and repentance that the qadi applies to his life and his legal work. For instance, after a case before the majlis dealing with French Jesuit priests is settled amicably, Abu Khalid cites the Qur'an, sura 50, verse 8: "You should show them kindness and deal justly with them. Allah loveth those who deal justly."<sup>128</sup> This verse deals with treatment of non-Muslims who are not waging war with the Muslim community. The context of the verse generally fits the case of the Jesuits, but it articulates a broad principle. It does not indicate how to deal with Jesuit priests who have built a compound without permission and are ringing their church bells.<sup>129</sup> The qadi is able, however, to connect this broad objective of dealing justly with non-Muslims to this specific case. Most of the other Qur'anic verses cited in the novel are similarly general, yet Abu Khalid applies them to diverse moments of his life.

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<sup>126</sup> *Id.* at 96-7.

<sup>127</sup> *Id.* at 90.

<sup>128</sup> *Id.* at 42.

<sup>129</sup> *Id.* at 40-41.

## V. THE QADI'S POWERLESSNESS

However, Abu Khalid is unable, due to the new Ottoman constraints on the legal system and due to his own education in the Hanafi School, to similarly apply the general principles of the Qur'an to his legal rulings. He may retain some power, social standing, and autonomy, but they are all waning. The Ottoman Empire will not allow legal rulings except according to Hanafi jurisprudence,<sup>130</sup> and we see the qadi struggling with this limitation. In determining a child custody case, he wants to rule for the mother because he knows her and knows her love for her son, but he ultimately rules for the other litigant.<sup>131</sup> He explains, "Unfortunately, the teaching of our Master Abu Hanifa does not allow me to rely upon personal knowledge unless it is acquired during the exercise of my duties."<sup>132</sup> The qadi rules against his own inclination because of the Empire's limitation of legal rulings to Hanafi fiqh. In some cases such as that of Abu Kasim's waqf, the qadi is able to find creative solutions to legal problems within the Hanafi School. At other times, a just or equitable solution is not possible as in the case of the French-owned silk-reeling factory. The French owners rented a piece of land for the factory and put in a well because silk-reeling uses a lot of water.<sup>133</sup> Their new well and their copious water use deprived their neighbors of the water they used to have.<sup>134</sup> While Abu Khalid wishes to rule against the French because the Europeans are economically exploiting his country, he cannot find a way: "We discussed the case but failed to find any way out of the unsatisfactory solution of the Hanafi school, whose teaching is the sole official teaching of the Empire... In a Maliki law treatise, it is said that Imam Malik does not allow a person to dig a well in his own property when such a well will decrease the volume of water of his neighbor's well; but that is Imam Malik, whose teaching cannot be followed here."<sup>135</sup> Qadi Abu Khalid is still partially independent, but his independence is limited to the Hanafi legal school. He cannot effectively stop the rising tide of European economic and political involvement in the failing Ottoman Empire within these confines. The Shari'a, which was historically characterized by a

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<sup>130</sup> FELDMAN, *supra* note 44, at 67.

<sup>131</sup> SALEH, *supra* note 99, at 11-12.

<sup>132</sup> *Id.* at 12.

<sup>133</sup> *Id.* at 34.

<sup>134</sup> *Id.*

<sup>135</sup> *Id.* at 35.

multiplicity of interpretations and methodologies is more and more uniformly defined and limited for Abu Khalid.

