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Fundamentalism and International Human Rights in Islamic Constitutions

Thesis in submission for the degree of PhD in Law

Trinity College, University of Dublin, 2016

Paul McDonough

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1. Introduction

This thesis explores how Islamic states can simultaneously remain faithful to Sharia and Islamic principles of governance, and uphold modern international human rights norms. This presents several distinct analytical challenges. First, both Sharia and international law claim a certain universal supremacy over any other source of law—if they collide, in principle neither can yield to the other. Second, within Sharia lies an intricate, ancient set of rules that can be understood today as a system of human rights—it is necessary to determine the degree to which this system and international norms are mutually compatible. Third, Sharia was revealed, and political Islam developed, long before the international state system evolved—this raises the question of how Sharia affects an Islamic state's external relations and its ability to participate alongside other states within a system that nominally considers all states sovereign and equal. Fourth, any discussion of human rights in an Islamic state or of the participation of an Islamic state in the international system faces a deceptively simple threshold question: what exactly is an 'Islamic state'? Finally, since the thesis argues that one defining feature of an Islamic state is that it governs in accordance with Sharia, it becomes necessary to assess how Sharia enters the municipal law of Islamic states.

Examination of these issues establishes a foundation to support the main analysis of the thesis, how Islamic states undertake to follow both Sharia and international human rights law. The thesis addresses them with reference to the Quran and the recorded instructions of the Prophet Muhammad (may peace be upon him); the examples of Islamic rule provided by the early caliphs and other enlightened rulers (may God be pleased with them); the writings of Islamic legal scholars and political theorists from the classical era until the present; and the constitutions, laws and treaty commitments of the member states of the Organisation of Islamic Cooperation (OIC).

Against this background, the final chapters of the thesis analyse the obligations that attach to the international human rights treaty commitments of Islamic states. It proposes a three-level framework of human rights law that binds modern Islamic states, consisting of Sharia, international treaty commitments, and three human rights instruments grounded in Islam: the Universal Islamic Declaration of Human Rights, the OIC's Cairo Declaration on Human Rights in Islam and the Arab League's Arab Charter on Human Rights. Through an evaluation of all commitments made by Islamic states under the International Convention on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and

Cultural Rights (ICESCR), including all reservations they have entered and their treaty partners' objections thereto, and the content of three modern Islamic human rights instruments, the thesis concludes that an emergent 'international Islamic customary law' of human rights now binds all Islamic states to uphold a set of human rights that nearly, but not completely, reflects international standards as envisaged in the Universal Declaration of Human Rights (UDHR), the ICCPR and the ICESCR.

1.1. Background

In many predominantly Muslim countries, a competition of ideas is under way to determine the future political shapes of states and societies. During the 21st century, and especially since the 'Arab Spring' events of 2011, in addition to the violence afflicting much of the region, constitutional debates and drafting or revision efforts have taken place or are under way almost throughout the territory that comprised the classical Islamic empires. Especially in the context of transitions from authoritarian rule, the nature of the state and the relationship between government and citizens are being re-evaluated, particularly the question of where the boundaries should lie between the rights of citizens and the powers of the state.

One key point in many recent debates is the degree to which states should incorporate Islamic law in their constitutional structures. Another is the adoption or implementation of international standards of democracy and human rights. Constitutional reforms that embrace Islamic law, international human rights norms, or both are increasingly coming into force in this region. Because of the number of states that institutionalise Islam and the size of their populations, these developments can in principle both influence the international understanding of human rights law, and establish a new type of customary Islamic law of states.

People want democracy, Islam and international human rights. If asked, most Muslims living in the region respond positively about democracy, and would prefer that their government make Sharia the official law of the land.[1] There is no inconsistency here. Far from being associated with harsh or absolutist rule, in many majority Muslim states, government by Islamic law is linked in the public mind with social justice and the rule of law. Civil society groups across the region, religious as well as secular, have demanded improvements in civil rights, making reference to international standards such as the UDHR. While some authors

[1] Pew Forum on Religion & Public Life, The World's Muslims: Religion, Politics and Society (30 April 2013).

and media project on to the anti-government movements in North Africa, the Middle East and Asia a Manichaean contest between Islamic and democratic forces, quite often the opposite is true—in principle at least, there is considerable overlap between the objectives of organisations such as the Muslim Brotherhood and those of secular opposition groups. This coherence is reflected in a positive correlation in recent constitutional enactments between the prevalence of clauses affirming Islam and of those proclaiming human rights—the more a constitution invokes Islam, the more clauses it tends to contain that protect individual rights and liberties.[2]

Some international human rights advocates assert that 'Islamic' states do not, and maybe can not, uphold democracy and human rights. There is evidence to support such views: a significant number of the 21st century governments that operate under constitutions that designate Islam as the state religion or otherwise as a grounding principle of the state have demonstrably engaged in gross abuses of human rights, including those of their own citizens. It is also possible to discover objectionable rulings of classical jurists, such as corporal punishment for crimes, or punishments for acts such as apostasy or adultery which do not attract criminal sanction in most countries, or disparate sets of rights accorded to men and women, or to Muslims and non-Muslims. Yet the first of these lines of argument contains the questionable assumption that a ruler's acts carried out in the name of Islamic law correctly reflect that law, and the second disregards the flexibility of Islamic law that can permit a ruler or judge to select among multiple rulings, some of which may reflect international norms more closely than others do. It is therefore not possible to categorically state that either "international law" or "Islamic law" is incompatible with the other regarding human rights. In a particular Islamic state, both may well operate simultaneously, and it may not be immediately clear which one displaces the other if they conflict. Only by analysing the interactions between three paradigms of law that apply to a particular Islamic state—Sharia, international law and the state's own constitution—is it possible to determine how a specific conflict between a state act and an individual right would be resolved under that state's law.

This thesis investigates how Islamic and international law shape the commitments of modern Islamic states to democracy and human rights, and how international and Islamic understandings of human rights law influence each other. This requires a hybrid approach to

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[2] Dawood Ahmed & Tom Ginsburg, *Constitutional Islamization and Human Rights: The Surprising Origin and Spread of Islamic Supremacy in Constitutions*, U. of Chicago Public Law & Legal Theory Working Paper No. 477 (2014).

law, sometimes applying international standards and reasoning, sometimes Islamic, sometimes a fusion of the two. The aim is to frame the discussion in terms of international law, but to adopt values and lines of reasoning that would seem familiar to a traditionalist Islamic jurist. The thesis focuses as much as possible on positive legal obligations, reflected for example in constitutions, treaties, legislation, the Quran and reported acts of the Prophet Muhammad (peace be upon him). Nevertheless, in searching for compatibility between two complex and highly developed fields of law that proceed from utterly incompatible first principles (the supremacy of God's Word versus the sovereignty of states), it is at times also necessary to engage with philosophical and theological justifications of law.

The main argument of the thesis is that, at least in the area of human rights, the modern era of multiple independent Islamic states has seen the development of a new branch of customary Islamic international law. The Organisation of Islamic Cooperation (OIC), founded in 1969 as the Organization of the Islamic Conference and re-launched under a new charter in 2008, has revitalised the political idea of a universal Islamic community, now organised into separate states. From the point of view of constitutional law, the development of a modern Islamic community of states has two key aspects. One is the coalescence and entry into practice of a set of ideas of how an 'Islamic' state should govern its citizens, and should incorporate Islamic law into its municipal legal order. The other is the emergence of a shared set of international standards that Islamic states consider they should follow, in order to simultaneously satisfy their obligations to Sharia, and to the global community of states.

Although this thesis is a work of international and comparative law, it aims at all times to acknowledge and accommodate Islamic law. If international lawyers do not engage with the basic framework of law of their Islamic counterparts, no meaningful dialogue is likely to take place. This means that the entirety of this thesis presumes the basic truth of the Islamic narrative: that God exists, the Quran is His literal word, and the Prophet Muhammad (peace be upon him) was the last Messenger of God, meaning that he received ongoing revelation and divine guidance that has not been available to any person since. Sharia, the law of God, is comprehensive and infallible. Islamic law, by contrast, is the best attempt of humans to understand Sharia and apply it to life on earth. The thesis makes every effort to convey a true respect for Islam, Sharia, God, the Prophet Muhammad (peace be upon him) and the many pious and enlightened Muslims who have contributed to the development of Islamic law (may God be pleased with them). Although after the current section invocations such as "peace be upon him" and "may God be pleased with them" will no longer be included in the

text, this is purely a matter of editorial necessity. These phrases should be understood as implicit following every mention in these pages of the Prophet and those who have striven to understand, explain and build upon his legacy.

1.2. Plan of chapters

The law of Islamic states rests on the proofs of Sharia and the precedents set by righteous Islamic rulers.[3] From the Islamic side, these are the basic building blocks from which to construct an international Islamic law of human rights. From the perspective of international law, Islamic states' influence derives from their standing as states and from the status of Islamic law as one of the world's major legal traditions. The first main task of the thesis is to examine how states have adapted their institutional and legal orders to reconcile Islamic rule with modern international norms of governance. The second is to establish how these states fit into the international legal order, particularly in their commitments to uphold international standards of human rights. The ways in which Islamic states combine Islamic rule and at the same time participate in modern treaty regimes guaranteeing human rights demonstrate an emergent international Islamic customary law of human rights. The expression of Islam in the constitutional structures and legal orders of Islamic states defines how they are prepared to implement these rights as civil rights accorded to persons under their jurisdiction.

