

Constitutionalism and Islamic Legal Theory: Preliminary Questions*

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This moment of suspense, this *épokhè*, this founding or revolutionary moment of law is, in law, an instance of non-law. But it is also the whole history of law. *This moment always takes place and never takes place in a presence.* It is the moment in which the foundation of law remains suspended in the void or over the abyss, suspended by a pure performative act that would not have to answer to or before anyone.¹

--Jacques Derrida

When we speak of law, and particularly constitutional law, we often find ourselves searching for origins, for elusive foundational moments of authorship and authorization. The search for Derrida's "mystical foundation of authority"—the "founding moment of law"—can leave us with unsatisfactory answers. Not surprisingly then, a form of this question, or tension, has long fascinated legal and political theorists interested in explaining the contradictions presented by constitutionalism and democracy. In particular, democratic political theory acknowledges the tensions created by the "containment of popular decision-making" imposed by constitutional laws, which place at least some "laws of lawmaking" beyond the reach of democratic politics.² Even if we understand constitutional laws to be a result of a particular majority's political will at one moment in time, we struggle to understand them as expressions of the majority's (i.e., the People's) will today. Thus, in a constitutional democracy, although the constitution claims to be the foundation of democracy, it also appears to violate this legitimating principle,³ a tension that inspires different answers to the question: what is the foundation of constitutional authority in a democratic society?

Attempts to reconcile Islamic law with constitutional democracy must also answer this question. Although the compatibility of Islamic law with constitutional democracy has preoccupied both the scholarly and the popular imagination, attempts to reconcile apparent tensions frequently end up mining Islamic legal history for principles, such as justice and equality, that resonate with theories of liberal constitutional democracy, rather than seriously examining the bases for legal and political authority in Islamic thought. While principles, such as justice and equality, abound in Islamic law and history and may be important sources for substantive laws, they are not necessarily the foundations of constitutional authority. If we

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¹ Jacques Derrida, *Force of Law: The Mystical Foundation of Authority*, 11 *CARDOZO L. REV.* 921, 991—93 (1989-90) (translated by Mary Quaintance).

² FRANK I. MICHELMAN, *BRENNAN AND DEMOCRACY* 13 (1999).

³ See Jed Rubenfeld, *Legitimacy and Interpretation*, in *CONSTITUTIONALISM: PHILOSOPHICAL FOUNDATIONS* 195 (Larry Alexander ed., 1998).

wish to explore the question of Islamic law's compatibility with constitutional democracy, we must first ask how Islamic legal thought conceptualizes political and legal authority.

This is, of course, an ambitious project, which I cannot undertake in the space of a few pages.⁴ Rather than exploring Islamic sources of legal and political authority in any detail, I explain why divine authority (i.e., God's will) is not a possible source. In other words, I address a preliminary matter, an idea that may strike some as counterintuitive: the absence in Islamic law of an ultimate, or basic, norm conferring legal authority. As described above, liberal constitutional thought struggles to identify the legitimating foundation of constitutional authority, the "founding moment," or in positivist terms, the basic norm, that validates all law. But we might assume that a legal theory based on religion would not suffer from this tension. The foundation of law would, it seem, be divine authority—what God commands. But as I explain below, legal authority in Islamic theory does not simply follow from an ultimate norm of divine authority.⁵

In Search of a Basic Norm: The Indeterminacy of Islamic Law

The enterprise of identifying the governing legal authority within Islamic law may appear to be an essentially positivist project of locating the basic norm⁶ or ultimate rule of recognition⁷ within the historical practices of Islamic law.⁸ That is, to locate the source of legal authority in Islamic legal theory, we might assume that we need only investigate historical Islamic legal systems to discover the existence of an ultimate norm as a social fact. As H.L.A. Hart explains, the ultimate rule of recognition is the foundation of a legal system, the underlying rule from which all other rules issue and derive their legitimacy.⁹ Because "its existence is a matter of fact," generally accepted by society and used by legal authorities, its validity is not at issue. Although we may question its "value," we cannot question its validity because it is, in fact, the

⁴ For more on the topic of Islamic political and legal authority, particularly in relation to the modern state and democracy, see: Mohammad Fadel, *The True, the Good and the Reasonable: The Theological and Ethical Roots of Public Reason in Islamic Law*, 21 CAN. J.L. & JURIS. 5 (2008); Asifa Quraishi, *Who Says Shari'a Demands the Stoning of Women? A Description of Islamic Law and Constitutionalism*, 1 BERK. J. MIDDLE E. & ISLAMIC L. 163 (2008); Khaled Abou El Fadl, *Islam and the Challenge of Democracy*, in ISLAM AND THE CHALLENGE OF DEMOCRACY 3-46 (2004); and Wael Hallaq, *Juristic Authority v. State Power: The Legal Crises of Modern Islam*, 19 J.L. & RELIGION 243 (2003-2004).

