

## **Hallaq's Challenge: Can the Shari'ah Save Us from Modernity?**

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### **Abstract**

Wael Hallaq, a leading western scholar of Islamic law, throws down the gauntlet in this daring book, challenging not only Orientalist distortions of Islam but also turning the tables on modernity, the ubiquitous and ineluctable paradigm that informs nearly all thinking, Muslim and non-Muslim, about the Shari'ah. An Islamic state is impossible, Hallaq contends, not because the Shari'ah is undesirable, but because the modern state is inherently contradictory to Islam's metaphysics as well as its historical manifestation as the Shari'ah. Today's economic and environmental cataclysms make it urgent, he insists, to recover the moral universe of the Shari'ah and to do so in conversation with other erstwhile and growing western critiques of modernity.

As a leading western scholar of Islamic law in the West, Wael Hallaq hardly needs introduction. Anyone studying Islamic law and history in the West in the last two decades would have had to have read his seminal articles and books on the origins, development, and principles of Islamic law. More recently, his surveys of the Shari'ah have become the most influential textbooks on the subject. These works have a scholarly focus with impeccable research that have,

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piece by piece, contributed to the taking apart of many of the key assumptions of the older western scholarship of Islamic law that had held sway for well over a century. Hallaq's *The Impossible State: Islam, Politics, and Modernity's Moral Predicament* (New York: Columbia University Press, 2012) is of a different character. It is an important, bold, and courageous intervention that stands out not just in the contemporary debates on the Shari'ah in the West and the Muslim world, but in all modern writing about the subject.

A word about the approach taken in this review is in order. That book reviews tend to say far more about the reviewer than the book at hand is a common refrain in academic circles. The present essay is a modest attempt to do otherwise; rather than finding pet flaws, elaborating on favorite themes, or even articulating a full critique, it attempts to simply reconstruct, as concisely and coherently as possible, the author's arguments in a way that enables the readers to formulate their own views while seeing the worth of engaging with the book itself. This approach is appropriate especially for the book at hand, for its sweeping and controversial thesis, its magisterial scope, and its doubtless pertinence to the modern predicament are bound to provoke abundant debate.

That the Shari'ah is incompatible with modernity is taken for granted by all, except for some Muslim reformists and Islamists. But the rationale Hallaq offers for this incompatibility turns all western as well as Muslim modernist wisdom on its head: It is not because the Shari'ah is outdated, obscurantist, irrational, or lacking in relevance, but because modernity and its cornerstone, the nation-state, are fundamentally morally flawed and at odds with the inescapably moral paradigm of the Shari'ah. The assumption Hallaq sets out to overturn is best stated by him thus:

Modern Islamist discourses assume the modern state to be a neutral tool of governance, one that can be harnessed to perform certain functions according to the choices and dictates of its leaders. When not used for oppression, the machinery of state governance can be turned by leaders into a representative of the people's will, determining thereby what the state will become: a liberal democracy, a socialist regime, or an Islamic state implementing the values and ideals enshrined in the Qur'an and those that the Prophet had once realized in his "mini-state" of Medina. (p. 155)

Hallaq contends that this premise, which remains emphatically the Islamist as well as the liberal reformist position, ensconced, for instance, in Muslim Brothers' official documents, is categorically false. In reality, the modern state is far from being a neutral instrument, for it contradicts the letter and

spirit, the form and essence, and the doctrine and history of Islam. The modern state is “an anthropocentric entity ... that possesses a metaphysic that resides within its own boundaries as sovereign will,” whereas an Islamic government “cannot permit any sovereignty or sovereign will other than that of God” (p. 157). No wonder, in his view, that modern Muslims’ attempts to recover the Shari‘ah via their various modernizing and reformist projects have met with such complete and unqualified failure (p. 2).