Related to the Empire's limitation on legal interpretation is the qadi's own limitations; like many of his contemporaries among the ulama', he does not believe he is allowed to or able to adjudicate based on his own *ijtihad* or efforts.<sup>136</sup> The four surviving Sunni schools of Islamic law are all skeptical of human reason and therefore do not allow rulings based on general Qur'anic principles.<sup>137</sup> Thus, if the answer is not easily found in the Qur'an or Sunna, the qadi's rulings must be based on past Islamic scholars' legal decisions as much as possible or on direct analogy to a specific sacred text. When the qadi goes to a village in the south of Lebanon, which is most likely Shi'a (although the text never specifies), he is questioned by the local bey about how he deduces the law.<sup>138</sup> He responds, "I am a simple jurist who relies on the work of eminent predecessors, who in turn have derived the law from the Book, the *Sunna*, and *ijma'* (consensus)."<sup>139</sup> When the bey further questions him about *ijtihad* and the use of reason, the qadi's uncle excuses him from the discussion.<sup>140</sup> Based on his own traditional education at the hands of a blind sheikh and the Empire's policy on jurisprudence, the qadi will not practice new *ijtihad* in order to decide cases. He can apply general Qur'anic verses to diverse experiences in his life, but he cannot apply the same principles to his legal rulings; he will only use the previous *ijtihad* of eminent predecessors from the Hanafi School.

While the qadi does not view his reliance on previous *ijtihad* as limiting, he does see government policies as limiting. He admits that his position is not as prestigious as in the past: "As if the position is worth fighting over. True, I am held in some esteem by the community, but I receive no fixed salary, despite the promise that all civil servants were

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<sup>136</sup> By the 10<sup>th</sup> century CE according to Sherman Jackson (following upon the work of J. Schacht), the broad consensus in the Muslim world was that scholars could no longer use much independent judgment in deciding legal cases but had to explain, apply, and interpret older doctrine. This idea is often referred to as *taqlid* or imitation. SHERMAN JACKSON, *ISLAMIC LAW AND THE STATE: THE CONSTITUTIONAL JURISPRUDENCE OF SHIHAB AL-DIN AL-QARAFI* 74 (1996).

<sup>137</sup> Bernard Weiss explains that after a short period of relative openness in terms of deducing general principles from the Qur'an and hadith, a strict textualism prevailed that required any analogous reasoning from the sources to "always be on the same level of particularity as the original rule." WEISS, *supra* note 20, at 69.

<sup>138</sup> SALEH, *supra* note 99, at 118

<sup>139</sup> *Id.*

<sup>140</sup> *Id.* at 119.

given by the authorities.”<sup>141</sup> He continues to describe how he is supposed to be paid by the winner of a case, but once the case is concluded, the winner is usually resentful at having to pay and at having wasted so much time in litigation.<sup>142</sup> The qadi may be respected in the community, but the government’s treatment of civil servants does not show respect or prestige. Moreover, his jurisdiction has greatly decreased in the last few years:

The number of cases to be administered by the Qadi has dwindled considerably. Commercial suits are tried by the provincial majlis (council); since 1256 criminal cases have been part of the jurisdiction of the mutasalleem (civil governor), while foreigners who belong to countries of some standing are subject to the complete jurisdiction of consular officers in civil and criminal cases. What is left to the Qadi is to deal with matters of personal status, property holdings and the like, as well as *awqaf* (charitable endowments).<sup>143</sup>

The qadi knows that the Tanzimat reforms have restricted his own jurisdiction and thus limited his power and the scope of religious law. He sits on the majlis and therefore participates in their adjudication,<sup>144</sup> but he plays only a minor role there among other ulama’ and the governor. He commands some respect from the community, but that respect is less than in the past.

In contrast to his own decreasing prestige, Abu Khalid notices the rising prestige of local and foreign non-Muslims with frustration. Since the Hatt-i Sharif gave non-Muslims equal status with Muslims,<sup>145</sup> they quickly increased their business and trade activities and allied themselves with European powers. The qadi remarks, “The *dhimmis* have nearly taken over a commanding status and deprived us of our livelihoods.”<sup>146</sup> The dhimmis or non-Muslim communities in the Empire quickly learned European languages and filled many of the local positions for the European powers. Because the Ottomans needed the Europeans and their financial loans, they allowed them much freedom to expand economic activity and even to establish missionary schools.<sup>147</sup>

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<sup>141</sup> *Id.* at 10.

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> For an example of Abu Khalid sitting on the majlis to decide a case, see *id.* at 40-41.

<sup>145</sup> FINKEL, *supra* note 36, at 447.

<sup>146</sup> SALEH, *supra* note 99, at 68.

