19

Islam and Constitutional Law

Insights for the Emerging Field of Buddhist Constitutional Law

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19.1 INTRODUCTION

In the hope of encouraging the enormously valuable project of developing a field of Buddhism and law that can interact symbiotically with the young field of Islam and constitutional law, this chapter will try briefly to do three things. First, it will ruminate upon the surprisingly long delay in commencing a study of the relationship between Islam and constitutional law, and upon the political and academic developments that eventually inspired the academic field to focus its energies productively onto studies in this area. Second, it will discuss some of the central findings produced by scholars over the past twenty-five years as they started, belatedly, to explore the complex relationships between Islam and constitutional law around the world. This part of the chapter will focus on the conclusions that have been drawn by scholars of the Sunni tradition. The study of Islam and constitutional law makes clear that when one is dealing with a global, internally plural tradition such as Islam or Buddhism, it is sometimes necessary to generalize first about particular sects or regional instantiations of a religious tradition, before one can draw broader conclusions. Scholars of Islam and constitutional law have largely, though not exclusively, focussed on the Sunni world and its "constitutional imaginary."[1] Third, this article will very cautiously draw upon the contributions in this volume to highlight some ways in which patterns found in the Sunni Muslim world seem to be absent in a number of Buddhist countries. The claims made in this section are cautious and the ambitions of the discussion modest. Hopefully, though,

[1] Martin Loughlin defines the constitutional imagination as "the manner in which constitutions can harness the power of narrative, symbol, ritual and myth to project an account of political existence in ways that shape – and re-shape – political reality. The phrase draws our attention to the capacity of constitutions to offer alternative perceptions of reality, revealing new ways of conceiving the boundaries of practical political action" (2015, 3).

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this discussion will highlight some possible areas for productive future research for scholars in the new field of Buddhism and constitutional law.

19.2 THE RISE OF THE STUDY OF "ISLAM AND CONSTITUTIONAL LAW"

In retrospect, it should have been obvious that the introduction of constitutions into the Muslim world would have profound effects upon the constitutional imagination of people around the world, Muslims and non-Muslims alike.

From a very early period, Islamic thinkers have been interested in questions of ethical governance and about how government should be structured, both to ensure that the ruler acts morally and that he creates a society in which morality is encouraged. Scholars of Islamic thought have long been interested in this subject. Furthermore, almost from the time that they were first introduced in the nineteenth century, constitutions in majority Muslim states have generally made at least some reference to Islam. Over time, the references to Islam have become more widespread and more elaborate. Furthermore, in countries where the constitution explicitly carved out a role for Islam or Islamic values, governments began to feel significant pressure to honor the constitutional obligation to respect Islam. As a result, national administrative legislation was adopted to organize (and control) the institutions that had historically interpreted Islam for the people. A number of scholars, particularly political scientists focusing on Islamic politics in post-colonial countries, have discussed these developments.

Hiding in plain sight within this literature were questions that begged to be answered. Why over the course of the twentieth and twenty-first centuries, were polities throughout the heterogeneous Muslim world demanding that constitutional systems carve out a role for Islam in shaping state practices and state law? What was the role of religious mentalities in the shaping of these demands? What were the effect of debates about constitutionalizing Islam on Muslims' understanding of their own religion? Were they causing Muslims fruitfully to revisit the works of Islamic religious and intellectual history? If so, should their findings cause the Western academy to rethink some of its accepted wisdom about Islamic intellectual and political history? Were these debates inspiring them to develop viable alternatives to classical liberal constitutionalism? If so, what was (or should be) the effect of this development of the constitutional imaginary *outside* the Muslim world?

The Islamic tradition, like many global religious traditions, presents itself differently in different parts of the world and, indeed, within a single majority Muslim country, different classes or communities may express their commitment to Islam in different ways.[2] After World War II, scholars focusing on the Islamic tradition

[2] Variations are so large that after World War II, some scholars of religious studies in the Euro-American academy suggested that it was misleading even to talk about a single religion of Islam

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started to emphasize the importance of describing the way that Muslims in a particular region experienced and understood their religion. Less attention was focussed on the task of identifying transregional patterns in Muslim religious discourse or practices.[3] During this same period, many sociologists of religion were under the thrall of a secularization thesis, a commitment that likely led them to discount the possible significance of religious language in political discourse or in new constitutional texts.

By the 1980s, however, global events were forcing policymakers and academics to admit and address the obvious. Islamist discourse was becoming an increasingly important factor in politics all over the Muslim world. This discourse often involved a common demand that national governments recognize (and honor) a constitutional obligation to respect supposedly "Islamic" traditions of government. In 1979 alone, the world watched as a military government in Pakistan continued to impose a program of Islamic constitutional reforms accompanied by massive legal reforms; Iran completed a dramatic Islamic revolution against a dictatorial ally of the US; Afghanistan was convulsed by an Islamically inflected war of resistance against a Soviet puppet regime; and oil-rich Saudi Arabia experienced a shocking armed takeover of the Grand Mosque in Mecca by Islamist radicals, who believed that the seemingly conservative monarchy was insufficiently respectful of Islamic traditions of moral governance. Within two years, the president of Egypt had been assassinated by Islamist radicals and in Sudan, a military junta decided to shore up its flagging popularity by embracing a radical program of Islamic constitutional and legal reform.

By the early 1990s, scholars studying different parts of the Muslim world through a variety of disciplinary lenses were beginning to think about how best to approach the phenomenon of Islamic political discourse in a world of nation-states and of Islamic language embedded into national constitutions. As they did so, these scholars began

(see e.g., Al-Azmeh 1993). Although few people adopted the strong form of this argument, it nonetheless had an impact on the way that Islam was studied. The study of "Islam" continued to accept at face value Muslims' shared description of themselves as partners engaged in a common project – the project of engaging with, interpreting, and obeying the divine message revealed in a shared set of scriptures.

[3] The post-war academy began increasingly to react against a long "orientalist" tradition of Islamic studies in the West, one that had very justly been accused of developing simplistic generalizations about Islam, generalizations that had shaped in unfortunate ways Western attitudes towards Muslims as well as colonial (and post-colonial) policies toward Muslim populations. After World War II, academics began consciously and systematically to challenge old generalizations about Islam and began specifically to focus on highlighting the rich diversity of different ways in which a commitment to "Islam" could be manifested in different countries or communities. Helping to push this trend were structural shifts. Many scholars who focused on Islam were placed into newly formed "area studies" departments, so that scholars working on Islam in South Asia had far more contact with scholars of Hinduism in South Asia than with scholars of Islam in the Middle East. And even scholars located in traditional methodological departments tended more than in the past to focus on exploring the nuances of Islamic belief, practice, and institutions as they developed in a particular region, rather than trying to look for broader patterns in Islamic beliefs and practices.

to identify some new questions. Among them: When and where did the impulse to constitutionalize Islam first emerge? Did it really grow organically (as some modern Islamist thinkers asserted) out of a premodern tradition of political thought that had incubated a latent commitment to constitutionalism even before the age of written constitutions? Why was the wording of the constitutional provisions that referenced Islam so idiosyncratic? How did a decision to integrate Islam into a constitutional text (or into the interpretation of a formally secular constitution) actually affect the people who lived under that constitution? This last issue involved two distinct but symbiotic questions. First, did the decision to bring Islam into constitutional discourse change the way that Muslims understood and engaged with their religion? Second, did the decision to bring Islam into the constitutional order change the practices of the state and/or the experiences of its subjects?

