TEACHING WAEL HALLAQ IN SHENZHEN: CHINA, ISLAMIC LAW AND THE RULE OF LAW

Danya Shocair Reda
Peking University
School of Transnational Law
86-151-1261-6767
dreda@stl.pku.edu.cn

Teaching Wael Hallaq in Shenzhen: China, Islamic Law & The Rule of Law ................................................................. 0
Teaching Wael Hallaq in Shenzhen: China, Islamic Law and Rule of Law ................................................................. 0
Introduction .................................................................................................................................................. 0
I. Hallaq’s Islamic Rule of Law ................................................................. 1
   A. Hallaq Defines the Rule of Law ...................................................... 2
II. Reading Islamic Rule of Law in Shenzhen .................................. 12
   A. A Private System of Law ............................................................ 13
   B. Resolution of Disputes Not Law Enforcement ............................ 13
   C. Consistency in Pluralism ............................................................ 16

INTRODUCTION

The first thing anyone hears about Shenzhen is how new the city is and how it has sprung from almost nothing. It would not take long, at any rate, to notice its newness, and its frenetic pace of growth. In the heart of this boom-town, resides Peking University’s School of Transnational Law, its own Shenzhen story—new, growing, and taking on a novel approach to teaching law in China. As students learn common law and civil law side-by-side, they are training to serve China’s increasingly transnational economy. The institution aims to develop students who can move fluidly between systems, and to develop the analytical flexibility to work with each and across both. These students
hold special promise for the legal profession—perhaps representing the future of global legal education.

It is here that I began teaching a course entitled, Introduction to Islamic Law. As the primary text, I used Wael Hallaq’s *Shari’a: Theory, Practice, Transformations*, a comprehensive introduction to the subject by the field’s pre-eminent North American scholar. I selected *Shari’a* for its utility—its coverage is extensive, and yet it presents an accessible entry point to the subject. I thought it would be a particularly promising text for this set of students, immersed in a comparative study of law, who already have exposure to both common and civil law traditions.

In his *Shari’a*, Hallaq argues Islamic law is a rule-of-law system. This claim is one of the more intriguing aspects of the work, and provides a comprehensive work with a cohesive, overarching theme. Yet, it is also an aspect of the work by which Hallaq has stirred up significant criticism and debate. Rule of law itself has come under attack as underspecified, underdetermined concept and as primarily an ideological instrument that supports of particular socio-political forms. What does it mean to claim this concept for Islamic law? Situated as they are at an institution at-the-crossroads, student observations on Hallaq’s core claim can help to shed clearer light both on the claims about Islamic law and about our conception of rule-of-law itself.

I. HALLAQ’S ISLAMIC RULE OF LAW

The opening line of Hallaq’s *Shari’a* asserts: “Following the collapse of the Soviet Union, Islam has come to fill a pivotal conceptual role of an antithesis to the West, the self-described abode of liberal democracies and the rule of law.”1 Hallaq wastes no time setting up the foundational orientalist binary, with Islam on one side and rule of law on the other—that he seeks to collapse over the course of the work.2 The concept, “rule of law”, is notoriously under-determined, meaning different things to different audiences.3 To engage Hallaq’s *Shari’a* it is helpful to understand some of the term’s most common conceptions.

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2 To be clear, this is not the only, or even primary, of the book. As Faisal Chaudhry describes it in his incisive review, *Shari’a* is the “best comprehensive introduction to Islamic law in the English language.” Faisal Chaudhry, “Revisiting Hallaq’s *Shari’a*: Between Legal Orientalism and a Rule of Islamic Law,” 15 J. of Islamic L. & Culture 44 (2014).
3 Hallaq no doubt recognizes this fact. Indeed, he likely plays with the term’s openness, recognizing that “rule of law” defines nothing so well as the West’s self-conception, and therefore is a useful trope for challenging Western views of Islamic law.
As China law scholars have explained: “The ‘rule of law’ means whatever one wants it to mean. It’s an empty vessel that everyone can fill up with their own vision.” Professor Stephenson quotes a State Department official explaining: “The beauty of the ‘rule of law’ is that it’s neutral. No one – the human rights community, the business community, the Chinese leadership – objects to it.”

Several different normative conceptions are signified by the phrase. These are often divided into substantive accounts of law, on the one hand, and formal requirements on the other. But even within these two broad categories, there are substantial variations. Substantive accounts of the rule of law have different points of emphasis. Some are “meant to describe a legal system that effectively protects specific individual rights.” Some rule of law commentators emphasize the protection of private property as the key marker of a rule-of-law system, others identify human rights as the lynchpin of rule-of-law values. The rule-of-law concept is also used to signal systems that are participatory and democratic.