<sup>147</sup> By 1874, 60% of the Ottoman Empire’s budget went to pay the interest alone on loans from Europe, so the Empire was completely indebted to European countries and their financiers. See CLEVELAND, *supra* note 53, at 86.

The majority of the local beneficiaries were non-Muslims.<sup>148</sup> Abu Khalid who gained prestige by memorizing holy texts and studying Islamic jurisprudence is watching in horror as the power and prestige of his entire community is falling. By the end of the novel, the qadi himself is forced to resign his position because of false rumors and the power maneuvers and intrigues of the European powers in the Empire.<sup>149</sup> He is no longer a powerful member of society, and the Qur'anic verse he cites early in the novel about avoiding suspicion of others<sup>150</sup> proves to be irrelevant in the new context of Tanzimat reforms.

## VI. THE QADI'S LIFE AS MIRROR

The qadi's personal life in the novel and his own downfall mirror the downfall of the multiplicity of Shari'a interpretation. When the novel begins, the qadi lives with his two daughters, a young son, and his wife.<sup>151</sup> Abu Khalid is not a harsh father or husband according to his diary. He prays for help protecting his daughters.<sup>152</sup> He refers to his son as "the light of [his] eyes and the joy of [his] heart,"<sup>153</sup> and he takes his entire family out for an afternoon at a family café near the sea.<sup>154</sup> When the qadi's best friend, Abu Kasim, asks for his daughter Aisha's hand in marriage, the qadi rejoices because Abu Kasim is wealthy, kind, and respectable.<sup>155</sup> Abu Khalid is a kind, traditional father, but he is not opposed to modernizing changes. Since the qadi has noticed the changing tides of influence in society, he has just found a non-Muslim teacher for his son, Khalid, so that Khalid will learn not only Arabic but also Italian.<sup>156</sup> "One has to go along with progress," asserts the qadi.<sup>157</sup> He is a traditional father figure, but he sees the effects of change on the Empire and is not opposed to some adaptation. He wants the best for his

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<sup>148</sup> Abu Khalid explains that the declaration of equality of Muslims and non-Muslims in the Empire has actually given the non-Muslims an advantage rather than equalizing the playing field. SALEH, *supra* note 99, at 68.

<sup>149</sup> *Id.* at 133-43.

<sup>150</sup> *Id.* at 13.

<sup>151</sup> *Id.* at 4.

<sup>152</sup> *Id.* at 17.

<sup>153</sup> *Id.* at 13.

<sup>154</sup> *Id.* at 48-49.

<sup>155</sup> *Id.* at 83.

<sup>156</sup> *Id.* at 16.

<sup>157</sup> *Id.* at 17.

son and daughters, even if that means sending his son to a Christian teacher.

Yet, there are clues early in the novel that the qadi's personal life is not as stable as it seems. The qadi's son, Khalid, is in frail health and struggles with his studies.<sup>158</sup> The qadi dreams of Khalid becoming a successful merchant and an influential man,<sup>159</sup> but his tutor says that he cannot focus on his studies and that they are a waste of Abu Khalid's money.<sup>160</sup> The qadi's daughter Aisha suffers from a mysterious illness; she takes to her bed refusing food and is "pale and uncommunicative."<sup>161</sup> What ultimately makes her feel better is a visit and a new dress from Mariam, the Jewish seamstress. The qadi remarks: "Could it be possible that a new garment has the power to cure illness?"<sup>162</sup> His response is utterly out of touch with his daughter and the rest of his family. He appears completely clueless as similar signs appear in his life. The culmination of these signs is the appearance of a gypsy fortune teller who tries to read his palm but runs away mumbling, "Nothing, I see nothing...but blood, blood."<sup>163</sup> This point is the turning point in the novel. After the terrifying fortune, the qadi's daughter Aisha elopes with a man from another religious sect, never to be seen again.<sup>164</sup> Mariam, the seamstress who allowed Aisha to meet secretly with her lover, is murdered,<sup>165</sup> and the public blames the qadi.<sup>166</sup> After a campaign of slander, the qadi is forced to resign under pressure.<sup>167</sup> The diary ends at this point with the qadi declaring, "The predicament I have lately experienced has made me more aware of the true nature of mankind and killed not only my illusions but also my dreams."<sup>168</sup> Abu Khalid has lost not only a daughter, but his position as qadi. Throughout the events, he seemed blind to the problems with his family and his career just as Noah Feldman asserts that the ulama' seemed unaware of the danger Tanzimat reforms posed to their autonomy.<sup>169</sup> Like the loss of control the qadi