After this introductory chapter, chapter two introduces Islamic law, the *raison d'être* of an Islamic state. In the early centuries of Islam, scholars developed formal methodologies by which to discover God's law, proceeding from an agreed set of sources and proofs, foremost among them the Quran and the sayings and acts (*sunna*) of the Prophet. The resulting understanding was applied to all aspects of public and private life, eventually including the development of specific sub-fields of Islamic law dealing with government, external relations and (less thoroughly developed) human rights. Any effort to build on the theories the classical jurists developed about the Islamic state, how it should conduct its external relations, and the rights of individuals under its jurisdiction must accord with sound Islamic reasoning. This ultimately requires expertise that only *ulama*—duly qualified traditionalist jurists—possess. However through awareness of the basic materials and methodologies *ulama* work with, non-specialists can at least build on their conclusions and respectfully

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[3] Sharia has no earthly source, being simply the will of God. The Quran and the divinely inspired words and deeds of the Prophet are sources of law, but otherwise even the teachings and actions of even the most pious and rightly guided Muslims are better understood as evidence or proofs of law than as sources. Mohammad Hashim Kamali, Principles of Islamic Jurisprudence (Islamic Texts Society, 1991) 9.

contribute ideas to help stimulate discussion about how to interpret Islamic law in the context of states and international human rights treaties, neither of which yet existed when the classical jurists propounded their theories.

The chapter presents an overview of the core proofs and principles needed to understand how Islamic law is constructed and can evolve. It focuses first on how the law is derived from its sources and proofs, then discusses the pluralistic nature of Islamic law and the interpretive methodologies developed by the classical Sunni scholars, which still comprise the basic tools of Islamic jurisprudence. Because even a careful and complete extrapolation of the sources of Sharia may not yield a clear, enforceable rule for every human situation where a law is needed, the latter parts of the chapter present some of the principles the *ulama* developed to guide their rulings on questions brought before them. Foremost among these are the *maqasid al-Sharia*, the purposes of the law: protection of life, religion, family, intellect and property. The chapter is limited to Sunni interpretations of Islamic law, although later chapters consider the constitutions and treaty participations of Shia states as well.

Chapter three completes the main introductory portion of the thesis by presenting the basic international and Islamic understandings of human rights. It first considers the question of why humans have rights, as seen from the points of view of Islam, and of international law. From the Islamic point of view the answer is essentially, because God says so. It is not as easy to locate the roots of international law's assertion that humans share a universal set of core rights, but for the purposes of this thesis it suffices to find them in positive law. This requires the second part of the chapter to present a brief overview of the sources of international law and the principles that guide their application, then to introduce the UN human rights system. That introduction describes the basic treaties and gives a short overview of the substantive rights their signatories agree to guarantee to persons under their jurisdiction. In its third part the chapter locates these principles in Islamic law, then describes the framework of substantive rights that results from their application. The final part of the chapter compares the ways in which human rights are understood in Islamic law and in international law, finding considerable compatibility both in the rights themselves and in core underlying principles of human dignity, equality and freedom.

Starting with its fourth chapter, the thesis turns to the relationships between Islamic law, Islamic states and international law. Chapter four examines the international aspects of Islamic law. The starting point is *siyar*, the traditional Islamic law of external relations. The

rapid expansion of the caliphate required Islamic scholars to explore how Sharia regulates the external relations of an Islamic community. This they duly did, led by Abu Hanifa and two of his prominent disciples, Abu Yusuf and al-Shaybani, who wrote the definitive treatise on *siyar*. The first part of the chapter discusses how *siyar* informs the Islamic understanding of external relations including human rights, predominantly through the regulation of *jihad* and of the treatment of individual non-Muslims, including citizens of the caliphate as well as outsiders. The second part details the similarities shared by *siyar* in its means of construction and its substance to international law, whose development it may in fact have influenced. As the part demonstrates, while these similarities are not sufficient to support an argument that the two legal traditions can fully merge, they are at least compatible in crucial respects such as the ability to contemplate reciprocal relations among states, and to regard treaty commitments as sacrosanct. Therefore Islamic states can participate in good faith in the systems of international law. In the process, they can and do influence the further development of international law. The final part of the chapter argues that after the universal duty of a state to preserve itself and its citizens, the most important justification of an Islamic state's engagement with the international system is to propagate the *da'wah*, the call to Islam. In a world where the basic presumption of relations between states is peace rather than hostility, this is akin to the pursuit of *jihad* in its oldest and, according to the classical jurists, highest form of persuasion rather than force. Modern Islamic states fulfil this duty through Islamic research and education, and building their foreign policies around solidarity among Islamic states and succour to the disadvantaged members of the international community.

Chapter five looks through an Islamic lens at the fundamental rights of citizens to choose their leaders and participate in their own government. This requires consideration of the nature of an 'Islamic state', because the Islamic law relating to governance, *siyasah Sharia*, developed long before the idea of the nation-state that underpins modern international norms of government. The main task of the chapter is to transpose the classical rules of *siyasah* to modern state structures, guided by the approaches taken in Islamic constitutions. After a short background part, the second part of the chapter explores the model presented by the classical caliphate, the only type of government dealt with at length in the classical sources. The third part of the chapter discusses the modern debate over the proper shape of an Islamic state that ensued following the historical discontinuity represented by the fall of the Ottoman Empire and the era of colonial rule over Muslim lands. The fourth part summarises the principles of Islamic governance that derive from the previous parts, the most important of which are rule

by consent, rule with justice and rule in consultation with the people. These, the fifth part argues, are highly conducive to government as envisioned by international human rights standards. The sixth part of the chapter proceeds to analyse how the constitutions of modern Islamic states implement these values in the face of the apparent dilemma that *siyasah* as derived from the proofs of law by the classical jurists never contemplated separation of powers or government according to legislation rather than by edict. Either these institutional arrangements need to be reconciled with Sharia, or they are examples of *bid'ah*, unwarranted innovation, which would mean that the vast majority of today's Islamic states are not Islamic. The final two main parts of the chapter respectively confront the conundrum of constitutions—how can a constitution be supreme, when Sharia is supreme?—and assess the role of courts in interpreting Islamic constitutions. A concluding part proposes that most such states do indeed maintain fidelity to Islamic law in how they arrange their executive, legislative and judicial powers.

To an Islamic state, the first fount of human rights is Sharia. Accordingly, the sixth chapter analyses how Islamic states implement their promise to their citizens of rule according to Sharia. Because Sharia is subject to a range of human interpretations, its integration into state law can potentially either advance or retard human rights (as understood in conventional international law). The technological and political eclipse of the Muslim lands by European powers led to a tendency in the post-colonial era for newly independent states with Muslim populations to enact constitutions based largely on European models. Modern Islamic states seek to ensure adherence to Sharia through constitutional clauses that assign Islamic law a place in the municipal legal order. The first main part of the chapter analyses how states accomplish this through clauses that require legislation to be grounded in Islamic law, or not to transgress its bounds. The second part examines how some Islamic constitutions use their court systems for a similar purpose, either requiring courts to apply Islamic law in the absence of on-point legislation, or assigning certain areas of law exclusively to Sharia courts. A third part discusses how Islamic states can use these legislative and jurisdictional tools in tandem to establish Sharia in their legal order, and argues that while this may risk creating tension between two branches of government, for the most part the approaches are complementary. A brief concluding part traces the resulting patterns in which modern Islamic states fuse Sharia into what are now predominantly hybrid legal orders.

Chapter seven carries the analysis of the coevolution of international law and Islamic law into the area of human rights, demonstrating the emergence of a modern customary Islamic

international law of human rights. This framework of law consists of Sharia; adherence to the ICCPR, ICESCR and other UN human rights treaties; and a commitment to the rules stated in the UIDHR and the Cairo Declaration. The chapter's first part analyses all of the reservations entered by Islamic states party to the ICCPR and ICESCR against the corresponding objections of treaty counterparts, concluding that in terms of positive law there are only a few provisions actually in dispute between non-Islamic members of the international community and Kuwait, the Maldives, Mauritania and Pakistan. The part further argues that through state action, the international community has accepted Pakistan's recasting of its original Sharia-based reservations to be narrower and more specific than when they were first entered. This demonstrates that the contours of international human rights law can change in in at least some respects to accommodate rules of Sharia, and indicates an available path for Kuwait, the Maldives and Mauritania to explore resolution of the objections to their remaining reservations.

The second part of the chapter completes the discussion of the emergent framework of customary international Islamic law that is the main result of the thesis, by examining a growing set of Islamic human rights instruments, which include a widely respected aspirational statement, the Universal Islamic Declaration of Human Rights; a formal statement of the OIC Council of Foreign Ministers, the Cairo Declaration on Human Rights in Islam; and a binding treaty among the states of the Arab League (four of which have not ratified the ICCPR or ICESCR), the Arab Charter on Human Rights. These instruments are especially important in understanding the international human rights commitments of those Islamic states that are not party to the ICCPR or ICESCR. The first two are framed in Islamic law, which has raised concerns about their fidelity to human rights as understood internationally. However in at least some areas of concern, if the Islamic declarations are read from the point of view of Islamic rather than international human rights principles, they can reach substantive rules that closely resemble international norms. While they do not bind states in the same way that treaties do, these documents show a customary Islamic law of human rights through a shared understanding of the human rights obligations found in Islam. Coupled with the binding commitments of the Arab Charter, which more nearly resemble the ICCPR and ICESCR, this provides a framework of international human rights obligations that nearly all Islamic states subscribe to. For the states which participate in the ICCPR and ICESCR, this provides a second layer of guarantees of human rights. For the rest, it constitutes a reasonably comprehensive alternative set of commitments. In the aggregate,

through commitments to the ICCPR, ICESCR and the Islamic framework, nearly all Islamic states have agreed to be bound by rules reflecting nearly all provisions of the international bill of rights.

