

REBELLION AND VIOLENCE IN ISLAMIC LAW

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CHAPTER I

Modern scholarship and reorienting the approach to rebellion

ISLAMIC REBELLION IN MODERN SCHOLARSHIP

Aḥkām al-bughāh, or the juristic discourses on rebellion, have received very little attention in both non-Muslim and Muslim modern scholarship. Nevertheless, there has been no shortage of statements about the absence of a right to rebellion in Islamic legal discourses. Most commentators have tended to focus on the history of Islamic discourses on the caliphate, and then deduced from this history the Islamic position on rebellion. Very little attention has been given to the specific juristic tradition from which *aḥkām al-bughāh* arose, or to the specific legal paradigm upon which Muslim jurists relied. Contemporary commentators have tended to treat Muslim juridical pronouncements on the duty of obedience to those in power as if they are a genre of political thought or theory. The legal culture that provided these jurists with the terms of their discourse, and that imposed modes of thought and expression, has been largely ignored.¹

In its most basic formulation, the accepted thesis is that Muslim jurists moved from the absolute realm of political idealism to an absolute realm of political realism. Muslim jurists insisted on strict qualifications for the position of caliph, and insisted that the caliphate only be assumed through a proper *ʿaqd* (contract) and *bayʿa* (pledge of allegiance). The caliph had to be pious and just, and had to enforce the *Shariʿa*.² Importantly, only a single, just *imām* may represent the *khilāfa* and the *umma*. If

¹ Al-Azmeh (*Muslim*, 171) recognizes the specifically legalistic nature of the juristic theories of the caliphate. However, as will be noted, when it comes to juristic discourses on rebellion, al-Azmeh himself fails to heed his own warning against ignoring the legalistic nature of Islamic juristic discourses. Enayat (*Modern*, 4) notes that pre-modern Islamic political thought was always subsumed under some other discipline. Rosenthal (*Political*, 31) notes that pre-modern Muslim jurists were not political philosophers, and that politics as a discipline did not interest them. But he does not take account of the specific legal culture of Muslim jurists.

² On the traditional qualifications demanded of the caliph, see Gibb, "Constitutional," 6–14.

the caliph is neither legitimate nor just, the *umma* may remove him and replace him with another.

These requirements and qualifications were a pious ideal which perhaps was never realized. According to H. A. R. Gibb, in response to the Khawārij's anarchy and fanatical revolts, the jurists were increasingly forced to deprecate the right of rebellion against an unjust *imām*.³ The two civil wars in early Islam and the constant rebellions in the first two centuries pressured Muslim jurists to emphasize the duty of obedience to the ruler, whether just or unjust, and to engage in endless polemics about the evils of rebellion and anarchy. In other words, Muslim jurists reacted by going to the other extreme – from an extreme of idealism to an extreme of realism.⁴

The power and influence of the ʿAbbāsīd caliphate steadily decreased throughout the third/ninth century. By the fifth/eleventh century, it had been reduced to virtual impotence. According to Gibb, the first theoretical and systematic compromise was a pious invention by the Shāfiʿī jurist al-Māwardī (d. 450/1058) as he attempted to defend the caliphate against the Buwayhid warlords and the Fātimids ruling Cairo. Under certain conditions, al-Māwardī recognized the legitimacy of usurpation as a means of coming to power in the provinces. Al-Māwardī argued that the usurper, by pledging allegiance to the caliph and complying with certain conditions, became the caliph's agent.⁵ Effectively, al-Māwardī had created a legal fiction of sorts:⁶ under certain circumstances a usurper could become the caliph's agent even if the caliph had no real power to restrain or direct his agent. Gibb insists that al-Māwardī had opened the door for the eventual supremacy

³ Ibid., 6. ⁴ Ibid., 15.

⁵ Ibid., 18–19; Gibb, “al-Māwardī's”; Watt, *Islamic*, 101–2; Lambton, “Changing,” 55. Al-Azmeh (*Muslim*, 169) argues that systematic, juristic statements on the caliphate were a fifth/eleventh-century innovation by al-Māwardī and Abū Yaʿlā.

⁶ In this context, Rosenthal (*Political*, 30–1) states:

What appears to us as pious fraud, as born of political expediency, as condoning aggression and brute force must be set against the overriding principle ruling the guardians and interpreters of Muslim law: to preserve the unity of the Muslim community under the authority of the *khalīfa* whose religious aura increased in proportion to the decrease of his effective power and authority.

Evidently, Rosenthal is not aware of the quite common use of legal fictions in Islamic and non-Islamic legal systems. I would argue that Muslim jurists were not necessarily preserving the unity of community. Rather, they were doing what was, by training and habit, dictated by their legal culture; that is, resolving conflict and maintaining order. See below on the function of law and the roles of jurists.

of political expediency over legal order. I will quote Gibb at length because it is important to demonstrate the tenor of his argument on this point. Gibb states:

It must be supposed that in his zeal to find some arguments by which at least the show of legality could be maintained, al-Māwardī did not realize that he had undermined the foundations of all law. Necessity and expediency may indeed be respectable principles, but only when they are not invoked to justify disregard of the law. It is true that he seeks to limit them to this case, but to admit them at all was the thin end of the wedge. Already the whole structure of the juristic theory of the caliphate was beginning to crumble, and it was not long before the continued application of these principles brought it crashing to the ground.⁷

Gibb argues that Muslim political theory increasingly became an after-the-fact rationalization of actual historical practices, as Muslim jurists ignored any moral imperatives and focused solely on the element of power.⁸ Muslim jurists not only sanctioned the authority of those who usurped power, but also made obedience to them a moral and legal, as well as religious, obligation. Thus, according to Gibb, the belief was fostered “that rebellion is the most heinous of crimes, and this doctrine came to be consecrated in the juristic maxim, ‘Sixty years of tyranny are better than an hour of civil strife.’”⁹

The Seljuks gained control of Baghdād in 447/1055, shortly before al-Māwardī’s death. The next main figure usually mentioned in this context is the Shāfi‘ī jurist Abū Ḥāmid al-Ghazālī (d. 505/1111).¹⁰ Al-Ghazālī wished to reconcile the temporal powers of the sultānate to the religious authority of the caliph. The caliph would officially confer the title of sultān upon sovereign princes in the temporal field. Hence, al-Ghazālī went further in legitimating usurpation as a lawful means of gaining power. According to Ann Lambton, he was preoccupied with the threat of internal disturbances (*fitan*), and the dangers posed by the Bāṭinī movement to Sunnī Islam. He was far less concerned with the danger posed by the external threat of the Crusades.¹¹ Al-Ghazālī placed

⁷ Gibb, “al-Māwardī’s,” 164. Mikhail (*Politics*, 43) criticizes Gibb’s overly dramatic presentation of al-Māwardī but seems to accept Gibb’s basic conclusions.