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<sup>158</sup> Thus, when the qadi tries to teach Khalid the Qur'an, Khalid gets tired and dizzy. *Id.* at 54.

<sup>159</sup> *Id.* at 81.

<sup>160</sup> *Id.* at 78-79.

<sup>161</sup> *Id.* at 50.

<sup>162</sup> *Id.* at 54.

<sup>163</sup> *Id.* at 95.

<sup>164</sup> *Id.* at 107-08.

<sup>165</sup> *Id.* at 126.

<sup>166</sup> *Id.* at 127.

<sup>167</sup> *Id.* at 143.

<sup>168</sup> *Id.* at 142.

<sup>169</sup> FELDMAN, *supra* note 44, at 65.

experiences in his personal life, Islamic law is losing its control. In the tension between Islamic law and the Ottoman state, the Ottoman state is soon to win out with the codification of even civil law in the Majalla.

In the very middle of the novel, the qadi has a dream that foreshadows this end. He dreams that he is floating above a crowd of people who are “[advancing] towards the slender figure of a woman who appeared from nowhere.”<sup>170</sup> The qadi reaches out to help her, but no one sees him or hears him. He is completely invisible to them, and then he begins to plummet out of the sky.<sup>171</sup> He wakes before he hits the ground, and he is left feeling melancholic because “reality is as grim as my dream. Grey is the colour of my entire life. Torpor and mediocrity reign supreme here and I cannot avoid them even in my dreams. After all, I need no one to unravel the meaning of my night vision; I live it every day.”<sup>172</sup> In his dream, he is completely impotent, and he will soon be impotent as a qadi as well. What prestige and power he still possesses is only mediocre and grey. This dream occurs exactly in the center of the novel in chapter five of ten, and this chapter is the longest in the book.<sup>173</sup> After this chapter, Abu Khalid’s life begins to unravel and he progressively loses the respect of his community. He becomes almost as invisible as in his dream. The next chapter brings the fortune teller’s terrible prediction, and the chapter after that is Aisha’s disappearance. At this point, the qadi even abandons his beloved Qur’an for a time. The fortune teller’s chapter has only one Qur’anic citation and the next chapter is the only one in the novel with no Qur’anic verses at all.<sup>174</sup> Abu Khalid eventually recommences his Qur’anic citations, but his life has changed drastically.

One of the primary ways his life changes by the end of the novel deals with the relationship between his career and his spiritual life. For most of the diary, Abu Khalid is incredibly concerned with judging justly and trusting in God. His concern for spiritual things is echoed in his lyrical descriptions and reflections on his surroundings. He describes the “dazzling” sunlight and open space of Beirut’s port<sup>175</sup> and the

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<sup>170</sup> SALEH, *supra* note 99, at 74.

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> *Id.* at 68-84.

<sup>174</sup> The Qur’anic verse from the fortune teller’s chapter comes in the first half and affirms the idea that God is the supreme protector. *Id.* at 87.

<sup>175</sup> *Id.* at 48.