To answer all these questions scholars had to draw upon a multitude of disciplines that had not hitherto existed in regular dialogue. Historians of classical Islam had to revisit the accepted wisdom in their field about both Islamic thought and state practices, while historians, anthropologists, sociologists, and political scientists with expertise in one or more parts of the Muslim world had to explore the evolution of modern ideas about constitutions and constitutionalism. Building on these micro-studies of constitutional (or proto-constitutional) thought and of religious developments, scholars could attempt to draw broader conclusions about the way in which ideas and practices traveled and evolved across space and time, and about the nature of the impact in the Muslim world both of Islam on constitutional law and, conversely, of constitutional law upon Islam.

As scholars have begun to answer some of these questions, the promise of a greater prize has appeared. Some scholars began tentatively to draw hypotheses about the broader lessons that evolving studies of Islam and constitutional law might teach the world about the role religion can and often does play in the modern world and, more specifically, about the roles that religion can play in the constitutional orderings of modern states (Brown 2002, Hirschl 2010). For some of the more ambitious hypotheses to be tested, scholars needed access to studies that could help establish whether patterns in the Muslim world were analogous to patterns in other parts of the world, especially parts in which a person's identity was understood in terms of a religion other than Islam. For example, were majority Buddhist countries constitutionalizing Buddhism? If so, was the process being driven by factors similar to those driving constitutional Islamization? Was the process proceeding in a fashion similar to that unfolding in the Muslim world? Was the constitutionalization of Buddhism enshrined in constitutional provision similar to that being drafted in the Muslim world? And finally, was the constitutionalization of Buddhism affecting governance in the Buddhist world in a manner similar to the way it was affecting governance in the Muslim world?

The present volume provides hope that some of the answers to these questions may start to be answered in the coming years. Contributions to this volume

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demonstrate that Buddhism, like Islam, has clearly engaged from a very early period with questions about how rulers should act and about how political actors should interact with religious actors to ensure that ethical behavior is encouraged in society. Buddhism does show up, albeit sometimes obliquely, in modern constitutional texts and/or commentaries. And Buddhist actors are active politically, sometimes in ways that affect constitutional politics directly and sometimes in ways that significantly affect the political dynamic and political expectations and thus, albeit indirectly, shape the constitutional order of the state.

The study of Buddhism and constitutional law seems to be at an even earlier stage in its development than is the now quite robust study of Islam and constitutional law. Possessing only the most cursory knowledge about the history of Buddhist studies in the modern world, I cannot say whether the delay grows out of the institutional structures and academic trends that postponed the arrival of a robust community focussed on studying Islam and constitutional law. Looking at the wealth of material produced in this volume, one can only be grateful that scholars in the field of Buddhist studies have, like scholars of Islamic studies, identified the study of religion and constitutional law as a fruitful area for research. Already in this pathbreaking volume, the editors and contributors have demonstrated that they have a great deal to work with. For anyone who is interested in generating robust comparative work on the phenomenon of "religion and constitutions," "constitutionalization of religion," or something that might be described as the "religification of constitutions," the contributions to this volume, taken together are eye-opening and provocative. One can only hope that scholars of Buddhism and constitutional law will be interested in actively engaging with scholars focusing on the study of Islam and constitutional law and vice versa.

19.3 THE STATE OF "ISLAM AND CONSTITUTIONAL LAW" STUDIES

As the intellectual project of "Buddhism and constitutional law" begins, the participants in that project might productively bear in mind some of the insights that scholars of "Islam and constitutional law" have to date developed as they have sought to describe the evolving constitutional imaginary for the vast number of Sunni Muslims who today want their state simultaneously (i) to satisfy the obligations of an "Islamic state" and (ii) at the same time to operate as a modern state under a modern constitution.

Over roughly the past twenty-five years, scholars interested in the broader connection between Islam and constitutional law have produced and slowly begun to synthesize a wide variety of findings from a myriad of different academic fields including, among others, religious studies, political history, social history, contemporary Islamic politics, anthropology, sociology, and area studies. As a result of this work, scholars have begun to develop a new understanding of Sunni Islamic

intellectual and political history – one that tries to explain patterns in Islamic thought and behavior, that scholars of Islam until recently tended to see as counter-intuitive and problematic.

19.3.1 *The Rise of Classical Sunni Institutions and Theories of Islamic Law*

Islam is a global religion growing out of the experiences of a man, Muhammad, who lived in Western Arabia in the late sixth century and early seventh centuries CE. His revelations lay the basis for the *shari`a* (literally the "path"), God's moral code that was simultaneously the path to individual salvation for an individual Muslim and the path to material welfare for a Muslim community. When the Prophet died without a designated successor, the young Muslim community lost both its moral guide and its political leader. Henceforth the community's access to God would come through texts, which provide a record of the signs given to the community in the special prophetic moment both in direct revelation and in the exemplary practices of its messenger. Since the secrets were recorded in scriptural texts, the community needed to identify people who could help them understand these texts, and it also needed to identify the people who could be trusted effectively to govern the expanding Islamic empire and its growing Muslim populations, protect its borders, and establish an order which allowed people to enjoy the material benefits that God had revealed to be "goals of the *shari`a*."

Muslims after the death of the prophet faced two questions: Who should engage with scripture to find information about God's moral command? Who should be trusted to develop and impose rules that realize the social benefits that God commands Muslim societies to enjoy? While some suggested that the roles of moral guide and political leader should be held by the same person, the group that would become the "Sunni" community ultimately concluded that the two roles could be divided and that, in many circumstances, dividing these roles was not only manageable but inevitable. The thinkers who developed Sunni Islam decided to begin with the first question. They believed that if they first identified people who could be trusted to uncover in the scriptures reliable information about God's moral expectations for individuals and for the community, those figures could then explain how the community should select the proper leaders.

Some Muslims, including the group that would evolve into the Shiite sect of Islam, suggested that people were not all born with the same capacity to understand scripture. According to them, God had granted to certain men known as "Imam" special abilities and insights. At any one point in time, there would be one Shiite Imam, and the community should defer to his interpretations of God's law. Upon his death, the Imam's unique insight and authority would transfer to a designated successor.

The community that would become the Sunni sect took a more democratic view of human capacities in the area of moral reasoning. According to the formative

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Sunni thinkers, it was impossible to identify one person who was destined always to interpret scripture correctly; all humans were born with the ability to do this. While most Muslims would remain untrained, a self-selected group of Muslims could and should take on the responsibility for providing moral guidance. After enormous training and effort, a person gained the right to try and demonstrate their command of scriptures and logic and to try and shape the views of other scholars – and, thus, of all the followers that those scholars had amassed among the untrained.