The poignancy of this claim has to be seen against Hallaq’s view of the Shari‘ah as indispensable to living a meaningful Islamic life:

[T]here can be no Islam nor any specifically Islamic moral-legal culture outside of history, for it is history and its forces and circumstances that gave rise to this legal-moral identity. To be a Muslim individual today is to be, in fundamental ways, connected with that Shari‘a-defined ethic, for it is this ethic that shaped what Islam is and has been. ... the formation of Muslim identity means the paramountcy of Shari‘a as the ruling ethic of human behavior. *There is no Muslim identity without this ethic.* (p. 70, emphasis in the original)

Modernity, as product of Europe and its particular historical struggles alone, is, on balance, a nefarious and tragic project. The improvement of the biological condition and the overcoming of natural limits have been more than offset by man-made problems that are of a much larger scale, among them the destruction of the organic, familial social structure that has always formed the backbone of all civilized human life, and certainly of Islam. This is not accidental, but rather a consequence, indeed in some ways a prerequisite, of modernity in its political and social forms. Drawing on the authority of a number of leading western scientists, philosophers, economists, political scientists, and other scholars, he insists that “The Modern Project” has been an irreversible disaster for the natural world. The reason he offers for this apocalypse sets him apart from others: The responsibility lies ineluctably with modernity’s relegation of the moral imperative to a secondary status – divorced from economy, law, and science – rather than any later or accidental development.

In substantiating this claim, he draws on the leading western critics of the various aspects modernity, such as Charles Taylor, Alasdair MacIntyre, Charles Larmore, Michel Foucault, Carl Schmitt, Paul Kahn, and Pierre Bourdieu among others. Indeed, he contends, Islamic societies give historical substance to the communitarianism that theorists like MacIntyre, Taylor, and Walzer only envision, but have nothing in the western present or past to point to as its actualization. In contrast, it was a lived reality for Muslims; for over

a thousand years the Shari‘ah ruled and reigned over Muslim societies, which constituted a highly complex, developed, civilization comprising a dynamic network of societies that boasted a far more successful and stable form of the “rule of law,” separation of powers, minimal government, and communal thriving than the modern West. “On the whole, and despite the inescapable cruelties of human life and its miseries ... Muslims, comparatively speaking, lived for over a millennium in a far more egalitarian and merciful system” (p. 110).

The first chapter elucidates the thesis and its premises by elaborating on what is meant by the demise of the Shari‘ah in the modern world and what specifically is modern and distinct about the state. The Shari‘ah, once the governing paradigm of the Islamic world, possessed its own hermeneutics, courts, education system, discursive practices, and sociology of knowledge, all of which were nearly decimated by colonialism. While “institutionally defunct” the Shari‘ah has survived, or has been resurrected, in its “psychologically and spiritually latent” dimensions, its memory as a moral resource, and, most importantly, in the form of “the pillars of Islam” and their overpowering, overlapping, and aggregate effects.

Hallaq’s thesis has more than a timid prescriptive note. To draw on these dimensions, “to find a moral space for the Muslim subject in the modern world, a subject who has grown no less disenchanted by modernity than his or her Western counterpart” is “a moral project of the first order.” It is a project that is, far from being nostalgic or anti-modern, both modern and post-modern. Such a project is urgently needed as a way to address “the environmental, social, and psychological-spiritual problems that modernity has created” – a project that will be charged as being nostalgic precisely by those who are unable or unwilling to identify and critique modernity and its pathologies – even if they are appalled by some of its symptoms or consequences, at the heart of which lies the singularly, absolutely, and crucially modern doctrine of progress (pp. 13-14). In other words, such thinkers fail to critique modernity because of their belief, created and incessantly replenished by modern biases and flawed, self-serving view of history and tradition, that no matter how dismal, modernity is still better than all that preceded it. It is this dogma of the religion of modernity that Hallaq seeks to unsettle.