Chapter eight, the final main chapter, concentrates on the points of apparent incompatibility between international and 'Islamic international' law of human rights. Using the framework proposed in chapter seven, its first part begins by briefly mapping the intersections between the ICCPR and the Islamic international instruments. It identifies a few gaps, but then uses the example of the right to freedom of association to argue that analysing international rights from an Islamic point of view can at times demonstrate that the Islamic instruments uphold the international rights in substance, even if not necessarily in their plain language. The second part of the chapter analyses the references made to Sharia in both the Islamic states' reservations to the ICCPR, and in the interpretive guidance provided for the Islamic international instruments. It concludes that viewing these references in light of the respective Islamic states' means of incorporating Sharia into their national legal orders as discussed in chapter six can considerably clarify their scope, as each state has specified which set of principles of Islamic law its legislation and courts should follow. The third and final part of the chapter discusses the interpretive freedom under which Islamic states can choose to follow rulings of Islamic law that fall within international human rights norms. It concludes that with some modest reinterpretation of their current understanding of Islamic law, and with that reinterpretation confined within boundaries that fundamentalist jurists of the classical era could readily accept, Islamic states can comport fully with all the requirements of the three levels of human rights law they subscribe to: Sharia, the UN treaty system, and the international Islamic instruments.

1.3. Methodology

This thesis examines the human rights commitments of "an" Islamic state, balancing theories and examples of ideal states with observations of the constitutions, laws and treaty commitments of modern states. It rests on three views of Islamic states: the idealised examples of pre-modern Islamic governance, such as the caliphate; the constitutional and legal commitments to Islamic values and human rights in the constitutions of modern Islamic states; and the common international undertakings of Islamic states. This approach aims to link the interpretations of revered jurists and rulers of the past regarding correct rule and the rights of the people to the reflection of similar values in modern constitutions and

international instruments. The aim is to establish how Islamic states reconcile their Islamic duties to rule with justice and through consultation with their participation in a basically secular international human rights regime. This entails investigating the ways and degrees in which their constitutions and national laws incorporate Sharia, and the scope given to Islamic law in declaring their international and domestic understanding of their legal obligations to uphold human rights.

Research that focuses on an intersection between Islamic law, constitutions and international law presents challenges in how to treat source materials. The distinction between primary and secondary sources can blur. This is especially true in Islamic law, where some early commentators on the original sources of law—the Quran and the reliably transmitted reports of the sayings and acts of the Prophet—have gained such great respect that their commentaries are for all practical purposes treated as if not actual sources of law, then unassailably correct restatements of that law. For example, although in principle al-Shaybani was only commenting on his teacher's presentation of the revealed law in his books of *siyar* (the Islamic law regulating dealings with non-Muslims), the framework he developed and the rulings he reported quickly became the standard orthodox understanding of this sub-field of Sharia. Similarly his teacher, Abu Hanifa, the ascribed founder of the oldest of the four main Sunni schools of jurisprudence, had become seen even in his own lifetime as in effect a source as well as an expositor of law. Even in the 20th century, Mawlana Sayyid Abu'l-A'la Mawdudi put forth a conception of an Islamic state that has influenced the understanding of what Sharia requires in terms of state structures, which quickly found its way into positive law through Mawdudi's role as one of the drafters of Pakistan's constitution. The result is somewhat analogous to the rule whereby the writings of eminent jurists may be taken as subsidiary evidence of international law,[4] but there is no equivalent in international law to the degree of authority afforded the opinions of the most revered classical Islamic jurists, or to the undertakings of modern political Islamists such as Mawdudi or Sayyid Qutb to define a new type of Islamic polity for a world of states. As a result, especially with source materials relating to Islamic law, the thesis at times treats secondary writings of particularly eminent authors as having almost constitutive, rather than merely declarative weight in law.

A further complication is the pluralistic nature of Islamic law. This is an inherent implication of the rule that a judge will be rewarded twice for arriving at a correct ruling, and once for

[4] Statute of the International Court of Justice, article 38(1)(d).

faithfully seeking a correct ruling but arriving at an erroneous one.[5] This has the profound implication that if two qualified Islamic jurists following valid paths of reasoning arrive at different conclusions on a point, no human agency (including other jurists) can say which is correct: in this sense, no *mufti* is mistaken. The resulting pluralism emerges into the Islamic law of states and human rights in two ways. First, beyond the contents of the revealed texts and a relatively few universally agreed rules, opinions regarding the content of Islamic law tend to cluster around the teachings and methodologies of leading ancient scholars. *Muftis* are free to follow any correctly-derived past ruling, or to devise their own, but less qualified decision makers can be instructed to follow the rulings of a particular line of jurisprudence. Disagreement is still possible even within a line of jurisprudence, in which case the decision maker must choose which among several rulings best fits the facts of the case at hand. Second, as Sharia is revealed law, the state or ruler has no special claim to be its interpreter or arbiter. This implies that in an Islamic state, there will always be some check, by or on behalf of the *umma*, on the state's application of the law. The thesis will take an eclectic approach to Islamic law, raising points from the original proofs of law as well as selecting among principles and rulings of diverse schools of jurists. It will address questions of Islamic law mostly from a Sunni point of view, but will also cite scholars from the Shia tradition. Despite their real and serious differences, Sunni and Shia Islam hold many principles in common, and proceed from the same basic sources of revealed law. Non-Sunni views are anyway necessary in order to accommodate the full spectrum of states that consider themselves Islamic.

The constitutions of the member states of the Organisation of Islamic Cooperation (OIC) comprise the main data set for this thesis. Countries whose constitutions do not state a link to Islam or Sharia are not discussed in detail, as although they are OIC members they do not present 'Islamic' constitutions. Bangladesh, Turkey and Uganda, for example, make no mention of Islam in their constitutions, and Turkey's principle of secularism is immutable.[6] Out of the 56 OIC constitutions reviewed (Libya lacks an operative or draft constitution), 25 proclaim a secular state or otherwise explicitly disavow any state religion.[7] A further six

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[5] Mohammad Hashim Kamali, Principles of Islamic Jurisprudence (Islamic Texts Society, 1991) 320 (quoting a *hadith* recorded by Abu Dawud, book 24, no. 3567 in the English translation).

[6] Constitution of Turkey (1982, amended 2010), art. 4.

[7] Constitution of Albania (1998, amended 2012), art. 10(1) (no official religion), (2) ("neutral in questions of belief and conscience"), Constitution of Azerbaijan (1995, amended 2009), arts. 7(1), 18(I) (church state separation), Bangladesh (formerly at least somewhat Islamic), Benin, Burkina Faso, Cameroon, Chad (church state separation), Cote d'Ivoire, Gabon, Gambia, Guinea, Guinea-Bissau, Guyana, Kazakhstan, Kyrgyz Republic, Mali, Mozambique, Niger (church state separation), Nigeria (state religion forbidden at federal level), Senegal, Tajikistan, Togo, Turkey, Turkmenistan and Uganda.

make no mention of religion,[8] and Indonesia limits its constitutionalisation of religion to a declaration of monotheism as a basis of the state.[9] The remaining 24 constitutions recognise Islam as the state religion or a governing principle of society. Of these, 13 are in North Africa (including Mauritania) and the Arabian Peninsula (including Somalia). Most of the rest lie within a constitutionally diverse but overwhelmingly Islamic super-region stretching eastward from the edge of the Mediterranean to the borders of India. While there is copious room for discussion of what exactly constitutes an 'Islamic' state or constitution, here the terms generally refers simply to these 24 states and their constitutions.[10]

Treaty and other international undertakings of the 24 Islamic states supply a secondary data set. These undertakings consist of the main UN human rights treaties and the Cairo Declaration on Human Rights in Islam, a 1990 statement of the OIC's Conference of Foreign Ministers. Applicable regional treaties are referenced, though not discussed in detail. The UIDHR and UDHR are included as aspirational documents reflecting widely agreed views of customary international human rights law. The main analysis focuses on the adherence of the Islamic states to the ICCPR and the ICESCR, especially the reservations Islamic states have entered against those treaties, and the objections of other treaty partners thereto.

The result is to enable the analysis of a three-layer system of law that regulates the human rights commitments of modern Islamic states. The government of a modern Islamic state is beholden to Islamic law and to its constitution, depending on the degree to which the constitution defers to Sharia as the primary source of law, as well as to its international undertakings and the commitment to customary international law that membership in the UN implies. The remainder of this thesis explores how Islamic states utilise this complex yet flexible framework of law to provide for their citizens in varying degrees democracy or at least consultative rule; government by Islamic law; and adherence to international human rights standards.

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[8] Djibouti, Lebanon, Sierra Leone, Sudan, Suriname and Uzbekistan. Sudan's constitution describes the country as "multi-religious". Interim National Constitution of Sudan (2005), art. 1(1).
[9] Constitution of Indonesia (1945, amended 2002), art. 29(1).
[10] Afghanistan, Algeria, Bahrain, Brunei-Darussalam, the Comoros, Egypt, Iran, Iraq, Jordan, Kuwait, Malaysia, the Maldives, Mauritania, Morocco, Oman, Pakistan, Palestine, Qatar, Saudi Arabia, Somalia, Syria, Tunisia, United Arab Emirates, Yemen.

2. Islamic law

This chapter introduces Islamic law, the implementation of which is a main *raison d'être* of an Islamic state. Although this thesis is primarily a work of comparative and international law rather than Islamic law, the reader will need to appreciate the relative significance of basing arguments on (for example) Quranic verses, sayings of the Prophet, acts of early pious caliphs, rulings of eminent jurists or evidence of consensus among the Muslim community. These are the building blocks of the 'fundamentalist' understanding of Islamic law—fundamental in the sense of being based on a common set of basic principles—which forms part of the foundation of all main arguments made in this thesis. The chapter also presents some of the types of reasoning Islamic jurists follow to arrive at conclusions when faced with novel situations. It aims only to cover the essential concepts. Subsequent chapters will introduce additional facets of Islamic law as needed to support their more detailed arguments.