An aspiring scholar of God's law must not only demonstrate mastery of texts and language but must bear in mind God's assurance that his laws always promoted human welfare. This was tricky because, in some cases, it could be hard to understand how accepting and following one interpretation of God's command (as opposed to another) might promote the goals of the *shari`a*. The successful moral reasoner would have to develop a compelling interpretation of God's command from texts. Some texts could be accepted at face value. Ambiguous text needed to be interpreted in a sophisticated manner, drawing on tools adapted from Greek logic, where analogical reasoning was influenced in subtle (and often tentative) ways by utilitarian calculations in which "the good" was defined as communal enjoyment of the *shari`a*'s goals.

Recognizing the need to develop a robust system of education in which particularly talented scholars could develop and distinguish themselves, Muslim communities began to encourage and support scholarly guilds. Those guilds devoted themselves to the task of training people to elaborate law from scripture and reason and to credential people whose opinions should be considered probative (if not dispositive) on questions of God's law. These guilds were not created and regulated by rulers. Rather, they emerged organically within communities committed to the goal of living according to God's law. The power of a guild depended upon its ability to attract students and to produce scholars whose interpretations of God's law were judged compelling.

Over the course of several centuries, the Sunni community came to prefer certain guilds of religious law over others. The four which ultimately survived, the Hanafi, Maliki, Shafi`i, and Hanbali are often described as the "four Sunni schools of law." For roughly 1,000 years (very roughly from 900 until 1900) these four Sunni juristic guilds, or "schools of law," functioned as self-governing institutions that controlled the teaching of Islamic law and the credentialing of scholars. Their opinion could be sought by anyone, ruler or subject, who needed an informed opinion about how God wanted people to behave. Aspiring scholars underwent training from a senior jurist recognized as a master of one among the Sunni schools of law. Upon receiving their own credentials as a master jurist of the guild/school's doctrines, they were deemed to be member of the Sunni *fuqaha'*, the profession of Islamic jurists who were understood almost uniformly to be the only trustworthy sources for reasonable opinions on the *shari`a*.

To understand the evolution of Islamic political thought, it is important to note that four guilds taught slightly different variations on the classical approach to legal

interpretation and taught different versions of God's law. Each guild could trace its origin back to a founding scholar. Each founder employed moderately different tools of interpretation and left a record of answers to questions about the morality of particular types of behavior. Members of a guild assumed axiomatically that the answers provided by the founder were correct, at least at the precise time and under the specific circumstances in which the question was posed to him. To be recognized as a member of the *fuqaha'*, a Sunni Muslim would have to study with a master jurist from one of the guilds/schools and would have to demonstrate command of the guild's preferred methodology and precedents. The successful student would receive a certification from the master stating that he was now a *faqih*, able to and, indeed, with a moral duty to provide informed opinions (*fatwas*) to anyone who had questions about God's law. Those opinions could be trusted reasonably to approximate the answer that the founder of the guild would most likely have provided were that founder alive today. As he issued these opinions, the master jurist was supposed to familiarize himself as far as possible with the opinions that his contemporaries in the guild were issuing on similar topics. To be a "Hanafi" jurist then was by definition, (i) to be formally recognized by one or more masters of the Hanafi guild, (ii) to commit to answering questions about God's law as one reasonably believed the school's founder, Abu Hanifa, would have done, and (iii) to continue to engage in dialogue with other Hanafi scholars and to allow one's understanding of the law, over time, to evolve in line with the views of thinkers that one found compelling.

The credentialed jurists trained within the Sunni schools of law represented within premodern Islamic society a distinct professional class of religious experts who were independent of the political authorities, although, as will be discussed shortly, they were constantly in dialogue with political authorities. In short, they represented a religious "establishment" distinct from the political establishment. While it is tempting to analogize them to members of the Buddhist sangha (or to members of the Catholic priesthood), one should recognize some ways in which the credentialed jurists of the guilds, the *fuqaha'*, as professionals, differ from the members of religious orders who constituted a special class of human within society.

First: the members of the Sunni schools of law, masters and apprentices alike, considered themselves to be members of society similar in crucial ways to all other members and generally subject to the same moral commands. Interpreting God's law was seen as a job among other jobs in society. God expected certain things from credentialed scholars that he did not expect from others, and God had also established rules that required scholars to follow certain procedures when they issued Islamic legal opinions. Outside of their professional duties, however, a credentialed scholar understood themselves to be a person like other people. Food that God had made permissible for a layman was also permissible for a credentialed scholar. Words that would form a contract for a layman would also form a contract that bound a scholar. Scholars could own property to the same extent that other

members of Muslim society could, and like all adult Muslims, they were permitted (indeed encouraged) to marry according to the same rules as non-jurists. When they did, they understood that their obligations to their spouse were no different than the obligations of a married layperson.

Second, when they acted in their particular area of expertise – issuing opinions about God's law – the credentialed jurists refused to establish a formal hierarchy of interpretive authority. While the community of scholars could identify some rules upon which they agreed and about which the Muslim community could know with certainty to be rules of *shari`a*, the community also recognized those areas of jurisprudence in which they had come to equally reasonable but fundamentally different understandings of God's law. Given the guilds' disagreements on questions of proper interpretive methodology and their decision to look to a competing body of precedents, the different guilds/schools of law inevitably taught slightly different versions of God's law. Each of these versions was described as a body of *fiqh*: literally, a well-reasoned "understanding" of God's law. Furthermore, the scholars within a single guild might disagree on questions of first impression, meaning that on some issues there would be different versions of *fiqh* within a single guild. Rather than try to establish a hierarchy of scholars who were empowered to make arbitrary and potentially incorrect judgements about which of the guild's interpretations was best, the guilds concluded that it was morally better just to "agree to disagree." Outside of the small number of rules that the guilds jointly recognized as those that were indubitably rules of *shari`a*, they acknowledged that it was impossible to say which of the competing interpretations of God's law was correct and all things being equal, humans had the right to choose for themselves which of the competing interpretations they wanted to follow. This was a concession that would come to impact in important ways classical Sunni political philosophy and the practice of premodern Islamic states. This would in turn shape profoundly the ways in which modern Muslims engaged with the idea (and realities) of constitutions.

19.3.1.1 Classical Sunni Discussions about Whether (and How) to Develop a Body of Predictable and Uniform State "Law"

Classical Sunni Islamic political thought developed in this very particular conceptual and institutional context. It was assumed that (i) God had laid down a code which dictated how every human was to act, and thus dictated how a ruler was to act when he laid down rules to govern his society; (ii) following this code would result not only in the salvation of individuals but also in the production of material benefits for the community (the so-called "goals of the law"), of which the most important were the protection within the society of religion, life, children, reason, and wealth; (iii) the secrets to the moral code were embedded in scripture (and to some extent in nature), and although all humans were given equal access at birth to scriptural secrets, their meaning could be properly discovered only by people who were

trained both in the arts of scriptural analysis and of logical reasoning; (iv) those who are trained to seek and acquire skills in the art of scriptural moral interpretation remain, in almost all respects, members of society like any other and subject to the same moral rules as anyone else; (v) among the many people who are recognized (and credentialed) as experts in the arts of Islamic moral interpretation, none can claim unquestioned superiority over another, thus Sunni society must accept that there are moral questions for which there is no indisputably correct answer. It follows that, although the answers to some moral questions are obvious to any trained scholarly mind (and are known with certainty to be part of God's *shari`a*), there will always be questions on which trained minds will disagree and about which the community will be given a range of answers, any of which might turn out to be correct. With respect to these rules-about-which-we-can-only speculate, no one can say with certainty which of the competing interpretations is definitively the best. Indeed, no one can preclude the possibility that the correct rule of *shari`a* will turn out to be "none of the above," a rule that is yet to be proposed.