A key theoretical issue for Hallaq is to justify his big “civilization talk,” to be able to assert the temporal and spatial unity of modernity and an “Islamic world” for a millennium, and the rupture of the unity of the Islamic world in the wake of western colonialism – without being accused of an essential-

ism that has been associated with Orientalism and the “clash of civilizations” thesis. For this purpose, he draws on the notion of “paradigms” (Kuhnian) or “central domain” (Schmittian) to identify large civilizational units. In order to account for anomalies, he insists that rather than speaking of “modernities” and “islams” and thus denying large-scale historical formations, shared beliefs, and their effects, it is more meaningful to speak of “paradigms” and “exceptions.”

Another theoretical objection Hallaq wishes to preempt is the refusal to see the modern state as distinct from its premodern counterpart, or as a stable object rather than an ever-fluid set of contingent institutions, policies, and histories. Without denying the state’s historical development and possible future withering away, by drawing on the notion of “form-property” Hallaq wishes to assert for the modern state a historical rather than a universal essence. The modern state is said to have the following such properties: (1) Its European origin, constitution, and birth conditions; (2) its notion of sovereignty and a unique metaphysics; (3) its complete monopoly over law and violence; (4) its bureaucratic mode of operation; and (5) its cultural hegemonic intervention in the social order in order to create particular kinds of citizens who are sufficiently infused with nationalism and willing to sacrifice their lives for its cause. Capitalism, although essential to the rise of the nation-state up until the Bolshevik Revolution, is no longer a form-property.

Hallaq devotes the next chapter to comparing the modern state with the Shari‘ah, with respect to the five aforementioned form-properties, and contends that the two are fundamentally incompatible. The most crucial element is metaphysics: given that the modern state is uniquely impersonal in character, this abstractness of its character being essential to its legitimacy and sovereignty, it cannot be evaluated merely “as an empirical set of differentiated institutions,” but rather must be examined “as an ideological structure.” The key concept is sovereignty, which is the notion that “the nation *embodying* the state is the sole author of its own will and destiny” (p. 25; emphasis in the original). The modern state emerged in its European context in the context of triumph against some tyranny, as in the American and French revolutions, and the fiction of the collective will being the master of its own collective destiny is absolutely essential to it. Note that the notion of the state’s embodiment of its people and its exclusive sovereignty over them and over its territory is not diminished, regardless of whether its political system is representative. Although Hallaq does not make this connection explicit, the idea of an impersonal state as representing, or embodying, all its subjects can be best explained

if we turn to medieval Christian history, where the seeds of the European ideals of the state really lay. Michael Wilks notes:

The identification of the ruler with the society in whose name he acts is one of the most influential conceptions in the history of political thought, and is the basis of the modern theory that the government or its head represents “the State” – an idea which is still liable to be surrounded with an aura of mysticism in more totalitarian regimes. This is however nothing more than the secularised offspring of the thoroughly Christian belief that the ruler must be equated with the whole congregation of the faithful, both having a common identity in the mystical personality of Christ. This theory is indeed ultimately unexplainable without a clear understanding of its central principle, namely, that the ruler is the human form of God. [*The Problem of Sovereignty in the Later Middle Ages: The Papal Monarchy with Augustinus Triumphus and the Publicists* (Cambridge, UK: Cambridge University Press, 1963), 41.]

Wilks' conclusion echoes Carl Schmitt's well-known contention that “all significant concepts of the modern state are secularized theological concepts” – a contention that underpins Hallaq's insistence that the modern state is a metaphysical, theologically laden being, rather than a neutral set of administrative institutions (p. 28). Drawing on Schmittian critics of modern politics, Hallaq emphasizes that the modern state is not an end among others, rather, “it is that end for which all others can be sacrificed.” To be its citizen is “to live with and under yet another god, one who can claim the believers' lives” (p. 28). The characteristic way in which the state manifests its sovereign will is law; all law is either created or at least sanctioned by the state – even if that law has religious justification, “it is the state that ratifies divine will, not the other way round.”