⁸ Gibb, “al-Māwardī’s,” 162; Lambton, *State*, 84.

⁹ Gibb, “Constitutional,” 15. Enayat (*Modern*, 12) lends his support to this argument in stating: “Acknowledging the necessity of strong government . . . is one thing; justifying tyranny in the name of religion is another. The price of medieval flexibility was to sanctify the latter position, which soon became the ruling political doctrine among the majority of Muslims of all sects.”

¹⁰ Imām al-Ḥaramayn al-Juwaynī (d. 478/1085), al-Ghazālī’s teacher, frequently receives honorable mention in this context. See Lambton, *State*, 104–5; Mikhail, *Politics*, 50. I deal with al-Juwaynī’s views later.

¹¹ Lambton, *State*, 109.

an undue emphasis on the duty to obey those in power, even if unjust or impious. Al-Ghazālī's rather infamous statement is usually quoted in this context:

An evil-doing and barbarous sultān, so long as he is supported by military force, so that he can only with difficulty be deposed and that the attempt to depose him would create unendurable civil strife, must of necessity be left in possession and obedience must be rendered to him, exactly as obedience is required to be rendered to those who are placed in command . . . We consider, then, that the caliphate is contractually assumed by that member of the ʿAbbāsīd house who is charged with its functions, and that the office of government (*wilāya*) in the various lands is validly executed by the sultāns who profess allegiance to the caliph . . . For if we were to decide that all *wilāyāt* are now null and void, all institutions of public welfare would also be absolutely null and void . . . Nay, but the *wilāya* in these days is a consequence solely of military power, and whosoever he may be to whom the holder of military power professes his allegiance, that person is the caliph. And whosoever exercises independent authority, while he shows allegiance to the caliph by mentioning his name in the *khutba* and on the coinage, he is a sultān, whose orders and judgments are executed in the several parts of the earth by a valid *wilāya*.¹²

After explaining that these concessions are involuntary but necessary, al-Ghazālī then asks rhetorically:

Which is the better part, that we should declare that the *qāḍīs* are divested of their functions, that all the *wilāyāt* are invalid, that no marriages can be legally contracted, that all executive actions in all parts of the earth are null and void, and to allow that the whole creation is living in sin – or to recognize that the *imāma* is held by a valid contract, and that all executive acts and jurisdictions are valid, given the circumstances as they are and the necessity of these times?¹³

The Mongol invasion finally destroyed the ʿAbbāsīd caliphate in 656/1258, but by then all vestiges of political legitimacy had disappeared. According to the prevailing scholarly view, Muslim jurists were willing to accept raw power, without anything further, as grounds for political legitimacy. The next often-discussed figure is the Syrian Shāfiʿī jurist Ibn Jamāʿa (d. 733/1332–3).¹⁴ Born in Ḥalab, he later moved to Jerusalem and lived the majority of his adult life as a judge in Mamlūk

¹² Quoted in Gibb, "Constitutional," 19. This passage is also quoted in Lambton, *State*, 116–17. See also Rosenthal, *Political*, 42.

¹³ Quoted in Gibb, "Constitutional," 19–20. Laoust (*La Politique*, 88) argues that al-Ghazālī incorporated both the caliphate and sultānate in a mixed theory of the *imāma*.

¹⁴ See Mikhail, *Politics*, 28; Lambton, *State*, 138–51; Rosenthal, *Political*, 43–51. Gibb incorrectly identifies Ibn Jamāʿa as a Ḥanafī: "Constitutional," 23.

Egypt.¹⁵ Ibn Jamā^ca equates power with legality and, according to Gibb, he abandons law in favor of secular absolutism.¹⁶ A much-quoted statement by him is the following:

When the *imāma* is thus contractually assumed by one person in virtue of his military power and conquest, and there subsequently rises up another who overcomes the first by his might and his armies, then the first is deposed and the second becomes *imām*, on the grounds which we have already stated, namely, the well-being and unity of the Muslims.¹⁷

The reproduction of these long quotations is justified by the fact that these statements have had a pervasive influence on the way political authority was analyzed in Islamic history, particularly as it pertains to the issue of quietism and activism. With Ibn Jamā^ca, the journey from political idealism to realism, with a few exceptions, had become complete.¹⁸ Order and stability became the primary concern; neither legitimacy nor justice mattered.

Admittedly, I do not find this view of the history of Islamic political thought, despite its wide acceptance, to be convincing. But for our purposes, this is not the material issue. Rather, the material issue is that this view has resulted in certain conclusions about the right to rebellion and the treatment of rebels in Islamic jurisprudence, which are largely inaccurate. For example, Gibb concludes that Muslim jurists ultimately adopted quietism and rejected any right to rebel against an unjust *imām*.¹⁹ Lambton agrees and adds that neither Sunnī nor Shī^cī jurists discussed the issue of rebellion at any length.²⁰ According to Lambton, the problem of tyranny presented a practical as well as a theoretical problem, and “in the conflict between ideal and practice, it came to be recognized that tyranny prevailed.”²¹

Hanna Mikhail is critical of Gibb’s conclusions regarding the stark realism of Muslim jurists. Mikhail argues that although Muslim jurists accepted the political reality, they continued to insist that Muslim rulers

¹⁵ The Mamlūk dynasty flourished in Egypt between 648/1250 and 922/1517.

¹⁶ Gibb, “Constitutional,” 23. ¹⁷ Quoted in *ibid.*

¹⁸ Ibn Taymiyya, for example, insists on the ideal of *Sharī‘a* but ignores the question of the *khilāfa* altogether: see Rosenthal, *Political*, 51–61.

¹⁹ Gibb, “Constitutional,” 6, 15. ²⁰ Lambton, *State*, 261–3.

²¹ *Ibid.*, 313. Marlow (*Hierarchy*, 40–1) argues that quietism was eventually endorsed by Sunnī and Shī^cī jurists. Cook (“Activism,” 21–2) argues that the activist heritage reflects the importance of tribal society in Islamic history. With the demobilization of tribal armies and large-scale conversions to Islam, Muslim masses who had no hope of partaking in the political process emerged. The result was political quietism.

strive towards certain ideals. Mikhail notes, for example, that both al-Māwardī and Ibn Jamā'a continued to insist that a ruler fulfill the requirements of religion and justice.²² But, ultimately, he concurs in the judgment that Muslim jurists became quietists – demanding absolute obedience to unjust rulers and forbidding rebellion.²³ In fact, Mikhail concludes that in the eighth/fourteenth century, Abū Ḥayyān (d. 754/1353–4) “stands out as a voice in the wilderness” when he argues that force may be used against an unjust ruler.²⁴