God's *shari`a* surely required that a ruler establish and impose a uniform body of social laws that was consistent with what the scholars had discovered about God's law and would also demonstrably promote communal welfare. Notwithstanding the default rule that allowed Muslims generally to select for themselves which guild's version of *fiqh* to follow, that freedom disappeared when the ruler had established within the areas of behavior that could not be regulated with absolute moral certainty, stable rule of law not inconsistent with what scholars had discovered about the *shari`a*'s rules and goals. At that point (though only at that point) every Muslim was required by God to abandon her preferred interpretation of God's *shari`a* and act as if the ruler's positive law accurately reflected God's will. Paradoxically, God would at that point reward in heaven the person who followed a ruler's ultimately incorrect laws to the exclusion of their own ultimately correct understanding of what God wanted to do. And God would punish in hell the person who did not. So much was known with certainty. But agreement on those basic principles raises its own questions.

The *fuqaha'*, the scholars credentialed by one of the four Sunni schools of law, struggled to understand who had the right to serve as the ruler who established order, what methods that figure should use when selecting rules to impose, and, of course, what the substance of that law should be. Although members of the *fuqaha'* touched upon such questions in a variety of different scholarly genres, many seem to have directed their energies towards developing theories that defined the legitimately "Islamic" body of state law as a body of law created by a special type of ruler.

19.3.1.2 Classical Caliphal Theories

For a time, leading Sunni thinkers such as al-Mawardi, a famous jurist of the Shafi`i school of law, proposed that Sunni societies should ideally be ruled by a person who

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combined, among many other extraordinary characteristics: credentials as a master scholar within one of the four Sunni schools of law, expertise in matters of governance, and the military power to impose his command. Once a person with such qualities was recognized as "Caliph" by the leading religious and military notables, he was allowed (indeed required) to draw upon his scholarly training as a *faqih* to fill in the gaps where the scholars had not identified with certainty all the rules necessary to regulate life efficiently and to ensure communal thriving. When he did so, Muslims were divinely commanded to set aside their respect for scholars who had urged humans to act in a way other than that favored by the Caliph, and to obey the Caliph's laws. According to this theory the legitimacy of state law depends upon the quality of the ruler who produces it.

19.3.1.3 *The Emergence of the Classical Doctrine of* Siyasa Shari`iyya

By the thirteenth century, many Sunni scholars had concluded that it was unrealistic to expect any proper Caliph to appear. As a result, some including Ibn Taymiyya, a famous jurist of the Hanbali school, proposed a new theory about the type of ruler that God permits. This theory, sometimes called the theory of *siyasa shar`iyya* (literally "governance" that is consistent with the *shari`a*), is far more radical in its implications than might at first be obvious.

The theory asserts that a ruler's right to impose his laws, and his subjects' duties to obey them (at the risk of divine punishment), do not depend upon the ruler's personal qualities. Under some circumstances, a ruler can be untrained in Islamic law and even personally impious and yet can produce, in the areas where God's law is not known with certainty, a set of legitimate positive laws, laws that God expects all the ruler's subjects to obey. The one quality a figure must always have if he is to be recognized as one-qualified-to-create-legitimate-positive-law-for-an-Islamic-state is simply the ability to project hard power and compel people to act in accordance with his preferred rules.

When such a person establishes himself, then irrespective of his personal qualities and irrespective of whether he has been "appointed" through the process of investiture that marked the rise of a Caliph, this "possessor of power" (*wali al-`amr)* is authorized to enact uniform rules. Each of these rules will be legitimate – meaning that God will punish people who fail to act in accord with them – so long as that rule satisfies two conditions. First, the rule must not require any Muslims to act in a way that violates a rule of *fiqh* that is known with certainty. Second, the ruler must be able to make a plausible argument that his rule will promote the social benefits that God wants his believers to enjoy. So long as a ruler's *siyasa* (the rules that he enforces in society) meet the conditions necessary to be recognized as *siyasa shar`iyya*, his laws are legitimate and deserve to be obeyed even in cases where they conflict with a subject's preferred interpretation of *fiqh*.

The doctrine of *siyasa shar`iyya* thus inverts the logic of Caliphal theories. Caliphal theories assume that the legitimacy of a ruler's law depends upon the quality of a ruler and, in particular of his possessing certain qualities. By contrast, the doctrine of *siyasa shar`iyya* assumes that the legitimacy of a ruler depends upon the quality of his positive laws. For the purpose of comparing Sunni and Buddhist intuitions about governance, it is important to note that according to the jurists who embraced the doctrine of *siyasa shar`iyya* (a group that came over time to include the vast majority of jurists), a legitimate positive state law binds all of a ruler's subjects. So long as a ruler's orders satisfy the twin requirements, credentialed jurists and lay-people alike, *fuqaha'* and non-*fuqaha'*, are required to obey them. Unless the ruler voluntarily chooses, by edict, to treat the *fuqaha'* differently, a member of the *fuqaha'* is obliged to obey the same contracts, pay the same taxes, and litigate in the same courts as lay-people.

19.3.1.4 *The Incorporation of* Siyasa Shar`iyya *into the State Practice in Premodern and Early Modern Empires*

In the wake of the Mongol invasions of the thirteenth century CE, the theory of *siyasa shar`iyya* came to be embraced by jurists and rulers alike in a number of empires around the world. Among the largest, longest-lived and most influential empires to establish its legitimacy in terms of this theory was the Ottoman Empire. The Ottoman sultan established a cabinet with a central role for a leading member of the *fuqaha'*, invariably a master jurist trained in the Hanafi guild. The bureaucracy of this appointed jurist, the *Shaykh al-Islam*, was tasked with the duty to review every statutory pronouncement and to confirm that it did not violate clear scriptural commands. The *Shaykh al-Islam* also stood as head of a judiciary staffed entirely by guild-trained jurists, which was instructed to approach cases that could not be resolved by statute by reference to the rules of *fiqh* (scholarly interpretations of God's moral law). The legitimacy of the Ottoman Empire came very much to be understood in terms of its adherence to the theory of *siyasa shar`iyya*, a theory whose own authority expanded as the empire that had adopted it thrived, and this success seemed to confirm God's promise that obedience to his command would allow a community to enjoy the goals of the law.[4]

[4] Although in the nineteenth century the Ottoman sultan began to assert that he should be recognized as a "Caliph," he did not claim to have the qualities of a Caliph in the classical Mawardian sense. Rather, he claimed to be a person whose rule was legitimate unlike, he said, the rule of Western colonialists and of their puppets. His rule alone was morally binding according to the doctrine of *siyasa shar`iyya*. By applying a body of rules that were either (i) statutes approved by scholars as being consistent with juristic *fiqh*, or (ii) judge-made rules grown of the *fiqh* tradition, the Ottomans could legitimately claim to be governing according to the doctrine of *siyasa shar`iyya*.