Another essential form-property of the modern state is its rational bureaucratic apparatus by which it controls all aspects of its citizens' lives, from cradle to grave. This apparatus develops its own interests, community, and genesis in the will of the state and development by its own logic, both of which put it in conflict with tradition or religious decree. Another aspect of the modern state is its cultural penetration of the societies over which it rules. To create obedient citizens, it harnesses education, and the rhetoric of nationalism creates patriotic citizens whose morality, memories, and desires reflect the designs of the state elite. A modern state cannot be complete without such penetration, which is why Third World states are seen by some scholars as states in name only, as they have been unable to penetrate, break down, and reshape such local forms of solidarity, such as tribalism. In Bourdieu's words,

the cultural domains are “constituted as such by the actions of the state which, by instituting them both in things and in minds, confers upon the cultural arbitrary all the appearances of the natural” (p. 35).

The third chapter comprises a provocative juxtaposition of the rule of law and the separation of powers in western liberal democracies, particularly the United States, and historical Islamic societies. It perhaps most directly challenges the views that are commonly held, most ardently by Muslim modernists, about what Muslims need to learn from the West. The doctrine of separation, Hallaq contends, has been compromised both in the United States and Europe and does not meet the standards of Islamic theory or practice of this separation (p. 38). Drawing on increasingly numerous American constitutional scholars of the state of separation of powers who complain not merely of deficiencies but of irreparable flaws in the system, Hallaq describes the millennium-long history of Islamic societies as a far more stable and successful instance of the separation of powers such that the authority of the ruler was fundamentally held in check by a system in which the rulers themselves believed. “[T]he Community, the common social world, *organically* produced its own legal experts, persons who were qualified to fulfill a variety of legal functions that, in totality, made up the Islamic legal system” (p. 52; emphasis in the original).

Hallaq is at his best in pointing out the functioning of this system:

The *qāḍī*, like the *mufīī*, was a member of the community he served. He was trained by his fellow mufti-cum-law-professors and belonged to the guild of ulama, the scholarly religious “class” that emerged from the midst of the ordinary social ranks. Islamic law itself insists that a *qāḍī*, to qualify for the position, had to be trained in Sharī‘a and to be intimately familiar with the local customs and ways of life in the community in which he served. With the help of his staff, he was in charge of supervising much in the life of the community. (p. 57)

That it was not the reason of the state but rather the will of the local community and its other-worldly concerns that had the upper hand in Islamic societies can be judged from the fact that charitable endowments constituted between 40 and 50 percent of all real property in the great majority of Muslim lands.

The pluralism of Islamic law, both the multiplicity of valid opinions within the law and its principle of accommodation of other, non-Muslim, communities who could live by their own laws and customs, furnished it with tremendously flexibility and adaptability, as it governed “drastically varied societies and regions, from Morocco to the Malay Archipelago and from Transoxiana

to Somalia.” Internal pluralism further allowed substantive law to undergo piecemeal change throughout the centuries, thereby accommodating new developments in social and economic life. Finally, it reflected

the endless varieties of societal interests and concerns ... overwhelmingly in the interest of the population, this “popular” representation was both legal and political, for its legally expressed will was also politically binding on the ruler in his dealings with the civil population. And it was this law that the Muslim judges applied, a law that was not the product of a state or a few distinguished jurists but of hundreds of socially anchored specialists who flourished across time in culturally disparate regions. (p. 59)

“In sum,” he concludes, “the supremacy of the Shari‘a meant a rule of law that stood superior to its modern counterpart” (p. 70). Indeed, John Rawls’ description of a well-ordered society as one held together by accessible, understandable, and shared standards of justice, which he recognized have never fit a modern western society, in Hallaq’s view, realistically describes historical Islamic societies (p. 73).