“magnificent views” on a trip to Sayda in the south.<sup>176</sup> He has “a predilection for terraces” where one can “see the sun, ‘smell the air.’”<sup>177</sup> Abu Khalid notices and reflects on beauty, light, and air; he enjoys open space and the intangible beauty of changes in light. He later describes a time of day that is remarkably akin to his own precarious position in terms of family and career: “There are brief moments during the afternoon when the world seems to be at a standstill. Amplified shadows seize large areas from brightness and nature pauses, balancing between day and night.”<sup>178</sup> The qadi, too, is in a balancing act, attempting to care for his family as his daughter is involved in an illicit love affair and his son is failing his studies, and attempting to adjudicate justly while his autonomy is continuing to be stripped away. Even the qadi’s son’s name indicates his concern with nonmaterial things; Khalid means eternal or everlasting in Arabic.<sup>179</sup> In contrast, his best friend’s son’s name, Kasim, means one who makes a living.<sup>180</sup> Abu Kasim appropriately names his son after his chief interest, which is material welfare, while Abu Khalid names his son after his concern with eternal spiritual matters. This concern with justice, beauty, and light seemingly ends with the end of the qadi’s position. The narrator’s postscript indicates that the qadi stopped writing in his diary just before his forced resignation. The narrator’s explanation is that “...he devoted his time to business and no longer saw the relevance of scrutinizing his inner self or examining others’ behavior.”<sup>181</sup> The qadi turns his attention to material, economic affairs because his dreams of implementing justice according to and through Islamic jurisprudence are over. The Ottoman state has co-opted what little autonomy and creativity remained to him and the other ulama’. Instead of allowing the traditional flexibility and multiplicity of Islamic law to adjust to rapid modernization, the Empire turned it into a rigid legal code based on those of Europe.<sup>182</sup>

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<sup>176</sup> *Id.* at 61.

<sup>177</sup> *Id.* at 76.

<sup>178</sup> *Id.* at 82.

<sup>179</sup> WEHR, *supra* note 47, at 294.

<sup>180</sup> *Id.* at 969.

<sup>181</sup> SALEH, *supra* note 99, at 143.

<sup>182</sup> CLEVELAND, *supra* note 53, at 84.

## CONCLUSION

We return again to our earlier question: What, if anything, can we learn from a literary representation of the relationship between Islamic jurisprudence and political rule? What more do we learn from Nabil Saleh's novel about the Ottoman Tanzimat period? We see the political intrigues of the late Ottoman period and the increasing power of the Europeans in human terms. The local merchants in the novel cannot economically compete with the Europeans and are slowly forced out of business. The local merchants who remain successful such as the qadi's friend, Abu Kasim, must befriend the Europeans and become close to the local governor to run profitable businesses. We see a good man and an endearing character who desperately wants to do good and to rule justly. He is often unable to act on these good impulses because of his fading power and prestige in the community and the government. He repeatedly references Qur'anic verses about God's goodness and mercy and justice, but he is unable to live up to these ideals because of the limitations placed on his jurisprudence. We see the shift on a human level from concerns with spiritual, eternal matters to a concern with financial and economic transactions. Modern capitalism becomes the dominant mode of economics in the Ottoman Empire. We see the impotence of individuals in the face of these sweeping changes and rapid modernization. In short, we see the basic problems of modernity embodied in a specific historical time and place. Modernity is often characterized by the lack of a totality or the lack of a totalizing worldview, the isolation of the individual, and a narrative of progress and rationality.<sup>183</sup> If these are the dominant markers of modernity, then the Tanzimat enacted modernity. It took away the basic social cohesion in the form of the ulama' and isolated the individual as the qadi was isolated in the novel. The reforms were also premised on making the legal system more rational and codified. They may have organized or codified the legal code, but they also shifted the multivocal nature of Shari'a interpretation to the monologic voice of the dictator. Even Saleh's qadi, who was one of the many voices in Islamic jurisprudence, is silenced by the monologism of the Tanzimat. He writes until he realizes that his dream of justice according to the multivocal Shari'a has been killed, and there is no longer room for his voice. The U.S. media

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<sup>183</sup> These traits are mentioned by many scholars and writers. To cite just one example, Arjun Appadurai describes modernity as characterized by isolation, rupture and migration. ARJUN APPADURAI, MODERNITY AT LARGE: CULTURAL DIMENSIONS OF GLOBALIZATION 9, 29 (1996).

would do well to silence themselves a bit more and listen to the voices of history, literature, and the heteroglossia of Muslim voices around the world about the complex relationship between political power and Islamic law.