Fazlur Rahman, consistent with the prevailing scholarship, argues that there is no law of rebellion in Islam. Whatever activist tendencies might have existed in early Islam became extinct as the Murji'a's quietist doctrine of non-judgment became widespread. According to Rahman, Muslim jurists rationalized any political reality that might have confronted them, and forbade any rebellions against an established ruler.²⁵ Bernard Lewis, however, notes that both the quietist and rebellious traditions are old and deeply rooted in Islam. He argues that the quietist–authoritarian and the activist–rebellious traditions competed throughout early Islamic history.²⁶ It was only with much reluctance and difficulty that Muslim jurists accepted the necessity of obedience to tyranny.²⁷ Ultimately, complete quietism was accepted.²⁸

Riḍwān al-Sayyid seems to agree with this basic assessment. He argues that there were two distinct trends concerning the caliphate: a law-based trend and a realism-based trend. The law-based trend insisted on the caliphate being contracted by a proper contract and *bay'ā* (pledge of allegiance given to the ruler), while the realism-based trend accepted the rule of the usurper. According to al-Sayyid, Abū 'Abd Allāh al-Ḥalīmī (d. 403/1012–13) was the last representative of the law-based trend. Al-Ḥalīmī refused to recognize the legitimacy of the usurper, and argued

²² Mikhail, *Politics*, 28. ²³ *Ibid.*, xxxii, 16, 38, 50.

²⁴ *Ibid.*, 50. Mikhail further concludes that since the eleventh/seventeenth century, most theological works either held that (1) between injustice and rebellion, Muslims must choose the lesser evil, or (2) rebellion is always the greater evil. Mikhail does not seem to distinguish between theological and legal works. Furthermore, he does not seem to give adequate weight to the significance of this equation.

²⁵ Rahman, “Law,” 1–10; also see Sonn, “Irregular,” 133–8. Cook (“Activism,” 15–23) argues that the Murji'a started out as an activist creed and subsequently evolved towards quietism.

²⁶ Lewis, *Political*, 92. Also see pp. 101–2 where Lewis reproduces the infamous quotes from al-Ghazālī and Ibn Jamā'a. Somewhat inconsistently, Lewis asserts that the duty of obedience to *legitimate* authority is a religious obligation, and that disobedience is a sin as well as a crime at *ibid.*, 91.

²⁷ *Ibid.*, 100; Lewis, *Islam*, 290. ²⁸ Lewis, *Islam*, 314.

that only a caliph who came to power through a proper contract should be recognized as the legitimate ruler even if he lacked effective political power. The legal acts (such as adjudicating cases or collecting taxes) performed by usurpers, al-Ḥalīmī contended, were recognized only in one situation. If a usurper controlled one of the provinces, and the just caliph was weak and unable to impose his authority, then the legal acts of the usurper could be recognized. However, according to al-Ḥalīmī the usurper would remain illegitimate; legitimacy could only be granted to the ruler who came to power through legal means. Al-Sayyid, however, argues that the realism-based trend became dominant, and juridical quietism became the norm.²⁹

Integral to the quietism thesis is the argument that through the course of Islamic history temporal authority split from religious authority: The Sunnī caliph lost his religious authority to the jurists, and his political authority to the sultāns.³⁰ Presumably, Muslim jurists concerned themselves with the administration of religious law and left secular concerns to those in power. Therefore, as long as Muslim jurists could be recognized as the guardians of religious law, they were willing to ignore issues concerning political justice and even to lend support to unjust rulers. Patricia Crone puts it nicely: “Intellectually, it is the very totality of the disjunction between the exponents of state and religion that explains why the relationship between the two could come to be seen even by the medieval Muslims as a symbiosis: once the divorce was finalized, there was nothing to obstruct an improvement in the relationship between the divorcees.”³¹

Recently, Muhammad Zaman challenged this simple dichotomy between the religious authority of the jurists and the political authority of the rulers. Zaman argues that the *‘ulamā’* (jurists) existed in a cooperative relationship in which they shared religious and political authority. This cooperative relationship existed before the *miḥna* (inquisition), which was instituted in 218/833 by the ‘Abbāsīd caliph al-Ma’mūn. According to Zaman, the *miḥna* was an attempt by the rulers to challenge the authority of the *‘ulamā’*, and to claim a certain degree of religious competence. But the challenge ultimately failed. Post-*miḥna*, a certain degree of tension and

²⁹ Al-Sayyid, *al-Ummah*, 136–43. I will argue that the issue of recognizing the legal acts of the usurper needs to be completely reexamined.

³⁰ Crone and Hinds, *God’s*, 19. Crone and Hinds, however, argue that this is not the way things began. They argue that the early Umayyad caliphs did enjoy considerable religious authority.

³¹ Crone, *Slaves*, 88.

conflict continued to exist between the *‘ulamā’* and the authorities, but it was cooperation, patronage, and the sharing of religious and political authority that became the earmark of the relationship between the *‘ulamā’* and the rulers. In other words, no real separation between politics and religion ever took place, at least during the early *‘Abbāsīd* period.³² The *‘ulamā’* for the most part supported the rulers and, in return, the rulers were willing to grant the *‘ulamā’* some political privilege. Partly because of this relationship of patronage, or because of political repression, the *‘ulamā’*, from the early *‘Abbāsīd* period, became political quietists as they completely excluded the option of rebellion against rulers.³³

Aziz al-Azmeh recently published a powerful challenge to the whole framework from which the issue of authority and legitimacy in Islamic history is approached. Al-Azmeh argues that much of the contemporary discourse on premodern Islamic thought is, among other things, ahistorical.³⁴ Muslim juristic discourses on the *imāma*, he contends, cannot be understood in terms of realism or idealism. Muslim jurists were neither idealistic nor realistic, but simply and thoroughly legalistic.³⁵ Muslim jurists and theologians were functioning under what al-Azmeh calls the historical absolutist imperative. The absolutist imperative arises from the anthropology and conceptions of power of the age.³⁶ Pursuant to this historical imperative, it was not entirely surprising that the caliphs would be perceived and discoursed upon as mini-gods, beyond good or evil.³⁷ The emphasis of early writers was on order and the need to obey the ruler, who was often portrayed as a shepherd taking care of his sheep. These conceptions of power were Islamized through the works of Muslim jurisprudence and the sanctification of Islamicity.³⁸ Al-Azmeh argues that it was never the case that politics became secular and devoid of religious influence. Rather, with al-Māwardī, there was an attempt to create a reliance on the *‘ulamā’* as a corporate group.³⁹ In due time, the *‘ulamā’* created a corporate religious logic on which politics could find, legitimate, and even judge itself.⁴⁰ By the time of Ibn Jamā’a, there is a representation of the *‘ulamā’* as an autonomous corporate group capable of standing in for political power in the regulation of public affairs in the absence of a convincing king.⁴¹ However, correlative with this development was an insistence by the jurists on the idea of obedience

³² Zaman, *Religion*, 81–2, 105–6.

³³ *Ibid.*, 49, 76, 78, 81–2, 98.