Politics was minimal to non-existent, as the rulers were merely

the executive, [] a hired class that was under the obligation to fulfill certain functions. This class consisted of a dynastic ruler (typically supported by slave-soldiers who, like those who brought them, were not original inhabitants of Muslim lands) who mainly executed the Shari‘a ordinances and generally complied with its order and wishes in exchange for a rent that he levied on the populace. The rent essentially took the form of taxes, which often exceeded Shari‘a-stipulated rates, universally acknowledged to be extraordinarily low, especially by modern standards. (p. 62)

Islamic tradition had, Hallaq further argues suggestively, no term for “state”: the modern translation, “*dawla*” in fact meant “dynasty” – more strictly, “turn” – as in, the turn of one family of rulers to enjoy power that will, inevitably, pass, and pass without many civilian tears or blood being shed in its wake. This state of affairs was the exact opposite of the modern state: it was this network of Muslim societies, intellectually and commercially thriving that persisted, and on it sat, rather lightly, an ever-changing tapestry of ruling families and mercenaries who more or less played by the society’s rules; it was law, divinely given and socially interpreted, rather than politics and power, that governed this civilization. In Hallaq’s evocative metaphor:

[*Dawla*] is a means to an end. Just as one hires a housekeeper to maintain a home according to certain standards, so did the *dawla* and its somewhat



mercenary sultan function to uphold the Shar‘ī social world on the Community’s behalf. And just as the housekeeper is replaceable, so is the *dawla*. (p. 63)

The fourth chapter elucidates the theoretical gist of Hallaq’s critique of modernity, namely, the separation of “is” from “ought” – which gives birth to the modern domain of the “legal” as distinct from the “moral,” and the “political,” the domain of the power of the sovereign, both of which, he contends, are not only absent in Islamic tradition but are actually contrary to it. “Islamic governance, significantly defined by Shar‘ī values, fashions a drastically different identity of its subject, one that does not know the political and therefore the political meaning of sacrifice.” Hallaq builds on Carl Schmitt’s notion of the political as elucidated by Yale legal scholar Paul Kahn, who has argued that to demand sacrifice of its citizens is an essential feature of the modern state. Hallaq deems such demand for sacrifice entirely absent in the Islamic tradition, where sacrifice was “a moral duty imposed exclusively in the context of self-defense and unfettered by stern conscription laws,” and, moreover, when it was offered “it did not derive its meaning from a love for the nation or even for the Community as the site of the political but rather from a moral meaning” (p. 96).

Hallaq’s claims concerning the political are likely to draw critical attention; however, a simplistic judgment based on his statement that in the Shari‘ah one “does not know the political” should be avoided. This appears to apply only to the political as defined by the modern state in the Schmittian sense of the state as a theological entity demanding sacrifice. Hallaq concedes the possibility of *siyāsa*-style politics, which, his later elaboration suggests, comprises the executive authority to implement the judgments and imperatives of a genuinely independent legislative discourse of the community and also enjoys limited administrative freedom, and is compatible with the moral citizenship that is quite different from modern sacrificial patriotism (pp. 139-40).

The fifth chapter turns to a comparison of modern subjectivity and Islamic worship and spirituality, which he calls “moral technologies of the self.” The Shari‘ah, whose translation as “Islamic law” Hallaq only grudgingly accepts (see his critique of this misleading translation in his *Sharī‘a* [2009]), makes no distinction between the legal and the moral, and thus its mundane commandments (such as to support one’s family, avoid usury, etc.) are infused with moral and spiritual concerns. But the heart of the Shari‘ah is the battery of acts of worship and their aggregate attitude that promoted a “mild asceticism.” The Shari‘ah was therefore “not only about law, morality, and their or-

ganic confluence,” but also “a mystical perception of the world, a perception deeply anchored in a society – represented by a class of mystics-cum-jurists – that did not distinguish, in the practice of living, between the meanings of the legal, the moral, and the mystical” (pp. 137-38).