A single chapter cannot explain Islamic law. At most it can provide a basic overview of the minimum set of concepts necessary to support the arguments developed later in this thesis. After a short background part, the next three of this chapter's six main parts introduce the revealed sources of Islamic law; the reasoned proofs of law that supplement those sources; and the means by which Sunni jurists develop Sharia-based rulings for questions placed before them. The fifth part discusses some purposive tools available to an Islamic jurist to guide the choice among the multiplicity of possible rulings that often emerge from an analysis of the sources and proofs. The final main part presents the nature and legal significance of rulings of Islamic law, which may take the form of a *fatwa* (a juristic opinion) or a *hukm* (an enforceable decision). A brief conclusion follows. The result should supply a basis to understand the import of points drawn from the Islamic proofs and their use, along with reference to the arguments of respected Muslim scholars, to support reasoned conclusions throughout the thesis.

2.1. Background

Islamic law is highly developed, multifaceted and pluralistic. Since the revelation of Sharia, which began in 610 AD, ended with the passing of the Prophet in 632, human understanding of it has evolved through the work of innumerable scholars and jurists, as well as political leaders. Few fields of endeavour have seen as much concerted effort for so long as the development of Islamic law. Islamic law is multifaceted in the sense that in principle Sharia is complete, governing everything from individual duties of prayer to the correct way to

govern a state. Its pluralism stems from the impossibility of any human except the Prophet understanding Sharia completely; therefore the results of any sincere, well-informed effort to understand it must be accepted as potentially correct. This is the frame within which Islamic states should assess their human rights obligations.

Law began to infuse Islam in Medina, a transformation that would eventually yield a "religious law that was at once the law of the body politic . . . one of Islam's greatest innovations".[11] As the law of God, Sharia is perfect, immutable and complete. Except for the Prophet, humans can understand it only imperfectly and incompletely (although the Prophet's Companions, who knew him personally, and Successors, who learned from the Companions, could be expected to understand it better than most). The Muslim community, the *umma*, has the responsibility to interpret and apply Islamic law in its collective "capacity as the vicegerent of God", but sovereignty and the law itself are the province only of God.[12] This lends Islamic law a legitimacy that supersedes the will of the ruler, the desires of the people, legislation, a constitution or any other font of law.[13] Any perceived shortcomings reflect human misunderstanding, either of the law itself or of God's purposes in providing the law.

Islamic law is subject to disagreement even among experts regarding the proper methodology to apply to its discovery, what its valid proofs are, and its substantive conclusions. This can obscure the fact of large areas of universal agreement. The revelation ended with the Prophet. The Quran is the supreme legal text. When questions arise regarding how to interpret and apply Islam, especially in areas the Quran does not explicitly address, the ways (*sunna*) of the Prophet and his Companions provide authoritative principles and precedents. There is no question of the primacy of the revealed sources of law, and since the medieval period of Islam most jurists have agreed on two further proofs that emerge from human reasoning.[14] These main resources—the revealed Quran and *sunna*, *ijma* (consensus) and *qiyas* (analogy)—form the unchanging core elements of Islamic law.

2.2. Sources of law

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[11] Wael B. Hallaq, The Origins and Evolution of Islamic Law (Cambridge U. Press, 2005) 195.
[12] Mohammad Hashim Kamali, Principles of Islamic Jurisprudence (Islamic Texts Society, 1991) 16-17.
[13] Khadduri notes that the idea that not only the Quran, but all of Islamic law is divine began in early Islamic history but was not fully elaborated until the second Islamic century. Muhammad ibn Idris al-Shafi'i, *Al-Risala fi Usul al-Fiqh* (Majid Khadduri tr, 2nd ed.) (The Islamic Texts Society, 1987) 43-44 (translator's introduction).
[14] A notable exception was Ahmad ibn Hanbal, eponym of the Hanbali school of jurisprudence, who opposed the use of *qiyas* or any other form of reasoning, holding that only the Quran and the *ahadith* could support legal conclusions. Livnat Holtzman, *Ahmad Ibn Hanbal*, in Gudrun Krämer et al. (eds), Encyclopaedia of Islam, 3rd ed. (Brill, 2010) 15-23 at 21.

This part presents an overview of the two universally agreed sources of Islamic law, the Quran and the *sunna* (practices, demonstrated through words or acts) of the Prophet. It is misleading to think of Islamic law as having sources in the sense of codes, legislation or court judgments. The sole true source of Islamic law is the will of God. Because they came to humans through divine revelation, however, Kamali accepts the Quran and the Prophetic *sunna* as 'sources', referring to all other materials used to discover the law as 'proofs'.[15] While jurists differ in the degree to which they permit the use of proofs other than the Quran and Prophetic *sunna* to arrive at judgments, all Islamic jurists agree that these two sources are superior to the other proofs. No application of other proofs of Islamic law may arrive at a conclusion that would contradict the words of these two basic sources.

2.2.1. The Quran

This section discusses the Islamic holy book, the Quran, as a foundational source of law. Law is only a small part of the message of the Quran, which has had a profound impact on human history. Its ideas and the inquiring spirit it encouraged "penetrated in countless ways and by-ways into the mind of medieval Europe and gave rise to . . . the Renaissance, and thus became in the course of time largely responsible for the birth of . . . the "age of science"".[16] This section speaks only to how the Quran relates to Islamic law, providing a few basic insights into the nature and history of the Quran as revealed to the Prophet and passed down through the generations. This sets a baseline for the rest of the chapter to show how Islamic law developed and continues to develop, in an on-going effort to understand the message of the Quran and apply it to the changing nature of human society.

The Quran was revealed piecemeal over the last 23 years of the Prophet's life. 'Quran' means book or recitation. The first verse revealed commanded the Prophet to recite the words given to him. Further verses were revealed as his ministry progressed, often in response to specific situations facing him or the Muslims at the time. It was revealed in Arabic, and can only be fully understood in that language.[17] The Prophet and his followers wrote the verses on such media as were available, but also memorised them. The Quran is arranged thematically rather than chronologically into 114 *suras* (chapters), 85 of which were revealed before the *Hijra*, the relocation of the Prophet and his followers from Mecca to Medina, and the other 29

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[15] Mohammad Hashim Kamali, Principles of Islamic Jurisprudence (Islamic Texts Society, 1991) 9.
[16] Muhammad Asad, The Message of the Quran (Dar Al-Andalus, 1980) 1.
[17] Muhammad ibn Idris al-Shafi'i, *Al-Risala fi Usul al-Fiqh* (Majid Khadduri tr, 2nd ed.) (The Islamic Texts Society, 1987) 93-94.

thereafter. Uthman, the third caliph, commissioned the canonical compilation of the Quran.[18] Because the Muslim community began to take on the aspects of a state after the *Hijra*, the *suras* received in Medina tend to be more focused on governance and public affairs than are those received in Mecca, but the latter are of course quite relevant as well.

As the verbatim Word of God, the authority of the Quran is beyond question. About 350 of its over 6,000 verses contain instructions capable of being understood as law.[19] These are the *nusus*, "the definitive ordinances of the Qur'an which are expounded in positive legal terms".[20] These commands take two forms. Rules governing relations among people, *mu'amalat* (civil transactions), are enforceable by civic authorities, while transgression of equally mandatory *ibadat* (devotional) obligations "calls for moral reprimand in this world and punishment in the next, but they are basically not justiciable in the courts".[21] The verse "We have neglected nothing in the Book" (6:38) indicates that the Quran presents a complete treatment of law and religion, albeit mostly in the form of general principles that require further elaboration in order to apply them to society.[22]

The rules found in the Quran fall into two sets of two categories. They are definitive (*qat'i*) or speculative (*zanni*), general (*'amm*) or particular (*khass*). Definitive rulings, for example that a husband takes half the estate of his deceased wife if there are no children, are not open to interpretation.[23] Speculative rulings may require some juristic effort (*ijtihad*) to interpret. For example, most jurists understand the command that highway robbers should "be banished from the earth" to mean exile, but jurists of the Hanafi school interpret this to mean imprisonment.[24] General statements made in the Quran can include the particular, or further evidence from the Quran or the Prophetic *sunna* can specify the particular. Al-Shafi'i provides as an example of the former Quran 49:13 which speaks first to all people and then to

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[18] Mohammad Hashim Kamali, Principles of Islamic Jurisprudence (Islamic Texts Society, 1991) 25.
[19] Mohammad Hashim Kamali, *Source, Nature and Objectives of Shari'ah*, 33 Islamic Quarterly (1989) 215-34 at 219. This represents more of the text than it may seem, because the legal verses are generally longer and repeat other verses less frequently than do the verses that do not include statements of law. Wael B. Hallaq, A History of Islamic Legal Theories (Cambridge U. Press, 1997) 3-4.
[20] Mohammad Hashim Kamali, *Source, Nature and Objectives of Shari'ah*, 33 Islamic Quarterly (1989) 215-34 at 217 (citing Muhammad Asad, The Principle of State and Government in Islam (U of California Press, 1961) 13).
[21] Mohammad Hashim Kamali, *Source, Nature and Objectives of Shari'ah*, 33 Islamic Quarterly (1989) 215-34 at 217-18.
[22] Mohammad Hashim Kamali, Principles of Islamic Jurisprudence (Islamic Texts Society, 1991) 35.
[23] Mohammad Hashim Kamali, Principles of Islamic Jurisprudence (Islamic Texts Society, 1991) 28 (referring to Quran 4:12).
[24] Mohammad Hashim Kamali, Principles of Islamic Jurisprudence (Islamic Texts Society, 1991) 29 (referring to Quran 5:33).

those who are "God-fearing", a subset of all people.[25] Sometimes further evidence specifies the particular from the general, as when the Prophet clarified the Quran's command that heirs take from an estate after bequests are made and debts are repaid, by specifying that bequests may not exceed one third of the estate and that debts take priority over both bequests and inheritance.[26]