On the other side of the divide are more formal conceptions of the rule of law. The thinnest of these is a mere demand that a legal system employ transparent rules and apply those predictably. Formal rule-of-law also commonly anticipates features such as judicial independence, including the protection of the judiciary, and through it, the public, from domination by the state. This helps to explain the popular formulation of the concept as “the rule of law not of man.” Here, there is some overlap between the formal and the substantive visions of the rule of law. A rule of law, not of man, may entail a formal separation of law-making from legal application; it might also express a non-arbitrary, rational application of the law. A rule of law system is, at root, reasonable and not arbitrary.

A. Hallaq Defines the Rule of Law

As hopefully is obvious from the foregoing, there is no straightforward answer to the question: what is meant by the term “rule of law”? The confused picture above may achieve some clarity, however, through opposition. In *Shari’a*, Hallaq hones in on a set of rule of law

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5 Stephenson, Trojan Horse at 73.
6 [Law & Development literature citations]
7 [human rights literature citations]
8 [law as publicly known and predictable]
characteristics that he ultimately concludes are central to the classical Shari’a tradition. Specifically, Hallaq’s account of rule of law places emphasis on a legal system that is (1) distinct and insulated from political power; (2) participatory and/or democratic in character; (3) consistent and predictable.

Hallaq relies on Anglo-European conceptions of Islamic law as a way of identifying these characteristics, of establishing what constitutes a rule-of-law system. Perhaps this has always been how the rule of law is defined: the Anglo-European tradition has not bothered to define rule of law with any precision, but rather has frequently defined it in its opposition to other systems, often Eastern, at times Islamic. Through this lens, the rule of law is whatever Islamic law is not.

Consider for a moment the classical formulation: “rule of law, not of man.” Focusing on this language illuminates the tropes against which the rule of law is generally defined. The rule of law is precisely not the rule of man—the type of rule that exists in all the different Orients one might encounter. It is not rule by Chinese, Oriental despotism. It is also not Qadi Justice. “Oriental despotism” or “Qadi Justice” are characterized by the unrestrained power of government. Because government is unrestrained, its whim or desire is what governs, rather than publicly announced law.

Such whim is unpredictable and inconsistent. The rule of law, defined as the opposite of all this, is thus characterized by restraints on governmental power, predictability, and consistency. At times, the idea of limitations on the power of government carries with it too a notion of the integrity and autonomy of the individual, as well as a sense of a democratic or participatory ethos. To the extent that governance is not imposed by fiat, via the dictate of the executive, it may appear that governance necessarily allows for public participation or control.

The colonial record offers ample discussion of these rule of law attributes, or notably, their alleged absence from Islamic law. Hallaq provides us with rich descriptions of the ways that European colonial powers problematized Islamic law, and hence identified the valued characteristics of law that would come to constitute their own rule-of-law

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9 This is classic orientalism at work. See generally, Said, Orientalism. Islamic law is just one of many “Oriental” systems that can stand in opposition to the rule of law. Relevant to the context here, and specifically to my students, oftentimes the legal Other is Chinese, and its system: “Oriental despotism.” For a illuminating treatment of the operation of orientalist discourse and functionality through law, see Teemu Ruskola, Legal Orientalism.

10 Ruskola [oriental despotism]

11 Morgan Clarke helpfully reminds us, however, that Weber did not mean Qadi Justice in the universally pejorative connotation that it ultimately came to have. Clarke, “The Judge As Tragic Hero.” at _.
systems. In India, the British embarked upon a “complete digest of Hindu and Mussulman law,” in other words, the creation of codes of Islamic law and Hindu law. The rationale for this project was that Islamic law was “unsystematic, inconsistent and mostly arbitrary.” The colonial administrators, says Hallaq, viewed Islamic law as a system of “undisciplined and uncontrollable legal interpretation of the Mussulmans’ magistrates.”

The very term, “Islamic law” came to signify in both scholarly discourse and colonial administration, the absence of the ‘rational.’ We might even say, the absence of the ‘legal.’ As Hallaq explains:

“Islamic law” for long did not signify a geography, a living sociology or a materially engaged culture, but [rather] a religion, a religious law, a religious civilization, or an irrationality (hence the presumed ‘irrational nature’ of this law)...the ‘religious’ functioned in opposition to such concepts as ‘rationalism’ and, more starkly, ‘secularism.’ In other words, the very utterance of the word ‘religious’ spoke of the absence of the secular and the antonymic rational.