⁵ The discussion that follows is based on the majority branch of Islam, the Sunni tradition, rather than the Shia.

⁶ HANS Kelsen, *PURE THEORY OF LAW* (Max Knight ed., 1967).

⁷ H.L.A. HART, *THE CONCEPT OF LAW* (1961).

⁸ My analysis is essentially a positivist inquiry into what—as a social and historical fact—may be the basic, or ultimate, norm of legal authority in Islamic law. This is consistent with a positivist approach to laws as "social phenomena." *Id.* at 17. The positivist analysis of a society's legal system takes the form of a historical sociological inquiry, see, e.g., *id.* at 89-96, by which we seek to identify various kinds of rules through empirical observation. See Joseph Raz, *On the Authority and Interpretation of Constitutions: Some Preliminaries*, in CONSTITUTIONALISM: PHILOSOPHICAL FOUNDATIONS, *supra* note 3, at 161 (noting that Hart's rule of recognition does not reach questions of legitimacy because it is only a social fact). Hence, positivism does not offer a general theory of what law should be or which legal structures (e.g., parliamentary versus constitutional democracy) should prevail. At most, we could say Hart's positivism predicts the necessity of secondary rules that remedy defects (of uncertainty, rigidity, and inefficiency) in the primary rules of less advanced societies. See HART, *supra* note 7, at 89-91. But this belief in a particular trajectory, or evolution, of a legal system does not inform theoretical efforts to design a new legal order for the future. In other words, we could not productively take a positivist approach to constructing an Islamic legal theory of constitutional government if it does not already exist in social practice.

⁹ HART, *supra* note 7, at 75, 97-120.

practice of a particular society to use the rule to assess the validity of all other rules.¹⁰ For example, we can assess the validity of a particular law by referring to another rule conferring the legal authority and procedure for the law, but when we reach the final rule conferring legal authority (Hart's example is "what the Queen in Parliament enacts is law"), "we are brought to a stop in inquiries concerning validity; for we have reached a rule which . . . provides criteria for the assessment of the validity of other rules; but it is also unlike them in that there is no rule providing criteria for the assessment of its own legal validity."¹¹ In other words, we have found Derrida's mystical foundation of authority.

The historical development of Islamic law may, however, frustrate the identification of an ultimate rule of recognition. The large body of substantive Islamic legal doctrine, called *fiqh*, originated outside the sphere of government and politics in the private realm of individual scholars or jurists.¹² When jurists began to derive legal rules and methodologies from the *shari'a* (the divine law of God), the ruling entity (the caliphate) was already established and governing according to its own public laws and regulations. During these early years, under the rule of the Umayyad and Abbasid caliphates, individual scholars began establishing the possible sources, tools, and substantive rules of Islamic law. But this scholarly tradition of *fiqh* was not standardized or even easily accessible; one scholar's diligent effort (*ijtihad*) to understand the divine law was as valid as another's, lending equal validity to opposing views and promoting a situation of legal pluralism. In Islamic jurisprudence, every individual conducting a diligent independent legal analysis (*ijtihad*) using the *shari'a* sources—namely the Qur'an, the *ahadith* (prophetic traditions), *ijma* (juristic consensus), and *qiyas* (analogical reasoning)—will be rewarded in the hereafter. A well-known tradition reports that the Prophet said that God promises two bounties for a correct *ijtihad* and one for an incorrect *ijtihad* in the afterlife.¹³

This understanding of humans' inability to discern the divine truth pervades Islamic thought and culture today. As one Islamic scholar explains, people recognize the indeterminacy of God's will: "Growing up in an Islamic Sunni religious culture, one is frequently reminded by one's teachers that there is no church in Islam, and that no person, or set of persons, embodies God's Divine authority. . . . Muslims strive to discover the Divine Will but no one has the authority to lay an exclusive claim to it."¹⁴ The closest we can therefore come to an ultimate rule of recognition is a good-faith effort to discern God's will;¹⁵ even the interpretive use of the legal sources noted above is highly contested, making them imprecise candidates for the ultimate rule of recognition's criteria by which all other legal rules are validated. Nor can we say, as Hans Kelsen suggests, that the basic norm of Islamic law is that "one ought to behave as God and the authorities instituted by Him command."¹⁶ What would this mean in a system that authorizes legal interpretations that may (according to the system) fail to reflect what God

¹⁰ *Id.* at 104-07.

¹¹ *Id.* at 104.

¹² See BERNARD WEISS, *THE SPIRIT OF ISLAMIC LAW* (1998).

¹³ See KHALED ABOU EL FADL, *SPEAKING IN GOD'S NAME: ISLAMIC LAW, AUTHORITY AND WOMEN* 9 (2001).

¹⁴ *Id.*

¹⁵ *Id.* at 48, 51.