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19.3.2 *Initial Muslim Engagements with Written Constitutions*

The tradition of *siyasa shar`iyya* and the Ottoman instantiation of that tradition gave many Muslims a conceptual lens through which they viewed the modern innovation of a written constitution. The Sunni tradition as mediated through the Ottomans proved to be a vernacular that could easily translate the normative claims of liberal constitutionalism and see them as cognates of at least some ideas and institutions already present in the Islamic tradition.

As scholars like Nathan Brown have described, during the nineteenth century, many states in the Muslim world, both colonial and independent states trying to strengthen themselves to fend off would-be colonizers, began to borrow tools of Western governmental organization to expand the power of the state at the expense of its citizens and of civil society (Brown 1997; 2002). Ironically, as Brown points out, the first written constitutions in the Muslim world, including the Ottoman Constitution of 1876, were part of this state-empowering process. They were promulgated by unaccountable rulers in order to establish the procedures by which rulers would henceforth come to power and make decisions. Naturally, they did not include many provisions which explicitly defined substantive limits on the government's discretion with respect to lawmaking or policy.

What Brown calls "non-constitutionalist" constitutions were increasingly challenged, however, by constitutionalist movements in Muslim societies, which demanded reforms that would rewrite constitutions to include substantive constraints on the government's legislative discretion, and in some cases also include institutions which could enforce those constraints. Increasingly these were characterized, sometimes explicitly and sometimes implicitly, as calls to integrate into constitutions provisions which required the state to respect the traditional logic of *siyasa shar`iyya*.

It is easy to see in the doctrine of *siyasa shar`iyya* some areas of overlap with modern European theories of liberal constitutionalism. Rereading scriptures and classical texts in light of modern constitutionalist theories, an influential group of Islamic intellectuals – many but not all of whom were based in the Ottoman Empire – argued that there was built into Islam a sophisticated theory of constrained government in the service of the public good that, when implemented properly, was superior to the liberal constitutionalism that Europeans had developed far later using their reason alone. Accepting that liberal constitutionalism reflected a meaningful, if imperfect way of guaranteeing constrained government, Islamic constitutionalists saw constitutions as useful tools to help reinvigorate traditional Muslim commitments to the ideal of an Islamically constrained state. Islamic constitutionalists were thus eager participants in constitutional politics in the late nineteenth and twentieth-century Middle East, and backed many of the demands of liberal constitutionalists, such as rights guarantees and demands for judicial review. They

demanded, however, the addition of further provisions which would require the state to respect the core principles of Islamic law.

The earliest successful call for Islamic constitutionalism of this type appeared in majority Shiite Persia (soon to be renamed "Iran"). Persia/Iran was a neighbor of the Ottoman Empire, with its population close observers of its powerful Sunni neighbor. Over the course of 1906 and 1907, a diverse group of liberal and Islamic constitutionalists in Iran forced the king of Iran to enact constitutional documents that required the state both to respect some fundamental liberal rights and also to forswear the adoption of any law that was inconsistent with principles announced in Islamic scriptures. This Iranian Constitution, as amended in 1907, also established what was for all practical purposes a constitutional council staffed by credentialed Shiite clerics. It was empowered to exercise preenforcement review of legislation and had the power to void any draft law that its members deemed to be inconsistent with Islam. Notwithstanding their success in having this constitution enacted, the Iranian king later reasserted his power and thereafter he and his successors ignored entirely their constitutional commitments. But the Iranian revolution of 1979 ushered in a new constitution which reiterated the requirement that Iran enact only legislation that conformed to Islamic law as understood by credentialed clerics.

In Istanbul and the Anatolian heartland of the Ottoman Empire, incipient Sunni Islamic constitutionalism associated with the Young Ottoman movement was supplanted during the early decades of the twentieth century by the militantly secularist and non-constitutionalist Young Turk movement, leading to the dissolution of the Ottoman Empire and the formation of modern Turkey and a multitude of other nation-states. Yet Sunni Islamic constitutionalism thrived in the Arab-speaking states that had formerly been part of the Ottoman Empire as well as in parts of the British Empire, where Pakistan was about to emerge as a new state that would be a homeland for the Muslims of the subcontinent.

Harnessing the tools of mass communication and mass political organization and finding around the world a community of Sunni Muslims whose scriptural studies had equipped them to read in Arabic, a number of Sunni thinkers were able to transmit these ideas and this particular framing of constitutionalism to a global audience. Among the influential Arab thinkers were activists like Rashid Rida, the founder of a publication with a global audience, and the founders and early leaders of the Egyptian Muslim Brotherhood, a group that inspired like-minded organizations around the Muslim world. Their ideas of such thinkers and groups were reframed by local thinkers, some of whom expanded upon the idea of Islamic constitutionalism in ways that, themselves, were transmitted globally. A notable example of such a thinker was Maulana Maududi, an Islamist thinker in India – and later Pakistan – whose ideas on Islamic law and Islamic constitutionalism were transmitted back to the Middle East, where they influenced the ongoing evolution of the ideology of the Muslim Brothers.

The development of a transnational ideology of Islamic constitutionalism helped to shape the way in which Sunni Muslims around the world engaged with the phenomenon of written constitutions and the constitutional demands of liberal colonial legal elites, many of whom had been trained abroad and were using their influence to push for the adoption of liberal constitutionalism. In the hands of thinkers like Rida, al-Banna, Qutb, Maududi, and many others, a Sunni Islamic constitutionalism reframed classical Sunni Islamic texts, including those that were connected with the doctrine of *siyasa shar`iyya*, as texts which (if properly understood) embraced constitutionalist ideas long before European liberals had reasoned out their own arguments in favor of constrained governance. They saw European constitutionalism as an area in which the ideal end-state embraced values that overlapped in some but not all ways with Islamic values, and more importantly as a source of ideas about institutional design that would permit those with moral insight to constrain executive power.

Today it seems plausible to define an "Islamic constitution" as a constitution that contains a provision prohibiting the state from enacting legislation that is inconsistent with Islamic values (a provision almost invariably read to require the state to govern only by *siyasa shar`iyya* which is consistent both with all clear scriptural rules and with the quasi-utilitarian requirement that government rule to advance the spiritual and material welfare of the people).[5]

19.3.2.1 Pressures of Modernity

As noted earlier, during the classical period when it came to the question of who could be trusted to interpret the *shari`a*, the *fuqaha'* established for themselves a monopoly on interpretive authority. Their initial claim was, however, a humble one. Interpretive authority, they claimed, belonged to those who could develop the most compelling interpretation of God's law. Jurists associated with the four Sunni schools of law had developed the most compelling method of interpreting God's law, as proved by its ability to attract the leading intellects of the day and to inspire compliance on the part of rulers and masses alike, and by its ability to generate a society that thrived as God had promised its law, properly understood and obeyed, would do.