Thus a rule-of-law system emerges as the opposite of the classical Islamic law system. In this view, whereas Islamic law is religious, moral, and irrational, rule of law is rational and secular. Implicit in the notion of an irrational system is the idea that the system is arbitrary and unpredictable. Often this is coupled with the notion that the judge does as he (or as the ruler) likes; unlike a rule-of-law system where law is independent, in Islamic law the system merely reflects the whim of the judge or his superiors.

In colonial administration, this oppositional construction of the rule-of-law carried over into the realm of what we would today term criminal matters. Consistent with the understanding of Islamic law as arbitrary,

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12 This was the proposal of Sir William Jones, an Oxford classicist and Orientalist, as cited in Hallaq, *Shari'a* at 373.
13 Aside from the peculiarity of such “codification” being conducted by colonial governors overseeing the application of local law to locals, codification was fundamentally inconsistent with the structure and jurisprudence of Islamic law. See Hallaq at 376-
14 Hallaq at 373.
15 Hallaq at 373.
16 Hallaq at 5.
17 citations
despotic, and unpredictable, its criminal law also was deemed inappropriate for proper governance. Perhaps ironic to modern sensibilities, British governors in India lamented that criminal enforcement in Islamic law was “founded on the most lenient principles and on abhorrence of bloodshed.”\[^{18}\] As a result, British criminal law gradually replaced the existing Islamic legal structure in India. The British system in India aimed to be more effective and predictable; it resulted in “much more frequent use of capital punishment and much less often to community-based methods of enforcement and reconciliation.”\[^{19}\]

Perhaps unsurprisingly, it is these themes of rule-of-law discourse, emanating out of the notion of restraint on government authority, that most occupy Hallaq. Hallaq’s *Shari’a* is attentive to the law’s restraint of government, its consistency, and its predictability as hallmarks of the rule of law. Just as significant to Hallaq, however, are the democratic and participatory values alluded to in much rule-of-law commentary.

Thus Islamic law has been understood traditionally as contrary to rule of law principles—lacking in consistency and predictability, devoid of a separation between legal and political power, authoritarian, and arbitrary. Throughout *Shari’a*, Hallaq provides a comprehensive introduction to Islamic legal principles and institutions that works to show that contrary to this traditional portrayal, Islamic law is in fact characterized by a high level of consistency and predictability, a committed separation between political and legal power, and a participatory, socially embedded ethos.

**Consistency and Predictability**

Hallaq’s account of the Islamic law system does not shy away from the substantial diversity of the tradition and its pluralism.\[^{20}\] Indeed, *Shari’a* makes the case that it was precisely this pluralism that enabled the system to be responsive to its subjects and to engage in inevitably necessary change over time.\[^{21}\]

Unsurprisingly, in the western legal imagination such pluralism is at odds with consistent and predictable outcomes, and is assumed to be prone to the type of ad hoc or whimsical decision making that is the hallmark of “qadi justice”, or the very opposite of a rule of law. What Hallaq manages to do in *Shari’a* is to show that residing comfortably within this pluralism was a legal structure that generated consistency quite effectively. Several features of the system, particularly Islamic

\[^{18}\] Hallaq at 378 (quoting Dirks, *Scandal* at 221).
\[^{19}\] Hallaq at 378 (quoting Dirks, *Scandal* at 221).
\[^{20}\] [citations] [quote re: spanning societies from morocco to java, Syria to ?]
\[^{21}\] [citations]
law’s doctrinal legal schools or madhhab, served to generate predictable and consistent legal authority.

Because production and development of legal knowledge was conducted by private scholars and jurists in Islamic law, and law was produced through these individuals, a “need arose to anchor law in a system of authority that was not political, especially since the ruling political institutions were...deemed highly suspect.” The doctrinal school produced law and provided law with authority. The core elements of the doctrinal school was a body of doctrine that was collectively developed, and adhered to by a loyal group of legal interpreters, experts, and practitioners. This adherence to a doctrinal school produced consistency within plurality. Islamic legal theory accepted that there were many right answers to a legal question, that is, an answer was only invalid if it was demonstrably incorrect. Hence the [canon, “every legal jurist/opinion is right]. Each individual jurist, however, was trained in a particular legal school and would maintain loyalty to that school’s methods and doctrine. Thus despite substantial openness within both theory and doctrine, the madhhab operated to produce significant consistency.

Separation of Law from Political Power and Government

Central to Hallaq’s understanding of Islam as a rule of law is the separation of law and politics, or more precisely, the locus of legal production and interpretation in private circles of professional learning separate from the institutions of political power. “A masterly knowledge of the law was the sole criterion in deciding where legal authority resided; and it resided with the scholars, not with the political rulers or any other source.” The upshot of this division between the legal and the political, for Hallaq, is that both the substance of the law and its legitimacy were not dependent on governmental power, and therefore did

22 Here, the madhab, describes a group of jurists and legal experts loyal to distinct and collective legal doctrine with distinctive characteristics. In Sunni Islam there are four such schools, named for great predecessors understood to have founded the doctrinal school. Hallaq at 62.