³⁴ Al-Azmeh, *Muslim*, 74.

³⁵ *Ibid.*, 171.

³⁶ *Ibid.*, 115–53.

³⁷ *Ibid.*, 77.

³⁸ *Ibid.*, 100–1.

³⁹ *Ibid.*, 106–7.

⁴⁰ *Ibid.*, 104.

⁴¹ *Ibid.*, 103.

to those in authority, and that disorder was worse than injustice. Although the jurists might have denied the rulers titles such as *khalīfat Allāh* (the caliph of God), the status and function of ruling was perceived and dis-coursed upon with a high degree of devotional sanctification. Put differently, obeying the ruler was considered a part of obeying God. The only limitation or condition imposed was largely theoretical – the ruler cannot be obeyed if he orders something contrary to the divine command. But even this limitation was, at times, “ruled out as a disobedience of disobedience.”⁴² In al-Azmeh’s colorful language: “In all, the rhetorical and visual assimilation of the caliph to prophecy, to divinity, to a charismatic line, and his conception in terms of inviolability, incommensurability, ineffability, and sheer potency, produced a critical mass creative of a sublime and holy authoritarianism, one which flows in the social and imaginary-conceptual capillaries of Muslim political traditions.”⁴³

Integral to al-Azmeh’s argument is that Muslim jurists did not start out with a political ideal that degenerated into coarse opportunism. Rather, Muslim jurists worked under a historical absolutist imperative that produced a certain practice, which was then systematized from historical practice into juristic form. Therefore, al-Azmeh asserts: “The imperative of absolutism was also the *leitmotif* behind the universal aversion to the idea of contesting a ruling power. Sedition in Muslim law books is a legal offense of great consequence, attendant upon which is a particularly rigorous statutory penalty (*ḥadd*).”⁴⁴ But he adds: “That Māwardī and other jurists did not propose a legal theory for sedition is unsurprising and does not imply, as modern Western scholarship generally assumes, the opportunistic legalization of injustice.”⁴⁵

Al-Azmeh is correct in criticizing most contemporary works for not taking the historical context sufficiently into consideration. Furthermore, al-Azmeh’s basic argument about the existence of a historical absolutist imperative is sound. But one problem with al-Azmeh’s argument is that he does not closely examine Islamic legal texts and, thus concludes that sedition in Islamic law is a grave crime punishable by a *ḥadd*.⁴⁶ By sedition, one can only assume that he means rebellion or perhaps

⁴² Ibid., 123. Al-Azmeh argues that, ultimately, the inconsistency between the absolute duty to obey the ruler and God was never resolved in Islamic discourses. The theoretical possibility of disobedience to the ruler was left open, but with much ambiguity.

⁴³ Ibid., 162. ⁴⁴ Ibid., 173. ⁴⁵ Ibid., 174.

⁴⁶ Al-Azmeh, for example, states: “It is the opinion of the vast majority of jurists that sedition, whatever its cause and even when directed against a miscreant or maleficent ruler, is illegitimate” (ibid., 108).

insurrection. But when we examine Islamic legal sources, we will find that this is not an accurate description of the juristic discourses. How should one then analyze this fact? One option, and the option that I suspect al-Azmeh would prefer, is to say that this fact is inapposite; Muslims jurists were writing thoroughly legalistic works, and technical legalistic questions of legitimacy were largely irrelevant to the socio-historical dynamics of society.⁴⁷ However, if one makes this argument, then one cannot cite the supposed absence of discourses on sedition as evidence for the supremacy of the absolutist imperative. More fundamentally, when one argues that legalistic questions were irrelevant, it is not quite clear what one means by this claim of irrelevance. If one claims that legalistic distinctions and discourses did not influence the historical, social, or political practices of Muslims, that is quite possible. But this is an empirical claim that needs to be examined within the confines of a specific historical period and place. If, on the other hand, one claims that the legalistic distinctions made by jurists were irrelevant to the way the juridical culture understood or dealt with power, this argument hardly makes any sense.⁴⁸

Al-Azmeh warns that legal works by Muslim jurists must be read within the specific genre to which they belong – they must be read as books of law and not as political theory.⁴⁹ He also argues that Muslim legal works systematized past practice in juristic form.⁵⁰ But al-Azmeh does not sufficiently recognize the role of legal culture. Legal works do not simply appropriate reality and then systematize it.⁵¹ Jurists also work within a legal paradigm that might be called, to modify a phrase, the “legal imperative.” This legal imperative, by the very nature of law, as will be discussed below, favors order and stability. But order and stability is the framework from which law begins, and then aspires to achieve certain social and

⁴⁷ See *ibid.*, 165, where al-Azmeh argues that legalistic discussions on the legitimacy of Marwān b. al-Ḥakam or ʿAbd Allāh b. al-Zubayr remained without doctrinal, dogmatic, or political consequence. Al-Azmeh also argues that although al-Māwardī, for example, stated preferences for certain positions, “there is no implication that these were in any way binding on the caliph, who had the same capacity for legal decision as does a judge” (*ibid.*, 170).

⁴⁸ The failure to carefully examine the legal sources allows al-Azmeh to argue that shortly after al-Māwardī compulsion became a legitimate means of appointment to power on a par with other means of appointment: *ibid.*, 172–3. In reality, as discussed later, compulsion as a means to power became recognized long before al-Māwardī.

⁴⁹ *Ibid.*, 170. ⁵⁰ *Ibid.*, 173.

⁵¹ Al-Azmeh makes the rather sweeping claim that all jurists at all times and places are realists: *ibid.*, 170. I agree that a successful jurist needs to be a realist to a certain extent, but that is quite different from claiming that all jurists are realists. Jurists also work within a specifically legal culture that incorporates precedent as well as social, political, and religious goals. In his “Islamic,” 250–61, al-Azmeh makes a convincing case that Islamic law was not simply theory, but that Muslim jurists appropriated reality. But it is a gross simplification to conclude from this that all jurists are realists.

political goals. If, as al-Azmeh seems to argue, Muslim jurists responded to a historical reality and an imperative of absolutism and nothing else, then we can hardly make sense of *ahkām al-bughāh* as a discourse.

I do not wish to overstate my case; as stated above, al-Azmeh provides a very useful paradigm by which we can understand conceptions of power and authority in premodern Islam. As al-Azmeh demonstrates, arguments by contemporary scholars about quietism and a mythical journey from idealism to realism are ahistorical. Importantly, however, they also make very little sense in terms of how law works, and they fail to explain the continued existence of *ahkām al-bughāh*. But al-Azmeh's thesis fails on that account as well. I agree with al-Azmeh that it is surprising to find jurists condoning sedition or rebellion. But it is surprising not only because of an absolutist imperative, but because the crude advocacy of rebellion or sedition is quite contrary to the tendencies of law and the role of jurists – or what I called the juristic imperative.