The colonial era represented for many Muslims a humiliation which suggested that if classical Islamic legal theory as applied by the *fuqaha'* had once been a trustworthy source of information about God's law and about how to integrate God's law into the governance of a state, that situation no longer held true. Either the

[5] Some constitutions that contain these two types of provision contain other provisions as well. Depending upon the nature of the additional provisions, one could probably identify a number of different types of "Islamic constitution." Nonetheless, the presence of the two core provisions is the only near constant in the constitutions of states that seek to define themselves as Islamic states.

methodology was appropriate only for an earlier period and was now obsolete or, alternatively, the *fuqaha'* misunderstood and were misapplying the method that their forebears had used. Sharing these intuitions, many of the twentieth-century champions of Sunni Islamic constitutionalism accepted these institutions. It was instrumental in another development as an extraordinary attack on the authority of the *fuqaha'* and an insistence that Muslims who were not trained within the four Sunni schools of law should be able to opine on an equal footing with classically trained jurists. This was the second development that would shape the ongoing evolution of Sunni Islamic constitutionalism in subtle but significant ways and would create new possibilities for thinkers who wanted to harmonize the new Islamic constitutionalism with liberal constitutionalism.

For a myriad of reasons, many of the early theorists and champions of Islamic constitutionalism came to question the value of the highly complex, often formalistic methods of Islamic legal interpretation that were associated with the four Sunni guilds/schools of law. These Sunni "modernists" argued that people without credentials as *fuqaha'* could and should reengage with scriptures using the new quasi-utilitarian methods of reasoning. As they did so, modern thinkers should not defer excessively, if at all, to the conclusions that had been reached in the past by scholars associated with the classical Sunni schools of law. Going back to the scriptures and applying their new methods of interpretation, modernist champions of Sunni Islamic constitutionalism, including Maududi in Pakistan and the Muslim Brothers in Egypt, argued that if a modern Sunni state was to be effectively constrained by Islamic values, it could not rely upon institutions that measured compliance according to the views of classically trained jurists steeped in the methodologies and worldviews of the four Sunni schools of law.

Anti-clerical movements fleetingly appeared in Shiite Persia, but they had little success, relative to those in the Sunni world.[6] While some in the Sunni Middle East, Pakistan, Southeast Asia, and Africa continued to defer to classically trained scholars, many did not. The growing number of dissenters accepted the "modernist" position that if Islam created constraints on governmental power and should be a source of guidance for humans when they acted in private areas not governed by law, then Islam had to be interpreted not by classically trained jurists, but rather by people who were pious, fluent in Arabic, trained in modern sciences, including modern social sciences, and usually committed to less formalistic, more utilitarian modes of interpreting God's law.

The rise of "lay" Islamic legal interpretation created new spaces for discussion about the possible overlaps between Islamic constitutionalism (seen as a modern

[6] Where Sunni jurists were divided among four guilds, Shiite jurists all belonged to one Shiite guild. The jurists centralized the procedures by which they trained jurists and by which they recognized hierarchies of authority among the credentialed jurists. The reorganized, newly centralized body of Shiite ulama were able to maintain their prestige within Persia (soon to be renamed Iran).

corollary of the doctrine of *siyasa shar`iyya*) and liberal constitutionalism. Modern Sunni ideas of constitutionalism, as a reframing of the classical doctrine of *siyasa shar`iyya* declares un-Islamic (and thus constitutionally invalid) state laws that either unambiguously violate clear scriptural commands or impede the public welfare. Classical jurists had historically defined "the good" as the enjoyment of five core values (religion, life, children, reason, and wealth) and they were very deferential to the ruler's judgement as to whether a law was likely to advance one or more of those benefits. Modernist lay intellectuals, by contrast, tended to consider a far larger number of possible benefits and harms, and they tended to be less deferential to a government official's conclusions about a law's impact. Depending on how a utilitarian lay Islamic modernist defined "the good," she might, in theory, conclude that a law was invalid because it violates internationally recognized human rights or principles of equitable social distribution. Conversely, if she were a social reactionary, she might strike down a law as violating the public good simply because it indirectly led to the subversion of traditional gender roles.

The assault in the Sunni world on the authority of a single self-regulating profession of scholars forced Muslims to think in a new way about what sort of institution could be trusted to mediate between the growing number of competing interpretations of Islam and establish one interpretation that would be binding on the state (Lombardi 2013). As Sunni political theorists and activists tried to answer these questions, new possibilities opened up, in theory, for the possible fusion of the proto-constitutionalism inherent in the doctrine of *siyasa shar`iyya*, on the one hand, and on the other, the democratic versions of liberal constitutionalists.

Andrew March has recently described the process by which a number of influential modernist Sunni Islamist thinkers moved in the direction of democratic popular constitutionalism (2019). In a world where every Muslim must be trusted to engage with scripture and to bring her own insights to bear upon questions of interpretation and in which on most questions no individual could ever be trusted with inevitable certainty to have superior insight to another, then one must trust "the wisdom of the [Islamically committed] crowd." According to this line of thought, in a modern era where every Muslim could be expected to be literate, the demos did not need to defer to a special scholarly class. Potentially each member of the demos could come to his or her own understanding of what moral rules a ruler must respect and could, through democratic institutions, identify and develop an official understanding on the point. It would then enforce the constitutional boundaries of moral governance through popular constitutionalism (March 2019). Since at least some members of the demos are likely to be reactionaries and other liberals, democratically defined versions of Islam will involve compromises between the two.

Alternatively, other modern Islamic intellectuals suggested that a modern, educated demos should not be asked to interpret God's law or to identify the boundaries it placed on rulers. The demos could, however, be trusted to set up systems that would appoint people to carry out this task on their behalf. In other words, they

argued that a constitution should provide some process by which judges would be appointed to perform a special type of judicial review: Islamic review. These judges should then be trusted to police the moral boundaries of the *shari`a* alongside other further constitutionally specified boundaries, such as liberal boundaries or socialist boundaries (Lombardi 2013). In this alternative mode of Sunni Islamic constitutionalism, constitutional benches (which might be staffed, in part or in whole by lawyers without classical training) would have the power to determine whether a state law was consistent with the core principles of Islamic law, by satisfying the twin obligations of (i) being consistent with clear scriptural commands, and (ii) plausibly advancing the public welfare.

Islamic review has, in fact, been adopted in many countries with Islamic constitutions. Depending on the process by which judges were appointed to the court, the training, and the character of the judges, a court could sometimes serve as a mediator between traditional understandings of Islamic law and the demands of modern liberalism. Among the judges who have exercised Islamic review in constitutional courts in the Muslim world some have been judges with degrees from secular law schools and of these some have apparently, a commitment to the modern, liberal rule of law. In some countries that have institutionalized the practice of Islamic review, including Egypt and Pakistan, constitutional courts have issued decisions that see Islam not merely as tolerating a liberal state but as affirmatively requiring the state to respect liberal values. Sometimes judges have tried to accomplish this through creative reading of Islamic scriptures.[7] In other cases, they have argued that in modern times, the traditional requirement that a ruler never enact a law that fails to serve the public good must be understood to preclude a court from upholding a law that manifestly violates internationally recognized human rights (Lombardi & Brown 2006).[8]

19.3.3 *A Note Regarding the Recent Evolution of Authoritarian Islamic Constitutionalism in Shiite Iran*

The doctrines of Sunni Islam, historical patterns of governance (which has shaped popular expectations regarding government behavior), and the increasingly fragmented nature of Sunni religious authority have combined to facilitate not only the embrace of constitutions, but more specifically the embrace of constitutions as a tool to promote "constitutionalism." It also has, in at least some places, created opportunities for thinkers to argue, sometimes controversially, that the substantive demands of Sunni Islamic constitutionalism might overlap significantly with the

[7] For example, in Pakistan, *Hazoor Bakhsh* v. *Federation of Pakistan* [1981] PLD 145 (FSC) but compare with *Federation of Pakistan* v. *Hazoor Bakhsh* [1983] PLD 255 (FSC).