23 Hallaq at 70.

24 The consistency this generates is understood to be a necessity of the legal system. “This loyalty, popularly summed up in Western legal systems by the expression ‘law is conservative,’ is nothing if not the lynchpin of all legal systems in complex societies.” Hallaq at 113.

25 Hallaq at 169 (“This [consistency in judicial decisions] is clearly attested in the various Ottoman court records from Egypt, Syria, and Anatolia...”). [quotations from Hallaq re: actual historical consistency and predictability; possibly from Authority]

26 Hallaq at 70.
not simply bend to government whim or necessity.\textsuperscript{27} If a legal system’s independence from political influence or the meddling of a ruling regime is critical to our understanding of it as a rule-of-law system, then the pre-modern Islamic system seems to pass with flying colors.

Indeed, Hallaq seems to imply that perhaps the Islamic legal system was more effective at this legal independence than modern state systems. As compared to its peers, he explains, it appears to preserve the realm of law more effectively: “Whereas law—as a legislated system—was often ‘state’-based in other imperial and complex civilizations, in Islam the ruling powers had, until the dawn of modernity, almost nothing to do with the production and promulgation of legal knowledge.” But it does not take a major leap to consider that today law is a “state-based” enterprise produced, interpreted, and enforced by the state ruling power. It is difficult not to hear in this some rebuke of law today as wielded by modern states.

\textit{Participatory and Socially Embedded}

One of the alleged features of Islamic law was its despotic quality—a legal system that was imposed by an all-powerful judge or \textit{qadi}. In contrast, a rule-of-law system is often expected to be more participatory or democratic in its relationship to its legal subjects. How does the traditional Islamic law tradition measure up against these categories? Hallaq explains that the Islamic court’s social-embeddedness was one of its core attributes.

Many factors contributed to the socially-embedded nature of the court and its law. Legal [canons] provided that \textit{qadis} should be well acquainted with the communities they served.\textsuperscript{28} The work of the courts tended to be distant from power centers and political rule. Hallaq explains that there was a “considerable degree of separation between the populace and the ruling regime.”\textsuperscript{29} Courts in the pre-modern Muslim world were relatively informal, open to the public,\textsuperscript{30} reliant on community witnesses and [jurors], and were utilized to a large degree by relatively powerless sectors of society, including women, religious

\textsuperscript{27} [citation re rulers subjecting selves to court jurisdiction; and people winning cases against governors]

\textsuperscript{28} There is a “centuries-old and highly recurrent prescription that a \textit{qadi}, to qualify for service, must be intimately familiar with the cultural context of his jurisdiction and the range of social customs and habits prevailing therein.” Hallaq at 166.

\textsuperscript{29} Hallaq at 159.

\textsuperscript{30} “[B]y the informal nature of the Muslim court, the parties and their relatives, neighbors and friends were allowed to air their views in full and without constraint, defending the honor and reputation of one litigant or the other.” Hallaq at 166.
minorities, tenants, and slaves. 31 “It was particularly the court’s open and informal forum that permitted the individual and defenders from within his or her micro-community to argue their cases and special circumstances from a moral perspective.” 32

Perhaps most significant of all for the idea that these courts were participatory institutions that provided means of agency and resistance to common populations, was the relation of the public to the law itself. As Hallaq describes it, “the Muslim court was embedded in a social fabric that demanded a moral logic of social equity...The Muslim court thus afforded a sort of public arena for anyone who chose to utilize that space for his or her defense.” 33 “The language of the law, related as it was to morality and the lived values of the communities it governed, was one in which common litigants felt comfortable and conversant. 34

Reading Contemporary Law Against An Islamic Law Backdrop

Thus Hallaq presents three key characteristics of pre-modern Islamic law that are both contrary to orientalist accounts and indicative of a rule of law system. The three characteristics together generate a law that is both non-arbitrary and not reliant on coercive force. Law’s independence from ruling power, its socially embedded and participatory character, and its consistency and predictability, in Hallaq’s reading, demonstrate that it is emphatically not the arbitrary system that it is portrayed to be, governed by the desires of autocratic rulers.

But if this is true and Islamic law is imbued with these rule of law qualities, what does this tell us about the systems against which Islamic

31 Hallaq at 167. “This was an expectation based on a centuries-long proven practice where peasants almost always won cases against their oppressive overlords, and where Jews and Christians often prevailed in court not only over Muslim business partners and neighbors but also against no less powerful figures than the provincial governor himself.”