Taking the Quran as infallible and complete, as it must be in order to provide a firm foundation for Islamic law, can require careful analysis. The Quran "[stresses] reason as a valid way to faith".[27] In principle this is a very controversial point—ever since the early centuries, some jurists have argued that God provided humans with the ability to reason and expects them to use it to better understand His revelation, while their opponents argue that because the revelation is complete and perfect humans have a duty simply to follow it. The choice cannot be this stark, as the jurists who argue in favour of reason ground their arguments in the revealed texts, and those who oppose them often apply formal hermeneutics to do so. In any case, as al-Shatibi observed, every jurist "who has resorted to the Qur'an in search of the solution to a problem has found" guidance there.[28]

Of the many interpretive tools that apply to the Quran, three in particular will inform the background to the arguments made in this thesis. Two are crucial: consideration of the occasions and circumstances of revelation, and identification of the legal reason (*'illah*) behind a command. The third, abrogation (*naskh*) whereby a later instruction overrides an earlier one, is less pervasive in the thesis but needs considered at some junctures. The connection between the words of the Quran and the events occurring at the time and place of their revelation can aid interpretation by resolving some apparent contradictions. Jackson observes "there is nothing necessarily contradictory about a transcendent, unchanging God commanding the commission of X whenever circumstance Y obtains, and the abandonment of X whenever Y changes or disappears".[29] In order to fulfil the Quran's promise of

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[25] Muhammad ibn Idris al-Shafi'i, *Al-Risala fi Usul al-Fiqh* (Majid Khadduri tr, 2nd ed.) (The Islamic Texts Society, 1987) 97-98 ("O ye people, We have created you male and female and made you peoples and tribes, that you may know one another. Verily, the noblest among you in the sight of God is the most God-fearing of you" (Quran 49:13). The second part speaks only to those "who can comprehend what fear of God means", which excludes "lunatics and children who have not yet come of age").

[26] Muhammad ibn Idris al-Shafi'i, *Al-Risala fi Usul al-Fiqh* (Majid Khadduri tr, 2nd ed.) (The Islamic Texts Society, 1987) 104-105 (referencing Quran 4:15).

[27] Muhammad Asad, The Message of the Quran (Dar Al-Andalus, 1980) 3.

[28] Mohammad Hashim Kamali, Principles of Islamic Jurisprudence (Islamic Texts Society, 1991) 35.

[29] Sherman A. Jackson, *Jihad and the Modern World*, in Mashood Baderin, ed., International Law and Islamic Law (Ashgate, 2008) 233-254 at 238. Jackson goes on to rebut Qutb's argument that Quran 9:29 ("Fight those who do not believe in God and the Last Day . . . .") commands perpetual hostility toward Christians and Jews

comprehensive guidance for all human interactions, most jurists seek to understand the reasons for its rulings then apply those reasons to new situations (this is critical to the use of *qiyas*). Sometimes the Quran explicitly states the reason for a rule, as for example when booty is shared with the disadvantaged, "so that wealth does not merely circulate among the wealthy".[30] This indicates that Sharia values some measure of redistribution of public wealth to the needy. Other rulings lack explicit justificatory text, but the majority of jurists hold that they have a duty to understand the reasons behind these rulings so that they may use them to more broadly further the objectives (*maqasid*) of Sharia when situations arise for which a clear ruling is lacking.[31] Finally, the Quran itself approves the idea that a later text can displace legal rulings contained in an earlier text (although not the earlier text itself, which being divine, was not in error).[32] Consideration of the circumstances surrounding the revelation can clarify the reason for an abrogation, as for example the *umma*'s conditions changed fundamentally after the *Hijra*,[33] when it became possible to form a state.

2.2.2. *Sunna* and *ahadith*

The Quran enjoins obedience to the Prophet.[34] Because the Prophet was the divinely inspired Messenger of God, his actions and instructions, and especially the rulings he gave on questions brought before him, could clarify the import of Quranic verses and speak to points of law not directly addressed in the Quran. The practice of following the behaviour, the *sunna* (sing. *sunan*; ways), of an enlightened individual as a model long predated Islam.[35] The Prophet taught, provided an example to live by, and gave judgment. His close Companions also issued rulings. At times the Prophet would send a Companion to a particular community of believers to provide guidance. Over time, Companions went out to the new cities of the empire, Basra, Damascus, Kufa and others. The Prophet tolerated many existing traditional practices and customary norms, giving them the sanction of his *sunna*.

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with verses in chapter 5 speaking of love between Muslims and Christians and verses in chapter 3 expressing respect for righteous People of the Book, arguing that these "establish[] a *range* of possible attitudes and behaviors on the part of Jews and Christians toward Muslims" (original emphasis). Id. 248-49.

[30] Mohammad Hashim Kamali, Principles of Islamic Jurisprudence (Islamic Texts Society, 1991) 41 (quoting Quran 59:7).

[31] Mohammad Hashim Kamali, Principles of Islamic Jurisprudence (Islamic Texts Society, 1991) 41-42.

[32] Wael B. Hallaq, Sharia: Theory, Practice, Transformations (Cambridge U. Press, 2009) 96-97 (quoting Quran 2:106: "Such of Our Revelation as We abrogate or cause to be forgotten, We bring [in place of it] one better or the like thereof" (original brackets)).

[33] Mohammad Hashim Kamali, *Source, Nature and Objectives of Shari'ah*, 33 Islamic Quarterly (1989) 215-34 at 223.

[34] See e.g. Quran 4:59 ("Obey God and obey the Messenger").

[35] Wael B. Hallaq, A History of Islamic Legal Theories (Cambridge U. Press, 1997) 10-11.

Sunna is transmitted through *ahadith* (sing. *hadith*), sayings of the Prophet or other eminent early Muslims that recorded the understanding of the Prophet and Companions of Islam. These could attest to a statement someone had made, or to an action performed. Eyewitnesses reported them to others, who passed them on. As the empire continued to expand during the Umayyad period, conquests and conversions brought Islam to regions with no experience of Arabian traditions and no exposure to the Companions. It therefore became necessary to instruct the new Muslims in the ways of the faith, which required in addition to the Quran some means of transmitting the *sunna* of the early Islamic leaders and communities, and the rules they expressed. Over the first two centuries of Islam, direct observation and emulation of the *sunna* gave way to *ahadith*. *Ahadith* attributed to the Prophet or the Companions or describing their actions were memorised and repeated verbatim—any summarising or interpretation would risk polluting the divine message with the imperfect understanding of the transmitter. As they were gathered into written collections, indexed, published and commented on, *ahadith* gained acceptance "based on their probability and plausibility, on the authority of the *shaykhs* who transmitted them, and on collective agreement".[36] The *ahadith*, however, are a form of transmission, not themselves constitutive of law. Their rise to prominence "was largely a matter of rationalization and authorization, [not] one of content or substance".[37]

Ahadith proliferated in the first century of Islam. Many were spurious. Others were genuine, but had originated with the Companions, the Successors or the parts of pre-Islamic tradition that carried on as Islamic norms, retrospectively attributed and connected to the Prophet.[38] The vast numbers of false *ahadith* and the lack in the newer regions of the empire of a set of local customs that fit readily into the Islamic framework were an impetus to spread standardised Arab-Islamic norms (somewhat different versions from each of the various main cities) in the form of *ahadith*.[39] Establishing authenticity involved textual analysis, as well as assessing the *hadith*'s chain of transmission (*isnad*). The most reliable *ahadith* were those that had been continuously reported by so many reliable witnesses from a diverse geography that they were certainly true.[40] Less certain *ahadith* could also carry significant weight. From

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[36] Ira M. Lapidus, Islamic Societies to the Nineteenth Century: A Global History (Cambridge U. Press, 2012) 160 (section co-authored by Lena Salaymeh).
[37] Wael B. Hallaq, The Origins and Evolution of Islamic Law (Cambridge U. Press, 2005) 200-01.
[38] Wael B. Hallaq, The Origins and Evolution of Islamic Law (Cambridge U. Press, 2005) 102-03.
[39] Wael B. Hallaq, A History of Islamic Legal Theories (Cambridge U. Press, 1997).
[40] Mohammad Hashim Kamali, Principles of Islamic Jurisprudence (Islamic Texts Society, 1991) 70-71.

about the third Islamic century written compilations of *ahadith* became widespread.[41] Ultimately jurists gathered the most reliable *ahadith* into collections of some thousands, which became the standard sets trusted to define the law. The collections of al-Bukhari, Muslim, Abu Dawud, al-Tirmidhi, Ibn Majah and al-Nasai becames the canonical references, with "the first two . . . occupy[ing] an almost sacred position for many Muslims".[42]

2.3. Proofs—reasoned law

This section introduces the secondary proofs of Sharia. Beyond the revealed Quran and *sunna*, three products of human endeavour complete the foundation of Islamic law. *Ijma*, a unanimous consensus of the community or of the scholars within it,[43] establishes a binding interpretation of Islamic law. Once a consensus is achieved, future generations may not dispute or change it. If a question cannot be answered by reference to the Quran, *sunna* or a rule of *ijma*, the jurist may reason by analogy (*qiyas*) from one or more of these.[44] *'Urf*, the customary practice of the Muslims or of a particular community, can constitute a supplementary proof of law as long as it does not contradict the revealed sources or a point of *ijma*. This is especially true of customs that the Prophet or his Companions tolerated as compatible with the strictures of Islam.

2.3.1. *Ijma*

Ijma stems from the Prophetic *hadith* "my community shall never agree on an error". Therefore if the *umma* come to agreement on a rule of law for a situation that the revealed sources do not explicitly address, their interpretation must indeed reflect the rule of Sharia, and as such is binding. After the Quran and the *sunna*, *ijma* is the next highest proof of Sharia. It is the only universally binding proof of law that stems from human reason.