[8] For a particular case, see Egypt, Supreme Constitutional Court of Egypt Case No. 8 of Judicial Year 17 (May 18, 1996) as published in Brown & Lombardi 1996.

demands of liberal constitutionalism. This is to say that Sunni Islam seems in the grand scheme of things to have helped mediate the entry of modern constitutionalism into the public discourse of modern Muslim societies, and has, at the same time, resulted in creative new thinking about the different types of constitutionalism that might meaningfully constrain a state. During a period of ongoing religious revival, the presence of good faith arguments has had an impact, and a handful of Muslim states have, even if tentatively, tried to implement liberal or liberal-leaning versions of Islamic constitutionalism.

This has not been the case over the past fifty years in Iran, the largest Shiite nation in the world. In Shiite-dominated Iran, Islamic thinkers and, it appears, the people remained committed to the ideal of Islamic constitutionalism. The 1979 Islamic revolution was designed to overthrow an unabashedly secular nationalist authoritarian regime. Yet the constitutional regime evolved in a direction that was distinctly illiberal. One reason appears to be that the Shiite *fuqaha'*, jurists trained and credentialed in the one Shiite guild/school of law, retained an extraordinary degree of popularity and religious authority and, furthermore the scholars had established for themselves an internal hierarchy of religious authority, subordinated to a "Supreme Leader." Unlike the Sunni *fuqaha'* who in most parts of the Sunni world had lost their monopoly on religious authority, the Shiite *fuqaha'* of Iran retained in the eyes of most Iranians a monopoly on the right to opine on questions of Islamic law. Because the 1979 constitution only required the state to respect the principles of Islamic law as interpreted by clerics and because the Supreme Leader was, for all practical purposes, the highest-ranking clerical authority in the country, the "Islamic" constraints on his authority were largely ineffective (Künkler and Law 2021).

Iran's constitutional experiment has, sadly, expanded the constitutional imaginary of Muslims outside the Shiite community. For some reactionary Sunni Muslims who decry the space that modernist Islam has created for liberal values, the Shiite example is inspiring. In Afghanistan, the Taliban regime from 1997 to 2001 clearly aspired to construct a clerical regime ruled by credentialed jurists from the Hanafi school that represented an embryonic reimagining of the clerical Iranian regime. It is quite likely that after the Taliban's recent military conquest of Kabul and the restoration of a second Taliban regime they intend to continue in this project (Lombardi and March 2022).

19.4 ISLAM AND BUDDHISM AND CONSTITUTIONAL LAW

Looking at the contributions to this volume, it seems clear that scholars of Buddhism and law are making progress toward some broader hypotheses about the relationship of Buddhism to constitutional law at different times and places. It is exciting to think that one may soon be able to do comparative studies of Islamic and Buddhist constitutional ideals, and it will be fascinating to see whether these potentially quite

different conceptualizations may have led Muslims and Buddhists to use constitutions (and constitutional law) in different ways. Many of the contributors to this volume describe ways in which the nature of Buddhist concepts and intuitions may have led Buddhists to embrace a different understanding to Muslims about what religion is, what the role that religious law and religious institutions should play in a modern state, and thus, in the modern world, what types of constitutional provision a religious constitution should include.

In the Sunni Muslim world, Islamic ideas have to date tended to facilitate the rise of a "constitutionalist" ethos in Sunni Muslim polities, albeit one that does not necessarily understand "constitutionalism" to require state respect for liberal values. This in turn has led to the widespread adoption of constitutional provisions that are explicitly constitutionalist and which announce that government discretion is broadly constrained by some moral principles that are announced in scripture. In these cases, the boundaries on moral governance are to be interpreted in the final instance by people outside the control of the ruler and whose authority comes, ultimately, from their recognition as scholars by the community as a whole. This pattern, already present in the premodern period, sounds in a "constitutionalist" key. It has led to the rise of Islamic constitutions that are marked by their consistent concern with identifying Islam as a source of *restraint* on state power, and with the identification of a system that can guarantee that the executive is not given control of the definition of Islam to such an extent that it is left to be the judge of its own power, notwithstanding the different assumptions about religious authority in the Shiite context of Iran.

19.4.1 *Some Questions for Scholars of Buddhism and Constitutional Law Going Forward*

As scholars in the still-congealing field of Buddhism and constitutional law go forward, I for one will be interested to see further exploration into a number of questions.

19.4.1.1 Is the Buddhist Tradition More Fragmented than the Muslim Tradition?

Based on the contributions to this volume, it seems possible that since the passing of the Buddha, the Buddhist tradition may have fragmented in a more complete way than the Muslim tradition did after the death of Muhammad. If so, this raises questions about how broadly one can generalize about "Buddhism" and constitutional law.

The possibility of fragmentation is suggested primarily by the fact that the Buddhist tradition is developed in any particular country by thinkers and activists who are often divided linguistically from thinkers and activists in another. By

contrast, throughout the Muslim world, Muslims engage with scriptures that are written in Arabic, and the tradition is developed largely by people who read and write in this common language. Thus, from the beginning of Islamic history, one has been able to find in every country religious authorities and religious-minded people who read and teach in Arabic. Notwithstanding regional variations in Islamic thought and practice, people throughout the Muslim world (or at least educated people with a command of the Arabic language) have been able to engage with each other's ideas about Islam, and in the twentieth century the spread of literacy, the rise of mass media, and the phenomenon of religious revival have together increased the set of people able to engage with common ideas. This may explain why one finds transregional patterns in Sunni thought about constitutional law and in the structure of self-consciously Sunni constitutional regimes.

This core of Arabic speakers around the world has also facilitated communication and productive discourse across sectarian divides. Notwithstanding the differences between Sunni and Shiite ideas and between Sunni and Shiite institutions, the two sectarian traditions have evolved in an environment where religious scholars (in the past) and a large number of literate pious lay Muslims (in the present) have access to views developed among members of the rival sects. Sunni Muslims in the modern era seem generally to have developed a different view on questions of governance and "constitutional law" than have Shiite Muslims, with Sunnis embracing a more decentralized understanding of religious authority than Shiites, one that might be analogized to Protestant Christian views that plant themselves in opposition to more hierarchical and bureaucratic views held by, for example, members of the Catholic or Orthodox church. Even here more work needs to be done to determine if this is in fact true and if so, whether there is any reason to believe that one or both of the traditions will change in ways that causes the two to converge. There was a time when it seemed possible that Shiite understandings of religious authority might move in a "Sunni" direction and the example of the Taliban suggests that at least some Sunnis might embrace a more centralized view.