Id.

32 Hallaq at 167. Hallaq continues: “But it was also the commitment to universal principles of law and justice that created a legal culture wherein everyone expected that injustices against the weak would be redressed and the wrongdoing of the powerful curbed.”

Id.

33 Hallaq at 166-167.

34 Hallaq describes a court where social underdogs not only appear, and speak for themselves, but win in the majority of cases. “They spoke informally, unhampered by anything resembling the discipline of the modern court...That they could do so was a testimony to a remarkable feature of Muslim justice, namely, that no gulf existed between the court as a legal institution and the consumers of the law, however economically impoverished or educationally disadvantaged the latter might have been...traditional Muslim society was as much engaged in the shar'I system of legal values as the court was embedded in the moral universe of society. It is a salient feature of that society that it lived legal ethics and legal morality, for these constituted the religious foundations and codes of social praxis. To say that law in pre-modern Muslim societies was a living and lived tradition is merely to state the obvious.” At 171-72.
law is compared? To the extent that rule of law has been defined as possessing the qualities that Islamic law lacks, what does Hallaq’s description mean for our traditional notions of the rule of law? In *Shari’a*, Hallaq touches on this question. His analysis uses Islamic law as a lens through which to view rule-of-law systems anew. In Hallaq’s descriptions of legal independence, a socially embedded system, and interpretive consistency, his account once again opposes Islamic law to its contemporary nation-state based counterpart. In this comparison, it is contemporary law that comes up lacking. For each characteristic, Hallaq’s account leads us to believe that perhaps modern, democratic, state legal systems are not as participatory, independent, or non-arbitrary as their pre-modern Islamic counterpart.  

**Legal Independence from Politics**

Hallaq hangs his analysis of Islamic law’s separation from political power on the private nature of the legal system. That is, the law is articulated, interpreted, and produced by private parties. Only secondarily is it enforced with the support of government power. This draws a stark contrast with contemporary legal systems, which are fully state-controlled; and Hallaq does not shy away from sketching out the difference. Through this lens, Hallaq leads the reader to wonder what separation can exist in the modern state between political power and the law; how much can the law be protected from the needs and desires of political rule?

**A Socially Embedded System**

Even Hallaq’s description of the socially-embedded and participatory nature of Islamic law works by drawing a contrast with contemporary, formal adjudication. Repeatedly, Hallaq references “all-or-nothing” justice and “winner-takes-all resolutions” in describing today’s legal system, and explains that this is not how the *qadi*’s court operated.

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35 Hallaq’s normative claims in *Shari’a* are not without criticism. For as much as *Shari’a* has been praised for its excellent and comprehensive introduction to the field, it has generated substantial controversy as well. Faisal Chaudhry provides an excellent critique of Hallaq’s rule-of-law thesis, suggesting that Hallaq’s decision to read Islamic law against the Rule of Law grain, showing how it contains the same features prized by Islamic law, is to perform the same idealization for Islamic law as Rule of Law performs for contemporary liberal legality. Chaudhry. See also Mohammad Fadel (arguing Hallaq undersells the significance of political sovereignty in Islamic law).

36 Take, for example, the following passage: “The highly formalized processes of the modern court and its structure of legal representation (costly and tending to suppress the individual voices of the litigants, let alone their sense of morality) were unknown to Islam. So were lawyers and the excessive costs of litigation that preven the weak and the poor from pressing their rights.” At 167. Indeed, in his treatment of Islamic courts, Hallaq echoes voices in the US alternative dispute resolution movement that critique formal justice on much the same grounds and hold out hope for alternative mechanisms,
*qadi* was focused on relationship-preservation, mediating a [some-and?] solution, rather than the identification of a winner. Again, in contrast to the modern rule-of-law court, Hallaq explains that litigants appeared without counsel before the *qadi* and were able to speak the language of the law.

In the modern world, Hallaq posits, individuals are alienated from the law, requiring translators, unable to present themselves to the judge and the court, perhaps less willing to assert their rights in courts, and undoubtedly less able to challenge powerful (or government) actors. Thus the *qadi*’s mediative approach, immersed in the community over which it presides, and arising out of the same cultural context, lends itself to a participatory ethos in ways that the legal systems of today’s modern states are unable to achieve. Hallaq concludes: “The Muslim court succeeded precisely where the modern court fails, namely, in being a sanctified refuge within whose domain the weak and the poor could win against the might and the affluent.”

Thus, paradoxically, Hallaq claims that the Islamic legal system was *more* participatory and reflective of its local populations than the systems of the modern era. To the extent that rule-of-law entails a democratic and participatory spirit, Hallaq once again leads the reader to ask, does modern state law still qualify as rule-of-law?