¹⁶ KELSEN, *supra* note 6, at 115.

actually commands? Furthermore, in a system lacking a recognized hierarchy of legal authority, individuals could hardly be expected to identify specific authorities instituted by God.¹⁷

From a positivist perspective, this indeterminacy in Islamic law distinguishes it from *both* positive and moral law. According to positivists, the legal validity of positive laws has no basis in morality because the basic norm rests on a social fact or, for Kelsen, on a “certain event as the initial event in the creation of the various legal norms.”¹⁸ For example, Kelsen argues that “[t]he validity of a legal norm cannot be questioned on the ground that its contents are incompatible with some moral or political value.”¹⁹ He contrasts the basic norm of positive law with the seemingly “self-evident basic norm” of natural law, a norm “which is considered to be the expression of the ‘will of nature’ or of ‘pure reason.’”²⁰ But Islamic law does not derive from either a certain event or a moral value. It is the indeterminacy of a basic norm in Islamic law that distinguishes it from natural law, as well as positive law. We cannot deduce Islamic rules from a certain fact or event; nor can we base them on a moral value, such as “right reason” or justice, because God’s will remains open to debate, complicating juristic efforts to ground legal authority in moral terms.²¹

Islamic legal theory is not, therefore, so different from liberal constitutional theory in its search for a foundation. Given the absence of a basic norm, Islamic constitutionalism seems likely to face the same tension as liberal constitutionalism in attempting to identify the basis of constitutional authority; it will be, in Jeremy Waldron’s words, “disagreement all the way down, as far as constitutional choice is concerned.”²² If morality in whatever form, including “God’s will,” is “disagreement all the way down,” it cannot serve as the basis of constitutional authority. And without a moral foundation, Islamic legal theory, like liberal political theory, must locate the founding moment of constitutional authority elsewhere.²³

¹⁷ The two major branches of Islam, the Sunni and Shia traditions, differ regarding the political authority of historical and religious figures. Generally speaking, Sunni Muslims recognize the political legitimacy of the first four leaders, or caliphs, of the Islamic community (following the death of the Prophet), while Shia Muslims only recognize the authority of the fourth caliph, Ali (the Prophet’s son-in-law), and his descendents. More important, in the Sunni tradition, no political ruler, including the first four caliphs, has any special claim to interpreting the divine will. Conversely, in the Shia tradition, the twelve Imams (leaders) beginning with Ali and ending in the ninth century did have divine authority. Their interpretations of religious law were infallible. See WILLIAM L. CLEVELAND, *A HISTORY OF THE MODERN MIDDLE EAST* 34-36 (2000). As a practical matter, neither tradition can identify political leaders with divine authority today. But the distinction is important. If I were exploring questions of constitutionalism from the perspective of the Shia tradition, the crucial role of the twelve infallible Imams would significantly affect my analysis of the historical norms of governing authority.

¹⁸ KELSEN, *supra* note 6, at 114.

¹⁹ *Id.* at 113.

²⁰ *Id.* at 114.

²¹ Islamic theories regarding God’s justice resemble Rousseau’s conception of it: “All justice comes from God, who is its sole source; but if we knew how to receive so high an inspiration, we should need neither government nor laws.” JEAN-JACQUES ROUSSEAU, *THE SOCIAL CONTRACT AND DISCOURSES* 210 (G.D.H. Cole ed., 1993).

²² JEREMY WALDRON, *LAW AND DISAGREEMENT* 295, 303 (1999).

²³ Frank Michelman notes that positivists seek “to block the regress [of founding authority] by shifting attention from the space of norms to the space of facts, and specifically to the convenient fact that a critical mass of the country’s inhabitants (or officials) does, as it happens, intersubjectively concede a regulative force to an actually

operative practice of government that these inhabitants for some reason or other tend to identify with (or hypostatize as) a textoid that they call 'the Constitution.'" Frank I. Michelman, *Constitutional Authorship*, in CONSTITUTIONALISM: PHILOSOPHICAL FOUNDATIONS, *supra* note 3, at 73. But, as Michelman argues, when searching for the foundation of constitutional authority, "[w]hat those reasons may be are a part of what we are after." *Id.* That is, if we cannot ground constitutional authority in the universal truths of moral or natural law, we must find another source, namely a theory of popular sovereignty consistent with constitutional democracy. H.L.A. Hart was well-aware of this problem, arguing that sovereignty cannot be attributed to either the legislature or the electorate. See HART, *supra* note 7, at 64-75. In order to make sense of a legal order, Hart argues that we must identify rules that *constitute* the sovereign. *Id.* at 75. We cannot identify the public authority without reference to rules and ultimately to social facts. See, e.g., *id.* at 74. But to construct a normative theory of constitutional democracy, we must find a way not simply to recognize popular sovereignty, but also to justify it.