The sixth chapter argues that the new phase of globalization and its impact on the state will likely thwart any burgeoning example of meaningfully Islamic government. While states are likely to transform, Hallaq argues that the change, as capitalist considerations increasingly shape political considerations, is driving the state of affairs even farther from the Islamic moral universe. Islam’s own economic imperatives form a crucial part of its normative framework, which is directly at odds with the modern economy: “Just as liberal economics dominating the world today are defined by a set of principles that distinguish them from other economic orientations – such as socialism – so is the Islamic system of economics,” which is “not political, but Sharī‘i in nature” and “rests on what might be called a moral economy” that “emerged with the Qur’an itself” and is “further elaborated by the articulation of the Prophetic narrative and subsequently by the encompassing system of the Sharī‘a as a discursive and institutional phenomenon” (p. 146).

Modern Islamic banking and finance aim at avoiding usury and interest (*ribā*) and risk-ridden business ventures (*gharar*), which, Hallaq argues, are goals that are neither sufficient nor actualized. Lacking “a holistic view of the world, a view that derives from a system of practices and beliefs constituting and reflecting the entire range of the technologies of the self, which shape and sustain the moral subject,” the so-called Islamic banking and finance in addition to their “narrow technical concerns” compels us to conclude that they are deeply flawed, “Islamic merely in name” (p. 152).

Indeed, driving his thesis home, Hallaq fears that any aspiring Shari‘ah government, even if it were to accomplish the miraculous metaphysical, moral, social, legal, and political transformation required of it to deserve the name, would face its most crushing challenge at the hands of international economy, the heart and soul of the “powerful liberal and staunchly capitalist states” “dominated by the corporation and its amoral pursuit of profit.” The imperative of economic growth, understood in a strictly neoliberal fashion, is considered by most reformist Muslims, Islamists and traditionalists included, to be the highest goal, even a religious obligation, that preempts even the desire to envision the miracle Hallaq considers necessary.

Throughout the book, his arguments for the impossibility of an “Islamic state” are tempered with allusions to some quite not fully explored possibilities. In the concluding chapter, with the disclaimer that the present book is

intended only to raise challenges, some intimation toward a solution is unveiled. The author reiterates the dilemma before Muslims today: Given the odds, it appears that Muslims will continue to succumb to the modern state and the world that produced it, a state of affairs that is “largely accepted by Muslims and even their intellectuals, though often on the erroneous assumption that the system of the modern state can in good time be converted to an Islamic state” (p. 162). Yet, “despite the destructive effects of colonialism, historical Shari‘a today remains, ever more forcefully, the locus of the central domain of the moral. While its institutions, hermeneutics, and personnel have all vanished without hope of return, its moral effects persist with unwavering stubbornness.”

The first course of prescribed action is internal and comprises rejuvenating the central domain of the moral by reestablishing moral communities that need to be “reenchanted” (a term the author does not explain), articulating a clear position on individual and communal rights, and finding a coherent “antidote to the dominating liberal concept of universalism.” This must be done gradually and dialectically in negotiation with the liberal state, thereby avoiding the backlash of the forces that would be set against any such project. The second course of action is to restate the Shari‘ah in conversation with western intellectuals, particularly the growing numbers of them who share this evaluation of the modern project and seek alternatives. Thus, while in conversation with thinkers of different persuasions, Muslims ought to try to both develop a view of rights that is in keeping with the Shari‘ah but also comprehensible to and respected by, though not necessarily shared by, their interlocutors, on the premise that “universalism and a universalist theory of rights can have no fate but ultimate failure” (p. 169).

Buried in a footnote, one finds important qualifications that clarify the main thrust of the book: The impossibility referred to in the title refers not to the “Islamic” but to the “state” part of the phrase. One, if not the key, concern for the author is ecological sustainability, along with moral and communal prosperity, as he sees these three as interrelated. And finally, none of the arguments here “should be construed to mean that Islamic governance is doomed” (p. 198). It is, rather, that modernity is unsustainable due to its physical and human destructiveness, whereas “Islamic governance,” a still viable and sustainable alternative to modernity, seems unattainable due in part to the Muslims’ enchantment with the modern state.