**Consistency and Predictability**

Perhaps the lynchpin of Hallaq’s argument that Islamic law—in both doctrine and practice—was not arbitrary and was in fact much more akin to a rule-of-law system, is the observation that the application of the law was consistent and predictable. As Hallaq puts it, “one of the most striking features of Muslim judiciary throughout North Africa and the eastern Mediterranean...[was] an impressive consistency in judicial decisions.”

Even this feature, however, is susceptible to Hallaq’s reverse comparison: after showing us that Islamic law is nearly the opposite of what we expect it to be, he turns this analysis back against the rule-of-law claim of contemporary legal systems. In the context of consistency and predictability, Hallaq’s account once again calls into question the claims of contemporary modern legal systems to consistency and non-arbitrary administration of justice. As described above, Hallaq explains

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including mediation, to offer greater participation, relationship-preservation, and holistic justice. For a critical assessment of these developments see Reda, Critical Conflicts; Abel, ed. Politics of Informal Justice.

37 Hallaq at 167.
38 Hallaq at 169.
that consistency is produced through the unique institution of the madhhab.

But this is not the only way that consistency comes about in the Islamic legal tradition. Hallaq also explains that the socially-embedded, meditative approach of the Muslim court also produces legal consistency. That is, the fact that judicial decisionmaking incorporates social and moral factors in its decisionmaking rather than an effort at “black-and-white” legal application and the imposition of a “single interpretation of legal norms,” contributes to the development of consistent judicial decisionmaking:

[T]he qadi mediated a dialectic between, on the one hand, the social and moral imperatives—of which he was an integral part—and, on the other, the demands of legal doctrine which in turn recognized the supremacy of the unwritten codes of morality and morally grounded social relations. And it was this dialectic that culminated in one of the most striking features of Muslim judiciary throughout North Africa and the eastern Mediterranean (at least under the Ottomans), namely, an impressive consistency in judicial decisions.

In this analysis, it is precisely the Muslim court’s informal attributes and its wide lens (incorporating factors such as larger social units and relations and how those informed the litigants and the litigation) that helped to generate the consistency required of a rule of law system. Hallaq does not extend this analysis, but it is difficult to ignore the question that his account points to: whether a system that strives to impose all-or-nothing, black-and-white interpretations that banish social and moral factors from the courtroom can also produce the same level of consistency and reasonableness.

There is a final point Hallaq raises about consistency and predictability. Here, he is not so subtle. One important mechanism for generating consistency in the common law is through stare decisis. Hallaq is very quick to distinguish this tool from those of the Islamic legal system. Hallaq is explicit that this is not a feature of Islamic law and plays no role in generating the consistency of Islamic law. In explaining the difference, Hallaq describes the distorting quality of introducing stare decisis into the Islamic legal system. Specifically, Hallaq discusses how the imposition of both appellate review and stare decisis in British India collapsed the flexibility and pluralism of classical Islamic law—a development that typically would be considered rule-of-law enhancing.

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39 Hallaq at 169 FN 39 (quoting Gulliver, Process).
40 Hallaq at 169.
But in Hallaq’s hands, this elevation of one interpretation of the law over other, potentially valid legal interpretations, and its further imposition not only upon the case at hand and the parties to the particular dispute, but imposed on future parties in future litigations, suddenly appears oddly irrational and arbitrary. On a close reading of the British India experience, it is *stare decisis* that becomes the arbitrary legal mechanism, applying a rule to legal subjects in order to serve the pre-ordained rules of the legal order, rather than applying the best rule to fit the needs of the case. In comparison, a system that provides the judge flexibility to interpret the law as will best serve the needs of the parties before it—and without having to worry about how that might bind future generations—may seem more likely to achieve justice.

II. READING ISLAMIC RULE OF LAW IN SHENZHEN

Thus sitting in an introductory class on Islamic law in Shenzhen, China, my graduate law students are made to grapple with Hallaq’s substantial—and not uncontroversial—claim: Islamic law is a rule-of-law system. Entwined as it is with another set of literature—the vast rule-of-law field—that is equally normative and controversial, Hallaq’s argument is challenging. But these students are particularly well-equipped to engage the subject. They enter this introductory classroom with a full complement of foundational common law courses under their belt, as well as several courses in China’s civil law system. Despite this, or perhaps because of it, there are certain strands of Hallaq’s rule-of-law thesis that give the students pause.