Despite al-Azmeh's criticisms of Gibb, Lambton, and others, he ultimately endorses the argument that Muslim jurists forbade rebellion and demanded absolute obedience to those in power. Al-Azmeh historicizes the accepted scholarly view, but he does not disagree with its basic conclusions. Aside from the argument about the absolutist imperative, I have three main criticisms of al-Azmeh's thesis, and of what I have called the accepted view in contemporary scholarship. The first criticism is terminological, the second is theoretical, and the third is theological.

First, as discussed above, the accepted view argues that Muslim jurists became quietist rather than activist. Nonetheless, the terminology of activism or quietism is extremely unhelpful, and only serves to obfuscate and obscure the role of jurists and the functions of law. It is never clear what is meant by quietism or activism, or in what sense modern commentators are using them. For example, if a jurist advocates disobedience to the law, is he being activist or lawless? If a jurist advocates passive non-compliance with what he considers to be an illegal order, is he being activist or is he advocating an individualized and subjective notion of justice? If a jurist leaves open the possibility of rebellion by arguing that one should rebel only if that is the lesser evil, is that a lawless or quietist argument? One cannot intelligibly start to answer these questions until one first defines the legal framework within which a jurist is acting. Quietism and activism are inherently relative and subjective terms, and they acquire a concrete meaning only from within a specific context.⁵²

⁵² For example, the activism of a soldier could be the use of force. The activism of a jurist could be the issuing of decisions that are unhelpful to the government.

The second criticism flows naturally from the first. The accepted view maintains that Muslim jurists had become quietist because they had accepted the legitimacy of the usurper and forbade rebelling against anyone coming to power, regardless of the means by which they acquired power. But if one argues that power could legitimately be obtained by usurpation, the necessary implication is that usurpers could be legitimate. In other words, if the act of usurpation could create political legitimacy, then the attempt to achieve this legitimacy is not necessarily reprehensible. Or, to put it differently, if those who are in power are perceived, in an ideal sense, to have an absolute moral claim to power, then those who rebel cannot be perceived to have any legitimacy. But if those who are in power are perceived to have a functional claim to power, that cannot preempt the moral claim of those who rebel against them. If, for example, a jurist claims that a usurper must, of necessity, be obeyed, the jurist is conceding a functional or practical legitimacy to the usurper. But this means that the usurper's claim to power is relative because it arises out of simple necessity. The necessary implication is that a challenger to the usurper's power may also have a relative claim to legitimacy. In other words, as a matter of logic, if one recognizes the legitimacy of usurpation, one also implicitly recognizes the functional legitimacy of rebellion. This point demonstrates the extent to which the language of quietism versus activism is unhelpful. Pursuant to the logic above, recognizing the legitimacy of a usurper could be an activist stance.

Third, besides the existence of a historical and legal imperative, there is also a theological imperative. The accepted view fails to take account of the early and late debates on early civil wars and rebellions in Islam. As discussed later, some of the most esteemed religious figures in Islam rebelled against those who were in power. ʿĀʾisha bint Abī Bakr (d. 58/678), Ṭalḥa b. ʿUbayd Allāh (d. 36/656), and al-Zubayr b. al-ʿAwwām (d. 36/656) rebelled against ʿAlī b. Abī Ṭālib (d. 40/661); al-Ḥusayn b. ʿAlī (d. 61/680) and others rebelled against the Umayyads. These rebellions created a theological imperative. Since Sunnī Muslims insisted on affirming the moral worth of all the Companions of the Prophet, if one maintains that armed rebellion against those in power is sinful, perhaps the conclusion that some of the Companions were iniquitous would be inescapable. Therefore, if one were to hold that all rebellions against unjust rulers are a sin, these theological and legal precedents either had to be explained away or distinguished. As we will see, the precedents of rebellions led by Companions played a powerful

and complex role in the discourses on rebellion. Most of the legal discourses on these precedents took place in the field of *ahkām al-bughāh*. Nevertheless, as we will see, the precedents were discussed not simply to defend the moral worth of all the Companions, but to co-opt and employ these precedents in a normative and prescriptive fashion. Of course, there are also many largely apologetic discussions on the early rebellions in theological works and in books written on *fitan*. But in contrast to these apologetic theological works, the legitimacy of a usurper or a rebel and the normative value of the early civil wars and rebellions are discussed at length in the discourses on *ahkām al-bughāh*.⁵³ It is in this field that we find that the precedents of the Companions were deployed in order to generate theological and legal imperatives on rebellion.

I am not arguing that, when it comes to understanding how Muslim jurists responded to issues of power and political authority, the only relevant discourse is that which is found in *ahkām al-bughāh*. Rather, *ahkām al-bughāh* is simply one part, yet certainly a very crucial part, of the total framework that informs our understanding of how Muslim jurists understood and dealt with issues of power and authority. As noted above, *ahkām al-bughāh* has received very limited attention in modern scholarship.⁵⁴ Some contemporary scholars have discussed or incorporated aspects of this field into their writings without being fully aware that they were dealing with a specific genre of legal discourse.⁵⁵ Some have dealt with the field as a specific discourse, but committed many technical errors or failed to

⁵³ I do not want to understate the value of these apologetic works, however. Like many legal treatments of political issues in situations of crises, legal discourses often provide a method of restoring the “psychic balance” of society. Many of the works on *fitan* written by jurists were specifically aimed at mending a serious rift in the Muslim psychology. I borrowed the phrase “psychic balance” from Christenson, *Political*, 4.

⁵⁴ Joel Kraemer has written a very helpful introduction to this and other related issues: see Kraemer, “Apostates.” Also see Abou El Fadl, “*Ahkam*,” 149–79. Khadduri, *War* has a short section (77–80) on fighting the *bāghī* and on highway robbers.

⁵⁵ Mikhail (*Politics*, 23), for example, quotes a rather typical passage from *ahkām al-bughāh* on recognizing the legal acts of usurpers, but does not otherwise draw attention to this field of law. He treats the passage as if it is unique to al-Māwardī, and concludes that the passage aims to “accommodate to the ‘Abbāsīd caliphate a variety of dissident groups” such as the Shī‘īs and Fāṭimids. Al-Sayyid (*al-Ummah*, 138–9) seems to treat the issue of recognizing the legitimacy of legal acts performed in the jurisdiction of a usurper as a fifth/eleventh-century development, and as part of the realism-based trend, as opposed to the law-based trend, in Islamic discourses. As we will see, this issue is a common part of the discourses on the *bughāh*, and is a fairly early development. Lewis (*Political*, 81–2) discusses the law of rebellion in Islam. In his *Islam*, after a short discussion on *ahkām al-bughāh*, Lewis concludes: “It is clear that what the jurists have in mind is not an attempt to overthrow the regime but merely to withdraw from it and establish an independent state within a certain territory. In a word, their concern is not with revolution, but with secession” (p. 318). I will argue that this is not accurate.