Ijma entered Islamic jurisprudence as an argument of the jurists of Medina against the tolerance of disagreement in interpretation by their counterparts in Iraq, whom they held in

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[41] Farooq A. Hassan, *The Sources of Islamic Law*, 76 Am. Socy. Intl. L. Proc. (1982) 65-75 at 70.
[42] Farooq A. Hassan, *The Sources of Islamic Law*, 76 Am. Soc'y Int'l L. Proc. (1982) 65-75 at 70. This is due in part to the thoroughness with which they were verified. For example, "Bukhari in 16 years of travel and research . . . selected only 7,275 as "true" and then classified them according to subject matter to provide a consistent interpretive guide of the Prophet's actions and sayings". Id.
[43] Wael B. Hallaq, A History of Islamic Legal Theories (Cambridge U. Press, 1997) 20 ("On matters related to general practice, all Muslims were deemed to participate in forming consensus, whereas on technical points of the law, the scholars had a monopoly").
[44] Ira M. Lapidus, Islamic Societies to the Nineteenth Century: A Global History (Cambridge U. Press, 2012) 164 ("Law came to be defined as a code of religious teaching based on revelation in Quran and hadith, as interpreted and amplified by the consensus of the legal scholars and by the use of analogical reasoning").

violation of the *sunna* sanctioned by the Prophet.[45] As with the Medinese *sunna*, the jurists of Medina considered that their consensus bound the entire Muslim community. Despite early objections that it constituted an impermissible instance of man-made law, the principle of consensus as demonstrating binding law quickly won acceptance among jurists, who modified Malik's original formulation "to include all the leading scholars".[46] Al-Shafi'i diverged from his contemporaries in presenting *ijma* as a product of the consensus of the entire community, not only the jurists.[47] His 11th/12th century follower al-Ghazali moved this view closer to the Sunni mainstream by asserting that community consensus was only needed for "fundamentals", and on questions of doctrinal detail the consensus of scholars could establish *ijma*.[48]

Doctrinally, it is agreed that the consensus of the Companions created binding, permanent law. Regardless of the practicalities, the classical jurists faced a theoretical question of whether the Companions could be considered to speak for "my people" whom the Prophet spoke about. Surely a complete agreement among those who knew the Prophet personally indicated a correct understanding of Sharia, yet just as surely not all Muslims were consulted in such exercises. While in principle *ijma* is a consensus of the entire *umma*, in fact the Companions could safely speak for them (if all the Companions agreed on a point, which Muslim who had not known the Prophet would challenge their conclusion?). Therefore arguably the Successors could also establish *ijma*, and so on down the generations until, arguably, consensus among the *ulama* (qualified Islamic jurists) could do so.

Although in principle consensus must be universal (at least among the *ulama*) in order to demonstrate binding law, as the Islamic territory expanded it quickly took on a regional aspect. Hallaq observes that other groups of early jurists, particularly from the regions that are now southern Iraq, also propounded their own practices as reflecting consensus, but had to gain acceptance from the jurists of the Hijaz and other regions as they could not construct the uninterrupted link between their own customs and the ways of the Prophet as the Medinese could.[49] In response to the practical difficulties involved in ascertaining the views of all prominent scholars on a point of law, much less the entire community, al-Ghazali argued "that if a few scholars reached an agreement and no objection was raised by others

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[45] Majid Khadduri, *Nature and Sources of Islamic Law*, 22 Geo. Wash. L. Rev. (1953-1954) 3-23 at 14.
[46] Majid Khadduri, *Nature and Sources of Islamic Law*, 22 Geo. Wash. L. Rev. (1953-1954) 3-23 at 14.
[47] Majid Khadduri, *Nature and Sources of Islamic Law*, 22 Geo. Wash. L. Rev. (1953-1954) 3-23 at 15.
[48] Majid Khadduri, *Nature and Sources of Islamic Law*, 22 Geo. Wash. L. Rev. (1953-1954) 3-23 at 15.
[49] Wael B. Hallaq, The Origins and Evolution of Islamic Law (Cambridge U. Press, 2005) 111-12.

(*ijma al-sukut*), or if the majority agreed and only a few raised an objection, agreement becomes binding on the community".[50]

Ijma significantly influenced the foundational jurisprudence—the agreement of all the Companions on how the Prophet would have ruled sufficed to establish a point of law, and succeeding generations could refer back to their example.[51] It could expand upon the law as revealed by the Prophet. For example, it is reported that Umar, the second caliph, imposed the penalty of 80 lashes, rather than the 40 applied by the Prophet, for the consumption of alcohol, and that the Companions ratified his ruling by consensus.[52] The incorporation of non-Arab societies into the *umma* reduced the likelihood that all Muslims would share a common understanding of a point left unclear by the revealed sources. Al-Shafi'i found that this mixing of communities had made following the civil customs of the local society an unreliable guide to correct behaviour, and that therefore only the practices shared among all Muslims could avoid error in indicating what is lawful and what is unlawful.[53]

Despite its weight as the third source of indisputable law after the Quran and *sunna*, in practice the establishment of new universal rules by consensus quickly became very rare. According to Kamali, only the *ijma* of the Companions themselves has gained universal acceptance, "partly due to their special status and not always due to their participation and consensus".[54] The main utility of *ijma* is to give authority to rules whose origin in the Quran or *sunna* is speculative. Such rules

> do not carry a binding force, but once an *ijma* is held in their favour, they become definite and binding. Instances can be cited, for example, where the Companions have, by their *ijma'*, upheld the ruling of a solitary Hadith. In such cases, the ruling in question is elevated into a binding rule of law.[55]

In principle *ijma* is second only to the revealed sources. In practice it has fallen into disuse since the first generations of Muslims. Partly this is due to the maturation of Islamic law, so

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[50] Majid Khadduri, *Nature and Sources of Islamic Law*, 22 Geo. Wash. L. Rev. (1953-1954) 3-23 at 16.
[51] Mohammad Hashim Kamali, Principles of Islamic Jurisprudence (Islamic Texts Society, 1991) 157.
[52] Muhammad Said Abdul-Rahman, Jurisprudence and Islamic Rulings: Transactions – Part 8 (MSA Publication, 2007) 232-33 (citing Abdullah Al-Bassam, *Tawdeeh Al-Ahkam* 5/300). There is some disagreement among the *ulama* whether this rule required, or merely permitted, the ruler to impose the increased punishment; the former reading would imply that *ijma* of the Companions could abrogate a prior rule of the revealed sources. Id.
[53] Muhammad ibn Idris al-Shafi'i, *Al-Risala fi Usul al-Fiqh* (Majid Khadduri tr, 2nd ed.) (The Islamic Texts Society, 1987) 287.
[54] Mohammad Hashim Kamali, Principles of Islamic Jurisprudence (Islamic Texts Society, 1991) 156.
[55] Mohammad Hashim Kamali, Principles of Islamic Jurisprudence (Islamic Texts Society, 1991) 158.

that ever fewer questions arise that are straightforward enough to be susceptible of resolution by consensus. Partly it is simply an effect of the lack of a means to measure and demonstrate the complete agreement of Muslims. The modern structures of states and treaties provide a way for the rulers of individual Islamic states, each representing a portion of the *umma*, to come together and consult, and declare their collective understanding of Sharia. This is not *ijma* in the classical sense, but if the jurists support the collective conclusions of the rulers then these would arguably at least carry the force of strong customary law, if not permanently binding *ijma*.

2.3.2. *Qiyas*

Qiyas is the act of reasoning by analogy from the trusted sources of law to arrive at a conclusion regarding a question those sources do not directly cover. As such it does not fit as readily into Masud's category of "immutable" as do the Quran, *sunna* and *ijma*. Yet as Muslim society developed it became clear that a legal system restricted to the plain wording of the texts would in effect leave large areas of law entirely to the discretion of individual *qadi*s (judges). Without some device such as *qiyas* it is difficult to see how a system limited to the rules explicitly laid down in the Quran and *ahadith* could have fulfilled the all-encompassing aspirations of Islamic law.[56] From the textualist point of view, *qiyas* has the advantage that it is at least grounded in a formal methodology of interpretation, rather than admitting of abstractions such as equity or the public interest. Eventually, *qiyas* secured widespread agreement, even from the followers of the strong textualists Shafi'i and Ibn Hanbal. *Qiyas*, if correctly applied, should always come to the same result in similar situations, and therefore can in effect establish principles of law that bind future jurists.

To resolve a novel legal question through *qiyas*, the main task of the jurist is to identify a common effective cause (*'illah*) between the case at hand and a case addressed by the texts or a rule of *ijma*.[57] After establishing that the two cases share the same *'illah*, but that the case at hand is not explicitly addressed in the revealed law, the jurist may apply the ruling in the older case *mutatis mutandis* to decide the new case.

2.3.3. *'Urf*

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[56] Wael B. Hallaq, The Origins and Evolution of Islamic Law (Cambridge U. Press, 2005) 127 (observing that the Hanbalite school eventually adopted *qiyas*, "abhorrent to Ibn Hanbal" and *istihsan*, whereas the Zahirite school that stood by its original principles of literalism soon ceased to exist).

[57] Mohammad Hashim Kamali, Principles of Islamic Jurisprudence (Islamic Texts Society, 1991) 158. The practice of developing analogies based on rules established by *ijma* remained somewhat controversial. Id. 183.

Custom, *'urf*, can be binding in Islamic law when it does not contradict the main proofs and principles of law. A course of action can be deemed customary when it reflects widespread practice, and is "reasonable and acceptable to people of sound nature".[58] As Islam spread through the Companions and successors, these senior Muslims became the reference point for Islamic norms. Their toleration of local custom sanctified it, even when it differed from practices in other Muslim cities, even the holy cities of the Hijaz. *'Urf* can differ from one locale to another, and unlike *ijma* can change over time.