The private character of the Islamic legal system is central to Hallaq—creating the separation between legal authority and political power that Hallaq deems so crucial to *shari’a*’s rule-of-law credentials. Hallaq likens his socially-embedded Muslim court to mediative and arbitral fora, ones that are oriented toward resolution of disputes and maintenance of existing social relations, rather than on enforcement of the law and punishment of violations. This is what Hallaq means by a system that is some/and, rather than all-or-nothing. Hallaq highlights this quality of the court not only to explain its rootedness in existing Muslim communities, but also to explain how the law was not externally, coercively, and forcibly applied, but that it was engaged in an altogether different endeavor than the law of the modern, centralized state. Finally, Hallaq insists that there existed consistency within pluralism and that this produced a rule-of-law type consistency that was capable of just and equitable application to particular circumstances. These three strands of Hallaq’s rule-of-law argument pose thorny problems for the students as they confront them in class.
A. A Private System of Law⁴¹

I attempt to draw out the epistemological character of legal authority in Islam, and how this affects the structure of legal institutions and legal authority. In truth, I too am working against particular western accounts—of both Islam and of law. To my mind, the idea that legal authority is based on one’s reputation as a knowledgeable and well-trained scholar is appealing. It presents a relatively decentralized system in which there is no monopoly on legal authority. This challenges western conceptions of authoritarian rulers wielding the law with absolutist power. But it also challenges existing conceptions of law as requiring a streamlined and hierarchical structure. The knowledge-based legal authority also suggests a rational system, again challenging western conceptions of Islamic law as irrational and arbitrary.

B. Resolution of Disputes Not Law Enforcement

As described above, Hallaq writes with the common perceptions and misperceptions of western scholarship in mind. He is very much writing against the western orientalist tradition. When Hallaq talks about the socially-embedded and participatory character of Islamic law, western claims of autocracy and violence inform his account. Perhaps as a result Shari’a emphasizes the system’s focus on conflict resolution. The pre-modern Islamic law system was focused on resolving disputes rather than punishing wrongdoers or enforcing the law. This approach to law challenges the students in my classroom. A legal system that is not focused on enforcing the law seems problematic, possibly inadequate. I ask again about legal authority in Islamic law—what are the structures that help to develop and maintain authority in the system? The answer the students provide me is faith. The belief of the Muslim legal subject is what creates legal authority. A thoughtful and diligent student explains: “The shared belief of the people creates legal authority. Here, no one believes in the law, so it has to be forced on them.”

The first time I hear this answer I am surprised, and dismayed. It sounds to me like I have reproduced in my students the orientalism that so many of my colleagues have argued forcefully and persuasively against. To explain features of the Islamic legal system as the result of the fact the populations it governed were Muslim is to engage in a classic form of orientalism—while true that the legal subjects were mostly Muslim, this fact alone does not explain the law’s features or structure.

⁴¹[Instead of leaving this in as a separate subsection, incorporate above into the pluralism section]
The students’ focus on the faith of the Muslim legal subject forces me not just to dismiss it but to grapple with their claim. For those in my classroom it is as if a shared sense of morality is what creates the rule of law, i.e. the rule of law is a moral system. This flips traditional notions of the rule-of-law on its head. My students are taken with the following conundrum: in a system that is focused on conflict resolution and not legal enforcement, why follow the law? Their explanation is that Muslim legal subjects have an independent reason to do so—their belief in that system as divine law.\footnote{Notably, in the American legal consciousness, China is understood to be a jurisdiction that is resolution-oriented and relationship preserving rather than a system focused on rights enforcement. See Ruskola.} Listening to the students’ persistent, and cogent, discussions of legal authority, I am forced to reflect upon Hallaq’s text. Although student comments appear to suggest that the Islamic legal system is contrary to traditional notions of the rule of law, I begin to wonder whether they are actually just reading Hallaq’s text very closely. Is their analysis all that different from what Hallaq is arguing? Surely Hallaq argues that Shari’a is a rule of law system because of its rootedness in the communities it governs, its authority independent from brute or coercive force, its source or rootedness is a shared sense of meaning and of right and wrong.