take account of the progressive development of the juristic discourse.⁵⁶ Works by contemporary Muslim lawyers have tended to explore the implications of the field as it relates to the doctrine of political crimes.⁵⁷ There have been few works on the related topics of terrorism and political dissent in Islamic law. But these works do not get beyond unhelpful polemics and are seriously handicapped by an inability to use original sources.⁵⁸

As discussed later, *aḥkām al-bughāh* has rather clear implications for contemporary discourses on political dissent and terrorism. In fact, perhaps no intelligible discussion can take place on these issues without incorporating *aḥkām al-bughāh* into the analysis. Yet one must be careful not to confuse the views and debates of professional Muslim jurists with some grand metaphysical reality called Islam. Many contemporary works tend to equate the institutionalized views of jurists with the greater reality of Islam. Besides being essentialist, these works do not make methodological sense. The juridical discourses are only a part of the reality of Islam. Furthermore, these discourses reflect the institutional, ideological, and sociological role of the jurists, and are very much a product of their specific historical contexts.

Muslim jurists responded to a variety of historical and sociological contexts and demands. In the field of rebellion, Muslim jurists also responded to theological demands, e.g. how does one declare rebellion to be a crime without suggesting that some of the most esteemed Companions of the Prophet were criminals? Significantly, however, they also worked within an inherited legal culture that imposed its own logic and language. Muslim jurists literally invented the field of *aḥkām al-bughāh* by reconstructing and emphasizing certain theological precedents and

⁵⁶ Hamidullah, *Muslim*, 178–87; his treatment is generally accurate but he confuses Ḥanafī doctrines with the doctrines of other schools. Furthermore, he does not discuss the progressive development of the law; Mohammad Kamali (*Freedom*, 183–206) discusses the topic at length, but his treatment is full of inconsistencies and inaccuracies. For example, he confuses the legal doctrine of giving permission to fight the rebels with a legal rule decreeing the death sentence for an act of rebellion. He assumes that because it is legally permissible to fight the rebels, then it also means that they may be executed: see esp. 198. Bahnāsī (*Madkhal*, 95) makes the same error.

⁵⁷ See Abū al-Faḍl, “Jarīma,” 69; Sanad, *Nazariyyāt*, “‘Udah, *al-Tashrīc*,” 1:100–9, 11:671–705. Abū Zahra (*al-Jarīma*, 148–9) deals with political crimes under the topic of *ḥirāba*. See, on contemporary treatments, Abou El Fadl, “Political Crime.” Al-Jamīlī, in his two-volume work on the subject, *Aḥkām*, does not get beyond mass reproduction of long quotes from original sources.

⁵⁸ For example, see Schwartz, “International”; Arzt, “Heroes.” A few studies have been done on the related topic of apostasy in Islamic law. Peters and De Vries, “Apostasy” is a solid study. Zwemer, *Law*, and Bercher, “L’apostasie,” are religiously motivated and not very helpful.

deemphasizing others.⁵⁹ Muslim jurists invented the field for both theological and political reasons. Once the corporate identity of the jurists developed and a body of precedents and legal discourses were firmly established, Muslim jurists labored under what might be termed a legal imperative, or the logic of law. By corporate identity, I mean a social body unified by a common linguistic practice, a sense of hierarchy, and a basic frame of reference; and vested in a shared set of symbolism signifying legitimacy. A corporate identity does not mean the sharing of exactly the same set of interests, but it does mean the sharing of a common sense of conditions for legitimacy, purpose, and destiny. Jurists as a corporate entity come to speak a common language and employ a shared set of symbolism signifying meaning and purpose. Corporate entities will produce indicators of status and value, and will often produce a jargon or technical language that becomes the symbol of inclusion and personal legitimacy. The jargon or technical language and the way it is deployed and developed is what I have called the linguistic practice of jurists. This linguistic practice is founded on a language of specialization, and it is the perception of specialization that plays an important role in the ability of the legal culture to authenticate and legitimate the acts of others.⁶⁰ In order for a researcher to understand what a juristic culture is doing, the researcher needs to analyze carefully the technicalities of the jargon and communication of that culture. By carefully scrutinizing this linguistic practice, we will discover that Muslim jurists generated an exceedingly subtle and sophisticated discourse on rebellion. Essentially, like all good legal minds, Muslim jurists affirmed a general legal principle: those in power must be obeyed. But they went on to riddle the field with qualifications, exceptions, and provisos so as to render the general principles quite complicated,⁶¹ and to elicit the classic legal response to many legal issues – “It depends.”

⁵⁹ The issue of whether Muslim jurists invented the precedents, as opposed to picking and choosing from a variety of circulating precedents in order to invent a field of law, is entirely uninteresting. The type of reconstructive or revisionist work that Schacht and others have done and do with Islamic law is not consistent with the way law develops. See Schacht, *Origins*; Calder, *Studies*. For a technical critique of Schacht, see al-Azami, *On Schacht's*. Rahman, *Islamic*, Hasan, *Early*, and Dutton, *Origins*, outline a more convincing methodology than that which is employed by Schacht and Calder. It is certainly true that jurists are painfully dependent on precedent and authority. However, while they may reorganize, and selectively emphasize and deemphasize certain precedents over others, they do not usually invent them.

⁶⁰ See Kirchheimer, *Political*, 13.

⁶¹ Interestingly, Bernard Lewis seems to see this process in the reverse. He states, “In time, the duty of disobedience was hedged around with restrictions and qualifications and was in effect forgotten in the general acceptance, in theory as well as in practice, of the most complete quietism” (Lewis, *Islam*, 314).

Before turning to *ahkām al-bughāh*, I will address the issue of the function of law. As discussed above, an analysis of juristic discourses on rebellion or insurrection cannot be performed without first making explicit the assumptions about law and legal culture that inform the analysis. Furthermore, this discussion is crucial for establishing our understanding of the legal context in which Muslim jurists constructed their discourses. In fact, it is not possible to evaluate properly the juristic discourses on rebellion without gaining an appreciation for the legal logic and paradigms that direct the determinations of jurists. In addition, as alluded to earlier, analyzing the issue of juristic quietism and activism is incomprehensible unless we take account of the specific nature of juristic cultures.