2.4. *Usul al-fiqh* – methods of discovering Islamic law

This part traces the progression of Islamic jurisprudence from its origin as the best efforts of individual judges based on the sources to an intricate, formal methodology. This process began in the time of the Prophet and took about 200 years to fully mature. The result, *fiqh*, is Islamic legal doctrine as developed by human effort, through Islamic jurisprudence or *usul al-fiqh*. The part consists of two sections. The first presents the evolution of *usul al-fiqh* from its origin in the instructions of the Prophet to a judge until the inception of what became the four major Sunni *madhahib* (schools of law; singular *maddhab*), the Hanafi, Maliki, Shafi'ite and Hanbali schools, each named after a jurist whose ideas the school developed from. The second section explores the two paradigmatic ways for subsequent jurists to apply *fiqh*, *ijtihad* (independent reasoning, following the methodology of one of the *madhahib*) and *taqlid* (imitation, application of the conclusions reached by prior jurists of the *maddhab*).

The root of *usul al-fiqh* is the verse, "O you who believe, obey God and obey the Messenger, and those of you who are in authority; and if you have a dispute concerning any matter refer it to God and the Messenger".[59] This establishes the Quran and Prophetic *sunna* as the highest sources of law, while obedience to "those . . . in authority" validates *ijma* and referral of further disputes to God and the Prophet sanctions the use of *qiyas*,[60] as the only way to ascertain God's will after the Prophet had passed. Muhammad ibn Idris al-Shafi'i, who lived about two centuries after the Prophet, proposed the formal methods that, subject to some variations, became the standard approach of Sunni jurists for discovering Sharia.

2.4.1. Development of schools of jurisprudence (*madhahib*)

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[58] Mohammad Hashim Kamali, Principles of Islamic Jurisprudence (Islamic Texts Society, 1991) 250. To apply to a transaction, custom must be in existence when the transaction is concluded, and "must not contravene the clear stipulation of an agreement". Id. 250-51.
[59] Quran 4:58.
[60] Mohammad Hashim Kamali, Principles of Islamic Jurisprudence (Islamic Texts Society, 1991) 35.

Traditionally, Islamic jurisprudence began with the instructions of the Prophet to Mu'adh ibn Jamal, upon sending him to Yemen to bring Islam to the community there. The Prophet asked how Mu'adh would judge, to which Mu'adh responded, by the Book of Allah (the Quran). The Prophet asked what he would do if he did not find the answer in the Quran. Mu'adh answered, he would follow the *sunna* of the Prophet. Finally the Prophet asked what he would do if he still did not find an answer to the question before him. Mu'adh responded, "I will strive to form an opinion", and the Prophet praised God for Mu'adh's answers.[61]

Consulting as needed with experts in interpreting the Quran and the *sunna*, *qadis* applied those rules of law that were demonstrable with certainty (*'ilm*). If the certain rules of the revealed sources did not apply to the case at hand, the *qadi* could appeal to the caliph for a ruling based on the sources or clear precedents, but the caliph did not have the authority to declare a new rule; in this case it fell to the *qadi* to independently exercise *ra'y*, the application of considered opinion, and decide the case.

By the second century after the Prophet's passing, study of *ahadith* had evolved toward a science of Sharia interpretation. Groups of students coalesced around respected expostulators of the Quran and *ahadith*. In the mid-8th century Abu Hanifa led a group of jurists in Basra who advocated a rationalist approach to resolving legal questions not directly answered in the Quran. Their introduction of *qiyas* provided a structure to help to reach correct decisions through analysis rather than their own subjective understanding of Sharia, *ra'y*. Some communities that had benefited from the personal leadership of the Prophet and the Companions continued to hold that their traditional practices, learned from the original teachers, demonstrated the true Sharia. Especially the jurists of Medina, epitomised by Malik ibn Abbas, held that since the Prophet had lived in and led the city by example, and the people had not altered their Islamic practices since, Medinan practice was a reliable guide to the *sunna* and thus preferable to *qiyas* as a way to reach rulings.[62]

Muhammad ibn Idras al-Shafi'i studied in Medina under Malik, then went to Basra where he disputed with Abu Hanifa's senior pupils including al-Shaybani. Dissatisfied with the approach of either nascent *maddhab*, al-Shafi'i advocated a stricter adherence to the sources of law. Through close analysis of the Quran and the most reliable collections of *ahadith*, al-Shafi'i developed or discovered a coherent set of rules of interpretation. His system

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[61] *Sunan* al-Tirmidhi, book 6, 3:1327.
[62] Wael B. Hallaq, The Origins and Evolution of Islamic Law (Cambridge U. Press, 2005) 105-06.

represented something of a synthesis of the Hanafi and Maliki approaches, and became the reference model of Sunni *usul al-fiqh*. Other schools diverge from it more in detail than in the main doctrines. In essence, the *usul al-fiqh* described in this thesis represents the Shafi'ite approach, which other *madhahib* now also more or less follow, except where variances are noted. The fourth main Sunni school follows the teaching of Ahmad ibn Hanbal, a pupil of Abu Hanifa's pupil Abu Yusuf and also of al-Shafi'i. Ibn Hanbal took al-Shafi'i's advocacy of the primacy of the sources to its logical extreme, rejecting not only *qiyas* and *'urf* but all forms of human reasoning in favour of a literal interpretation of the Quran and the *ahadith*, of which he was a renowned compiler. The Hanbali *maddhab* is thus in a sense the strictest of the four main schools, as no embellishment of the texts is permitted, but also the most permissive, because if the texts do not speak to a point then in principle a Hanbali jurist should not issue a ruling. In the early centuries there were many other *madhahib*, but these four—Hanafi, Maliki, Shafi'ite and Hanbali—eventually gained the adherence of nearly all Sunni *ulama*, and continue to thrive today.

2.4.2. Arriving at rulings

This section presents two alternative means by which Islamic jurists since the early centuries reach rulings on questions of law, *ijtihad* (reasoning) and *taqlid* (imitation). The question of which of these is appropriate to the ongoing development of Islamic law in the modern age may at first seem esoteric, but it is in fact crucial to this thesis (and will remain unanswered). An Islamic state that wishes to structure its legal order to be faithful both to fundamentalist Islam and to international human rights norms arguably faces a choice between developing its understanding of political Islam based on the sources of law (akin to *ijtihad*) or by building on examples provided by previous Islamic polities (akin to *taqlid*). The choice is complicated for two reasons. First, there is a strong (albeit very controversial) view that when the Sunni *madhahib* coalesced into four main schools around the 10th century, Islamic law had been completely discovered and therefore further *ijtihad* became impermissible. Second, even if *ijtihad* is still allowed, its use is restricted to *mujtahidun*, particularly highly qualified *ulama*. Those who attempt *ijtihad* without proper preparation, it is claimed, are at grave risk of leading the *umma* down an erroneous path. This thesis does not seek to resolve these questions, and in any case constructing the legal order of a state is a very different exercise to discovering Sharia. Nonetheless, *ijtihad* and *taqlid* are the two main analytical patterns of *usul al-fiqh*, and will form part of the backdrop to any effort to construct an Islamic legal order.

Similarly to English common law, the basic task of the *'alim* (singular of *ulama*) is not to create the law, but to discover it. In this effort the jurist must search diligently for God's intent as revealed in the law, but because of the impossibility of humans achieving perfect understanding, "will not be held liable nor incur a sin regardless of the result".[63] The Prophet is reported to have said, "If a judge passes a judgment having exerted himself to arrive at what is correct, and he is indeed correct, he will have two rewards. If he passes judgment having exerted himself to arrive at what is correct, but it is incorrect, he will have one reward".[64] This naturally encourages judicial pluralism, as while *ulama* may certainly disagree and dispute, no *'alim* can reliably assert that another is mistaken.

2.4.2.1. *Ijtihad*

In the second Islamic century, the use of *ra'y* receded in favour of *ijtihad*, the process of reasoning from Islamic sources and principles to reach conclusions of law in the absence of a well-established rule. The effort to gather, classify and propagate reliable *ahadith* yielded material which could support a more formal approach to legal reasoning. Simultaneously, the rapid expansion of Islamic rule and religion to new territories and peoples outstripped the capacity of the informal relationships and study circles that had ensured the corresponding spread of understanding of the law. With the availability of source materials and a dearth of experience living under and applying Islamic law, the methodological rigor offered by al-Shafi'i, and by those who advocated alternative methodologies in reaction to his, presented an opportunity to begin to standardise juristic reasoning.

Another attraction of *ijtihad* was that, unlike *ra'y*, it represented not unfettered human judgment, but rather called on the jurist to follow set rules of interpretation. This made it less objectionable to the textualist view that reason should play no role in interpreting the divine law. In order to perform *ijtihad*, a jurist must know the Quran and all legally significant *ahadith*, be proficient in the techniques of *hadith* criticism, and understand the doctrine of abrogation and which rules have been abrogated by others; be fluent in Arabic; be "deeply trained in the art of legal reasoning, in how *qiyas* is conducted and in the principles of causation"; and "must know all cases that have been sanctioned by consensus".[65]

Hallaq summarises the process of *ijtihad*:

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[63] Khaled M. Abou El Fadl, And God Knows the Soldiers: The Authoritative and Authoritarian in Islamic Discourses (University Press of America, 2001) 86.
[64] *Sunan* Abu Dawud book 24, *hadith* 3567 (English translation).
[65] Wael B. Hallaq, The Origins and Evolution of Islamic Law (Cambridge U. Press, 2005) 146.

> The Quran and the Sunna of the Prophet . . . contain some rulings (ahkim; pl. of hukm) and indications (dalalat or amiart) that lead to the causes ('ilal; pl. of 'illa) of these rulings. On the basis of these indications and causes the mujtahid may attempt, by employing the procedure of qiyas (analogy) to discover the judgement (hukm) of an unprecedented case (far'; pl. offuru'). But before embarking on this original task, he must first search for the judgement in the works of renowned jurists. If he fails to find a precedent in these works he may look for a similar case in which legal acts are different but legal facts are the same. Failing this he must turn to the Quran, the Sunna, or ijma' (consensus) for a precedent that has a 'illa identical to that of the far'. When this is reached he is to apply the principles of qiyas (analogy) in order to reach the ruling of the case in question.[66]

Ijtihad represented the first great synthesis between the rationalist and textualist conceptions of Islamic law. It held sway at least until the early part of the fourth Islamic century, when according to many—but by no means all—historians and jurists the juristic community arrived at a consensus view that the law had been completely discovered and future rulings could be based entirely on imitation, following the previous rulings contained in the canons of the *madhahib*.