What work is this notion of “faith” doing in their analysis? It may be helpful to understand it as a stand-in for consent. When the students say things like, “here, no one believes in the law, so it must be forced on them,” they are perhaps echoing Hallaq’s own assessment of modern law (though it is not clear that Hallaq would cabin “here” to particular geographic jurisdictions today, but rather to any modern legal system that depends upon a modern, centralized state for its promulgation and enforcement). Hallaq and his student readers are establishing a divide: communities in which a shared faith in law exists, allowing law to operate through consent and without the use of force; and communities in which law requires and depends upon coercive force. For Hallaq, this divide appears to be a temporal one—modern systems necessitate coercion:

[T]he very term “law” is ideologically charged with Foucauldian notions of surveillance, inconspicuous punishment, hegemony and subordination of the docile subject, all of which mechanisms of control (at the very least) make our modern notion of law, and therefore of morality, quite different from any earlier legal system and therefore from earlier notions of “law”—those of pre-sixteenth-century Europe included.\footnote{Hallaq, Law and Society at 258.}
Theorists have long posited that law requires force, that what makes it law rather than simply rhetoric, narrative, or persuasion, is its capacity to deploy force. Perhaps the most eloquent articulation of this concept is Robert Cover’s *Violence and the Word.*[^44] Cover suggests that what makes law, what converts it from mere words into the institution we reverently term “law” is its effectiveness, its non-optionality, its use of force; in a word, its violence. For Hallaq, there is an alternative. His emphasis on the legitimacy of the Islamic legal system, seems to open up another option for law, one in which law can rest upon something other than the threat of violence. When Hallaq discusses the Muslim court, the qadi’s immersion in the community surrounding him, and the ability of common people to access the courts, represent themselves, and to prevail there, he is claiming that these were legal institutions that were legitimate in the eyes of their publics. That legitimacy did not come from state power, or force originating outside the legal system; rather, Hallaq argues that the legal institutions’ activities were almost self-executing by communities that accepted them, that legal authority stemmed from private esteem established through higher learning.

It turns out that Islamic law’s presumed ‘failure’ to distinguish between law and morality equipped it with efficient, communally based, socially embedded, bottom-top methods of control that rendered it remarkably efficient in commanding willing obedience and—as one consequence—less coercive than any imperial law Europe ad known since the fall of the Roman Empire.[^45]

It appears for Hallaq that the problem resides precisely in modern law and its reliance on the state’s coercive violence for both its effectiveness and legitimacy. For my students that temporal element is less clear. In class they appear to hold out the possibility that a shared legal faith might exist in the modern era; theirs is simply descriptive—it doesn’t appear to exist in contemporary China.

To some extent, Cover, Hallaq, and my students are all in agreement. Contemporary law appears to be defined by its coercion. Coercion is a necessary component of law because law “must be forced on them.” Thus if we are inclined to agree with Hallaq that rule of law requires a non-coercive system, then it appears contemporary state laws are *not* rule-of-law systems. Both Hallaq and my students suggests that it is the faith of the public in the law that produces non-coercive legal regimes. This forces us to confront the question: is rule-of-law characterized not by traits of the legal system itself, which invariably must manage multiple contradictions, but by the commitment that legal subjects have toward it?

[^44]: Cover, *Violence and the Word.*
[^45]: Hallaq at [^Hallaq]
To consider the paradigmatic rule-of-law system today, the United States, is its greatest claim to that label the strong attachment that Americans have to their legal system?

C. Consistency in Pluralism

Hallaq emphasizes that classical Islamic law was a non-hierarchical system with multiple centers of authority, yet produced consistent and predictable results. The contradiction of this arrangement is troubling for my students; the poly-centricity seems *per se* anti-law; *per se* inconsistent, unpredictable, arbitrary.

Of course, on one level, this is not insight. This is law’s claim in the modern era—a monopoly on authority and violence, an abhorrence of overlapping jurisdiction or competing authority. But let’s return to it again. Hallaq’s claim, with substantial support, is that the form that polycentricity took in the classical era of Islamic law produced substantial consistency and predictability. In spite of this proffer, the students are nonetheless unpersuaded that polycentricity can be consistent with law’s claim. Certainly, they are skeptical that a poly-centric legal system could produce consistent or predictable results (i.e.-that it can be rule-of-law system). But what is behind this skepticism? Perhaps it tells us that rule-of-law today must be state law; that this necessity has nothing to do with consistency and predictability, but some other commitment.

Curiously, Hallaq seems to agree. In the final chapters of *Shari’a*, and as he develops much further in his subsequent *The Impossible State*, Hallaq suggests that there is no way back to the Islamic rule-of-law. He seems to suggest that the modern state cannot accommodate Islamic rule-of-law and that is, perhaps, because modern law is *necessarily* inconsistent with rule-of-law principles. This is where the agreement between Hallaq and students ceases. Students are skeptical of Hallaq’s critique. Perhaps they are more clear-eyed about law’s necessary contradictions. To get consistency and predictability, you sacrifice localized/community-controlled determination; to get enforcement you sacrifice autonomy/self-determination. These are tradeoffs and they are necessarily made by law. As long as law’s subjects accept the compromises it has made, then those are rule-of-law compromises. Where they cease to do so, where legitimacy is in doubt, the compromises are arbitrary, despotic, qadi justice.

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