THE FUNCTION OF LAW AND THE ROLE OF JURISTS

One of the basic and most essential functions of law is to resolve conflicts and maintain order. Perpetuation of order is in the nature of law. The very idea of law is about defining privileges, rights, or limits, and resolving disputes or competing claims to an asserted privilege or limit by the imposition of order.⁶² Law could have various goals or aspirations, and the dynamics of law could reflect a variety of values and processes. It could aspire to achieve justice or channel social behavior, or serve certain economic classes or interests.⁶³ But this does not necessarily negate the idea that law aspires to resolve conflicts and uphold stability and order. Of course, there have been innumerable theories dealing with the nature and function of law arising from rationalist and empiricist epistemologies. Such theories have relied on a wealth of moral, historical, and social insights.⁶⁴ For example, Lon Fuller has argued that law is purposive human activity because it relies on the collaborative articulation of

⁶² Watson, *Nature*, 41. Watson, however, goes on to argue that the essential feature of law is the existence of a *process*. The essential function of the process is to resolve actual or potential disputes with the specific object of inhibiting further unregulated conflict. Hence, it is the process that distinguishes law from simple aspirations or rules. According to Watson, law is about a process; the process is about resolving conflict and establishing order (*ibid.*, 40). For our purposes, we need not reach the issue of process or the essential function of such a process. However, my point is more simple; achieving and maintaining order and stability is one of the main functions of law. Friedrich (*Philosophy*, 206–14) argues that justice and order are co-dependent; one cannot be realized without the other. But this is a normative argument. The point of this argument is that order should not be put before justice because ultimately order itself is threatened by the lack of justice. This is probably true, but it is difficult to imagine a law, unless it is a moral law, that consists of justice but not order.

⁶³ See Watson, *Nature*, 9.

⁶⁴ See generally, Murphy and Coleman, *Philosophy*; Kelly, *Short*, 301–454.

shared purposes. Law, according to Fuller, has an inner morality which relies on what he calls the principles of procedural natural law.⁶⁵ John Finnis, on the other hand, has argued that reasonable laws must serve “basic human goods” such as life, health, knowledge, and sociability. Unreasonable laws violate basic human goods in either individual or social life by contravening what Finnis calls “modes of responsibility.”⁶⁶ Some jurists from the positivist tradition advocated the rather simplistic notion that the purpose of law is to maximize the public good⁶⁷ or that law is the command of the sovereign backed by the threat of sanction.⁶⁸ Furthermore, several theorists, relying on sociological

⁶⁵ Fuller, *Morality*. Fuller’s principles are: (1) generality; (2) promulgation; (3) prospective legal operation; (4) intelligibility and clarity; (5) avoidance of contradictions; (6) avoidance of impossible demands; (7) constancy in time; and (8) congruence between official action and declared rules. Also, from the natural law tradition, Philip Selznick argues that law relies on the principle of legality which is contrary to arbitrariness. The aim of a legal system is to reduce such arbitrariness which of necessity exists in positive law. Scientific inquiry about the proper ends and values can produce a scientific, but not necessarily eternal, natural law. See Selznick, *Moral*; Selznick and Nonet, *Law and Society*; Selznick, Nonet, and Vollmer, *Law, Society*. Morris Raphael Cohen, another author from the natural law tradition, argues that law expounds rules that serve as norms. Such norms command obedience and control conduct. They must be studied as normative jurisprudence, and normative jurisprudence depends on ethics. See Cohen, *Law*; Cohen, *Reason*; Cohen, *Faith*. On classical natural law theory, see d’Entreves, *Natural*. Heinrich A. Rommen wrote a very interesting, and rather unusual, history of positivism and natural law. He strongly attacked the historical and philosophical role of positivism. Rommen argued that law performs many functions such as teaching civic values, rendering justice, preserving order, and promoting social harmony. Law is a peremptory command which excludes certain options from the realm of individual choice. However, law does not consist merely of facts induced by force, but also by principles of obligation, discoverable by experience and reason. See Rommen, *Natural*.

⁶⁶ Finnis argues that the first principle of natural morality is the principle that one ought to choose, and to will those, and only those, possibilities whose willing is compatible with integral human fulfillment. In other words, one ought not to will those possibilities that are incompatible with integral human fulfillment. This abstract first principle is given content through intermediate principles (modes of responsibility). Examples of intermediate principles are: (1) do unto others as you would have done unto you; (2) that one should not answer injury with injury, even when one could do so fairly; or (3) that one should not commit evil in the hope of achieving good. A law that contravenes these intermediate principles would be unreasonable. See Finnis, *Natural*; also see Finnis, Boyle, and Grisez, *Nuclear*.

⁶⁷ Bentham, *Limits*; Bentham, *Laws*.

⁶⁸ John Austin, relying on the idea of the pedigree of law, argues that law is a command from the sovereign that obliges a person to act because of the threat of sanction. Austin also argues that law is habitually obeyed. See Austin, *Lectures*; Austin, *Province*. From a different philosophical basis, Hans Kelsen argues that law is a normative science, consisting of a hierarchy of norms backed up by the threat of a sanction. Each norm derives from a superior norm until one reaches the *Grundnorm*. The *Grundnorm* is the initial hypothesis of the law which is not derived from a higher norm. See Kelsen, *Pure*. In a much more sophisticated positivist theory, H. L. A. Hart challenges Austin’s theory of the sovereign. Hart argues that law consists of primary and secondary rules. Primary rules are duties without a system of priority or application. Secondary rules cure the inconsistencies of primary rules and consist of rules of recognition, rules of change, and rules of adjudication. See Hart, *Concept*.

perspectives, focused on the social dynamics of law. For example, Roscoe Pound argued that law is the product of the conflict and balancing of interests in society. The essential task of law, Pound argued, is social engineering in order to achieve particular social results.⁶⁹ Several theoretical approaches, most notably from within the movement of American realism, focused on the process by which law resolves controversies and conflicts, and thus tended to understand law as a means to social ends.⁷⁰

None of the theories mentioned above is necessarily inconsistent with the idea that one of the essential functions of law is to resolve conflict and impose order. For one, none of the roles mentioned above is reachable without the imposition and perpetuation of a system of order.⁷¹ Second, as Alan Watson recognizes, this is a minimalist argument: the minimum function of law is the resolution of conflict and the maintenance of order.⁷² This minimum function could then be utilized to achieve justice or channel behavior or any other alternative. However, unlike Watson, I am not arguing that the resolution of conflict and the establishment of order is always and invariably the function of law. Law could and does have many direct functions that vary in response to social and institutional dynamics. Furthermore, as argued later, often the role of law is symbolic; in other words it can communicate values and

⁶⁹ Pound, *Social*; Pound, *Introduction*, 47. Pound argues that the process of law engages in a “fiction of interpretation in order to maintain the general security,” *Introduction*, 49. Pound’s point is that the legal process does not simply and mechanically apply fixed rules to human conduct, but engages in a creative and complex process of social engineering. Other sociological perspectives include Rudolph Von Jhering, Eugen Ehrlich, Leon Duguit, and others. Von Jhering argues that law depends on coercion, norms, and purpose, and is the product of social life as supported by the power of the state. The purpose of law is to secure the conditions for social life. On Von Jhering, see Kelly, *Short*, 332–3. Ehrlich argues that law is produced by social facts or forces operating in society which exist in the conviction of people. The source of most norms is society, and not the state. The center of gravity of legal development is society, and not legislation or courts: see Ehrlich, *Fundamental*. Leon Duguit, claiming to rely on a scientific positivist method, argues that law is produced by objective conditions of social solidarity, and that the function of law is to promote social solidarity. On Duguit, see Kelly, *Short*, 355–6. For other authors who argue that law is the product of binding social facts or that law is determined by social welfare, see Ross, *Law*. On Alf Ross, Vilhelm Lundstedt, and Karl Olivecrona, see Kelly, *Short*, 369–71.