Looking at the contributions to this volume, a specialist in Islamic intellectual and social history is led to wonder whether the Buddhist tradition has over the centuries, atomized in a deeper way than the Islamic tradition. Because the core scriptures of different sects and/or different regions seem to be written in different languages, there may not be in each country a religious elite capable of engaging with the ideas that are developing in other sects or religions, and thus around the word, Buddhism may see fewer broad transregional trends than Islam with respect to its constitutional imaginaries. If so, scholars of Buddhism may find it more difficult than scholars of Islam to develop a holistic view of the global religious tradition and constitutional law. While scholars of Islam need to be careful to avoid hasty and unnuanced generalizations, the scholarship to date suggests that it is possible to talk meaningfully about "Islam and constitutional law." Scholars of Buddhism may find it necessary to talk instead about "Buddhisms and constitutional law."

19.4.1.2 Does Sunni Thought Tend to Incorporate and Build Upon a More Egalitarian View of Humanity than Buddhist Thought?

Sunni Islam has reflected, from the start, fairly egalitarian intuitions about humanity. All humans are born equal, and each is given an equal opportunity to succeed or fail, with success being rewarded in heaven and failure punished in hell. God has created a moral law to which all humans are subject in the same way; the rules apply to everybody. Everybody must pray in the same fashion, irrespective of one's social status or profession. Other rules govern certain activities. As a result, a ruler (when acting as a ruler) is subject to rules that do not apply to the subject (when acting as a subject), a trader (when carrying on his trade) must obey rules that are simply not relevant to a shepherd (and vice versa). Being a ruler or a scholar does not imply that one is morally superior to a subject or uneducated person, or that one is subject to different moral rules when it comes to the vast majority of one's daily life. One has distinct moral obligations only insofar as one is acting in one's professional capacity, whatever that profession may be. This intuition has consequences for the constitutional ordering of the state, as it tends to promote the idea that state laws too should tend to apply equally to all people. If a particular activity is regulated, then all people who engage in that activity should be subject to the same regulation. And if there are limits to the ruler's ability to regulate an activity, then those regulations provide space for every one of his subjects.

By contrast, Buddhism asserts that humans are not all born equally far along the path to salvation. In the contributions to this volume, one finds suggestions that this belief in the inequality of humankind may impact Buddhist intuitions about the way in which a Buddhist society should be structured and the goals that a Buddhist government should pursue – intuitions that might in turn affect the drafting and interpretation of constitutions in a Buddhist state. Buddhist societies are divided, in one way, between the members of the sangha and lay-people. At least in some contexts, it is suggested that members of the sangha are farther along the path to enlightenment, deserving of special solicitude and, therefore, should be allowed to govern themselves without governmental interference.

If this is correct, it would be interesting to see more work exploring whether Buddhist constitutions are generally drafted (or understood) that might be considered almost "federal" or even "confederal" insofar as they identify a country in which one community, the sangha, which is subject primarily to rules established by its own governing institutions; and a second community, the laity, which is subject to a second layer of national government.

19.4.1.3 Does Sunni Thought Tend to Incorporate and Build Upon a More Egalitarian View of Human Capacity to Understand the Higher Law than Buddhist Thought?

Sunni Islam posits that all humans are born to develop the same ability to discern their obligations under the law. Ultimately, everyone who wants to do so can seek

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training to work in the profession of Islamic jurist; and if they do, their success or failure is not to be assumed based on the circumstances of their birth. Rather, it is to be judged by their ability to convince people that their interpretation of God's law is to that of other interpreters. More striking still, Sunnis believe that if they are to maintain their monopoly on religious authority, religious institutions must also continue to justify themselves to the public by producing compelling interpretations of God's law that society – rulers and masses alike – find convincing. When in the nineteenth and twentieth centuries, intellectuals without guild training were able to produce compelling interpretations of God's law, the *fuqaha'* lost their monopoly on religious authority. This development had significant consequences for the way in which Sunni societies decided, constitutionally, to design the institutions that would interpret and police a constitutional obligation for the executive and legislature to respect all limits established by the *shari`a*. (Shiism, it should be noted, seems to have been less consistently enthusiastic about the idea that all humans have an equal capacity to understand God's scriptural command and the implications of God's promise that obedience to His law will inevitably promote social flourishing.)

The embrace of egalitarian views about humanity's capacity to engage with the law seems to have impacted subtly but significantly the way in which constitutions are drafted and interpreted. Egalitarian understandings of human capacity to understand God's law implies egalitarian understandings about human capacity to understand the constraints that God has placed on a ruler (or government's) discretion in social regulation. It facilitates intriguing discussions about the institutional structure of a state, and about who should have ultimate authority to determine whether government laws or policies are Islamic and thus deserving of obedience. As Andrew March has demonstrated (2019), it has facilitated in many Sunni Muslim countries arguments in favor of democracy as a moral obligation. If the Muslim community as a whole might be conceptualized as the ultimate arbiters of Islamic-ness, society must be structured to allow the community regularly to express its views on the matter. In other countries, it has facilitated the discussion on what sorts of institution should be trusted to speak for the public when it comes to interpreting constitutional guarantees that the state will govern in accordance with core Islamic principles, and in many countries, this has led Islamic constitutionalists to ally with liberal constitutionalists in clamoring for strong independence of the judiciary. (That said, the degree to which Islamic and liberal constitutionalists agree on the qualities that they would like to see judges possess may, in some countries, differ significantly.)

For a person familiar with Islam and constitutions, it is striking that some contributions to this volume suggest that some strains of Buddhism seem to have taken a non-egalitarian position and that this has affected the structure of governments in Buddhist societies over the years, and more recently seems to have impacted the drafting/implementation of constitutions. For example, it seems that a great deal of Buddhist thought suggests that not only is the sangha best suited to understanding what members of the sangha themselves are supposed to do as they

pursue enlightenment (a fact that requires that the sangha be given autonomy within society), but it also assumes that with respect to the regulation of lay-people, some members of lay society, by virtue of their advanced position at birth on the path to enlightenment, have more of an innate capacity to understand how they and their fellow lay-people are supposed to behave. In short, if I understand these contributions correctly, in some Buddhist societies, rulers are assumed to be, by virtue of the fact that they have accumulated enough merit to be born as rulers, people who are likely to have unique insights into the secrets of moral behavior. Rulers are thus uniquely prepared to develop laws that can be trusted to encourage the acquisition of merit.

19.5 CONCLUSION

These are only an initial set of questions that comes to mind from comparing my own field of specialty, in Islam and constitutional law, with the incipient subfield of Buddhism and constitutional law, as apparent in the contributions to this volume. The study of Islam and constitutional law has emerged only recently, but it has already produced provocative work that has challenged some long-held assumptions in the fields of Islamic studies and in comparative constitutional law alike. The study of Buddhism and constitutional law promises on its own to do similar things for the academy. More exciting yet, the work produced by scholars of Buddhism and constitutional law creates the possibility of meaningful comparative study in a broader field of "religion and constitutional law."

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