⁷⁰ Gray, *Nature*; Llewellyn, *Bramble*; Llewellyn, *Common*; Frank, *Law*.

⁷¹ For instance, John Finnis argues that law is a necessary condition of morality because basic human goods cannot be realized without coordinating between many people. Finnis contends that law is necessary to deal with what he calls “co-ordination problems.” See Finnis, *Natural*. Whether or not one adopts Finnis’s specific categories, I would argue that most lawyers would tend to believe that coordination, conflict resolution, or order is necessary for any substantive vision of justice. Notice, for example, the solemnity, decorum, and order imposed in contemporary courts of law. The assumption is that the imposition of these structures is necessary for the administration of justice.

⁷² Watson, *Nature*, 8.

legitimate power structures or social practices.⁷³ I am also not arguing that the juridical resolution of conflicts is objective or devoid of social or political values. In fact, the simple fact that legal systems can maintain the appearance of impartiality and objectivity plays a powerful stabilizing role in legitimating and authenticating traditional power structures.⁷⁴ My argument is that the values of order, stability, and conflict resolution are strongly ingrained in a legal culture. A legal system does not easily endorse a state of anarchy or the potential for instability. In response to intense social or political demands, a legal system might legitimate a certain degree of instability or disorder. But even in doing so, the legal system affirms its own legitimacy, and the legitimacy of the ultimate value of legality, order, and stability.⁷⁵ Ultimately, the tendency of a juridical culture to favor order and stability is consistent with the pursuit of particular norms and goals. In essence, it is exactly because law performs social and political functions that it needs to affirm the norms of order and stability.

Even if, as is the case with Islamic law, the law aspires to fulfill divine commands, this merely serves to complicate the analysis, but it does not materially alter it. If the law aspires to fulfill a divine command, this means that the imperative of temporal order might, at times, be challenged because of an imagined or perceived divine order. But, as a general matter, divine law does not dictate anarchy. In fact, divine law seeks to resolve conflicts and maintain order, but it does so pursuant to a particular frame of reference and hierarchy of commands. Perhaps divine law sanctifies the demand for justice, but it does not negate the need for order as a necessary condition of legality. Jurists, even if working

⁷³ See Abel, "Redirecting," 803, 817–26. McCormick (*Legal*, 233–9), concedes that law does embody values and that these values are expressed in the statements of the principles of a legal system.

⁷⁴ For instance, see Kirchheimer, *Political*, 6. Legal determinations often rely on the appearance of impartiality – the appearance of rendering “a decision not merely serving the needs and pressures of the moment, but capable of finding a wider and less transient adherence; a skillfully rationalized decision able to withstand a dispassionate scrutiny of its motivations” (ibid., 424).

⁷⁵ For instance, over certain hotly contested issues, courts might recognize a limited right to civil disobedience, or confronted by widespread rioting, courts might hand down lenient sentences. Furthermore, a government, under certain circumstances, might grant clemency to political foes. See ibid., 389–418. Nonetheless, as Kirchheimer demonstrates, systems of justice are thoroughly challenged by political cases. Often a legal system deviates from its asserted normative values and regular procedures when confronted by a political case in which there is political or social pressure, or perceived pressure. Courts will often succumb to such pressures by producing swift convictions and imposing harsh penalties, but in doing so, they also threaten to undermine the appearance of impartiality and their own legitimacy. See ibid., 46–172, 419–31.

under a so-called “religious system of law,” will be concerned with issues of order, conflict resolution, and stability. They may demand that this order be just, or that it would comply with the divine command, but they can hardly be expected to advocate lawlessness or anarchy.

Muslim jurists frequently repeat the formula that a ruler succeeds the Prophet in guarding the religion and regulating the affairs of this world (*ḥirāsāt al-dīn wa siyāsāt al-dunyā*).⁷⁶ *Dīn* (religion) and *dunyā* (temporal worldly affairs) are not necessarily in conflict or inconsistent with each other. The *imām* is charged with the implementation of the *Sharīʿa*, and the *Sharīʿa* guards both the temporal and the non-temporal. In this context, most Muslim jurists contend that the very purpose and function of the *Sharīʿa* is to fulfill the interests and welfare of the people in worldly life and the Hereafter (*taḥqīq maṣāliḥ al-ʿibād fī al-maʿāsh wa al-maʿād*). They usually go on to elaborate that the values that the *Sharīʿa* aims to safeguard are divided into what are regarded as necessities (*darūriyyāt*), needs (*ḥājjiyyāt*), and luxuries (*taḥsīniyyāt*, also referred to as *kamāliyyāt*). All *Sharīʿa* laws are aimed, or ought to be aimed, at fulfilling these values in order of importance – first, the necessities, then the needs, and then the luxuries. The five core or necessary values of *Sharīʿa*, according to the jurists, are the preservation and protection of religion, life, lineage, property, and intellect (some also add honor). From a normative perspective, any system implementing Islamic law is obligated to pursue and serve those values.⁷⁷ The question becomes: Do these values take precedence over any other value, including order and stability? Do these values set the standard for legality so that if they are not being fulfilled there is no justification for being concerned with order and stability? Not surprisingly, Muslim jurists argue that order and stability are primary functional values, without which it would not be possible to fulfill any other value. From a pragmatic and functional perspective, order and stability and the avoidance of *fitan* (disorder and turbulent social and political circumstances) are prerequisites for the pursuit of higher moral values. Consequently, when Muslim jurists specify the duties and functions of the *imām*, they first list the duty of protecting the orthodox religion. The second and third duties are concerned with preserving order and resolving conflict. The second duty is to implement

⁷⁶ See, for example, al-Māwardī, *al-Aḥkām*, 5; Ibn Jamāʿa, *Tahrīr*, 48; al-Mālaqī, *al-Shuḥub*, 56.

⁷⁷ Al-ʿAmīdī, *al-Iḥkām*, III:270–3; al-Ghazālī, *al-Mustaṣfā*, I:286–90; Ibn Qayyim al-Jawziyya, *Aʿlām* (Cairo), III:5; al-Qarāfī, *Sharḥ*, 391–3; al-Rāzī, *al-Maḥṣūl* V:172–4; al-Shāṭibī, *al-Muwāfaqāt*, II:4–9; al-Maḥmaṣānī, *Falsafat*, 199–200; Abū Zahra, *Uṣūl*, 289–301.