2.4.2.2. *Taqlid*

Taqlid, or imitation, is an alternative to *ijtihad*. *Ijtihad* is a complex exercise, which few jurists are capable of. Most questions that arise in the application of law to daily life are susceptible of resolution by reference to the basic sources or to prior jurisprudence, and thus do not require the attention of a *mujtahid*. One, uncontroversial use of *taqlid* is as the tool of lower ranking jurists, *muqallid*s (a category which in theory could include laypersons),[67] who could apply the law through transmitting the rulings of *mujtahidun* but could not exercise their own powers of reasoning.

More controversial is the theory of "the closing of the door of *ijtihad*", often associated with the writings of Joseph Schacht, whose 1950 Origins of Mohammaden Jurisprudence became a standard reference for western scholars of the mid-20th century. This idea, that around the 10th century a consensus arose that the law had been completely explicated and thenceforth jurists could only follow the rulings of their predecessors, has since the 1980s come into

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[66] Wael B. Hallaq, *Was the Gate of Ijtihad Closed?*, 16 Intl. J. Middle East Studies 1 (March, 1984) 3-41 at 4-5.
[67] Wael B. Hallaq, The Origins and Evolution of Islamic Law (Cambridge U. Press, 2005) 147.

serious question.[68] Hallaq reviewed the development of legal thinking within the Hanbali school in the early 10th century, observing that at a time when such views were still controversial it moved to acceptance of aspects of human reasoning such as *qiyas*, as part of a general "institutionalisation of the science of usul al-fiqh, of which ijtihad was an indispensable ingredient" which sits oddly with the idea of a simultaneous consensus against the further use of *ijtihad*.[69] Kamali, citing the independent work of numerous eminent later jurists who ventured to disagree with the imams of their schools on particular points, also rejects "the notion that the ulema, at around the beginning of the fourth century, reached such an immutable consensus of opinion that further *ijtihad* was unnecessary".[70]

Without denying the validity of the view of Hallaq and others that *ijtihad* remained a valid form of jurisprudence through to the present, and indeed that jurists are required by the revealed law to engage in it, Jackson argues that *taqlid* did indeed rise to a predominant role about when Schacht claimed the door closed. In addition to the obvious point that from then on every Sunni *mujtahid* affiliated with one of the four main schools, Jackson relies on the distinct rise in publication of what amounted to statute manuals in the 12th and 13th centuries, to instruct jurists in "how to identify and extract the view most widely subscribed to within a given school", whereas older literature tended to instruct jurists how to perform *ijtihad*.[71]

Jackson proposes that in the medieval period a dialectic ensued between *ijtihad* and *taqlid*, with the latter becoming predominant but both always extant. He further argues that, like *ijtihad*, *taqlid* can be used to effect change in the understanding of law. Adopting Watson's concept of "legal scaffolding", the process of seeking necessary adjustments "through new divisions, classifications, distinctions, exceptions and expanding or restricting the scope of existing rules",[72] Jackson concludes that effecting innovative legal change within Islam not only does not require the dismantling of *taqlid* in favour of renewed *ijtihad*, but may well hold greater power to sway society because *taqlid* rests on settled authority instead of being subject to perpetual re-invention.[73]

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[68] Sherman A. Jackson, Islamic Law and the State: The Constitutional Jurisprudence of Shihab al-Din al-Qarafi (E.J. Brill, 1996) 74.
[69] Wael B. Hallaq, *Was the Gate of Ijtihad Closed?*, 16 Intl. J. Middle East Studies 1 (March, 1984) 3-41 at 10.
[70] Mohammad Hashim Kamali, Principles of Islamic Jurisprudence (Islamic Texts Society, 1991) 336.
[71] Sherman A. Jackson, Islamic Law and the State: The Constitutional Jurisprudence of Shihab al-Din al-Qarafi (E.J. Brill, 1996) 74.
[72] Sherman A. Jackson, Islamic Law and the State: The Constitutional Jurisprudence of Shihab al-Din al-Qarafi (E.J. Brill, 1996) 97.
[73] Sherman A. Jackson, Islamic Law and the State: The Constitutional Jurisprudence of Shihab al-Din al-Qarafi (E.J. Brill, 1996) 100-01.

2.5. Purposive law

Because of the pluralistic nature of Islamic law and the need to apply interpretative methodologies to the fundamental texts, jurists at times must devise rulings for new situations, or select among several possible rulings. This part of the chapter presents two principles jurists have devised to guide such endeavours: *maslahah* (public interest) and *istihsan* (equity), both of which are grounded in the *maqasid al-Sharia*, the guiding purposes of Sharia as derived from the sources of law. Of the purposive principles of classical Islamic law, these are particularly well suited to facilitate its adaptation to changing social circumstances. Some jurists, especially adherents of the Hanbali and Shafi'ite schools, disapprove of them as introducing human reasoning into the divine law. Others argue that their use is at times unavoidable to avoid injustice that could defeat the purposes of Sharia.

Before the textualist movement developed into a powerful legal orthodoxy in the second Islamic century, jurists had established a variety of ways to reason their way to a decision in a case to which the texts available to them did not provide a clear answer. Masud employs two subdivisions, between textual and purposive approaches to discovering the law, the former epitomised by the methodology of al-Shafi'i, and the latter by the system of *maqasid* (intention)-based analysis described by the 14th century jurist al-Shatibi.[74] The two approaches are best viewed here as paradigms, useful for introducing the main principles that inform the application of Islamic law. A purposive jurist takes the traditional revealed sources of law into account, and even early traditionalists understood and applied the principles with which al-Shatibi constructed his alternative approach.

Al-Shatibi, building on al-Ghazali's work, proposed three levels of goals or purposes as the foundation of Sharia. The first level consists of the now universally agreed *maqasid al-Sharia*, the five primary objectives of Sharia which are to protect life, religion, family, intellect and property. These priorities explain the main rulings of Sharia. For example, jurists postulated "that the prohibition of murder in Islamic law served the basic value of life, that the law of apostasy protected religion, that the prohibition of intoxicants protected the intellect, that the prohibition of fornication and adultery protected lineage, and that the right

[74] Muhammad Khalid Masud, *The changing concepts of caliphate – Social construction of Shari'a and the question of ethics*, in Kari Vogt et al., eds., New Directions in Islamic Thought (I.B. Taurus & Co, 2009) 187-205 at 203 (describing the immutable law through the theology of Imam Shafi'i, and the purposive through Abu Ishaq al-Shatibi's theory of *maqasid*).

of compensation protected the right to property".[75] On a second level are supplementary "necessary benefits" that "make life tolerable"; a third level comprises "things that improve and embellish life generally and thereby enhance the character of the *Shari'ah* generally".[76] The latter two categories relate to the recognition of hardship, "such as the dispensation to break the fast for the traveller or the sick in Ramadan", and to the promotion of good habits and morals.[77] The *maqasid* facilitate *qiyas*, as identifying which of these interests is furthered enables the jurist to locate the legal cause underlying the ruling of a reference case.[78]

Istihsan, often translated as equity, allows the jurist to negate a legal ruling that would result in hardship or injustice. When strict application of the texts, *ijma* and *qiyas* would lead to a result that is not in harmony with the *maqasid al-Sharia*, the jurist may overturn that result if a principled basis to do so can be found in the main legal proofs.[79] One such basis is the doctrine of necessity (*darura*): for example, *qiyas* would negate prayer that was preceded by washing with ritually impure water, but *istihsan* would recognise that at times pure water may not be available.[80] According to *istihsan*, a jurist may choose a weaker plausible ruling than the one strict *ijtihad* would indicate, if the stronger ruling would result in injustice. As with *ra'y*, textualists initially opposed *istihsan* as a manifestation of individual juristic discretion, but "it survived in the later Hanafite and Hanbalite schools as a secondary method of reasoning".[81] Of the four main Sunni schools, only the Shafi'ite entirely rejects *istihsan* as a component of *ijtihad*.[82]

Imam Malik is usually credited with developing the principle of *maslahah mursalah*, or simply *maslahah*, the Islamic legal doctrine of the public interest.[83] *Maslahah* may be invoked in a fashion akin to *istihsan*, to avert the normal results of applying the main proofs of law, only with the public good rather than individual justice as the aim.[84] *Maslahah* is crucial to the questions of public law that concern the bulk of this thesis as a driving principle of legislation, especially in areas that are recognised as within the purview of the ruler rather

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[75] Khaled Abou El Fadl, *Islam and the Challenge of Democratic Commitment*, 27 Fordham Int'l L.J. (2003-04) 4-71 at 46 (footnote omitted).
[76] Mashood A. Baderin, International Human Rights and Islamic Law (Oxford U. Press, 2003) 43.
[77] Mohammed Abed al-Jabri, Democracy, Human Rights and Law in Islamic Thought (I.B. Tauris, 2009) 250.
[78] Wael B. Hallaq, Sharia: Theory, Practice, Transformations (Cambridge U. Press, 2009) 109.
[79] Mohammad Hashim Kamali, Principles of Islamic Jurisprudence (Islamic Texts Society, 1991) 218.
[80] Wael B. Hallaq, Sharia: Theory, Practice, Transformations (Cambridge U. Press, 2009) 108.
[81] Wael B. Hallaq, Sharia: Theory, Practice, Transformations (Cambridge U. Press, 2009) 50.
[82] Mohammad Hashim Kamali, Principles of Islamic Jurisprudence (Islamic Texts Society, 1991) 218.
[83] Mashood A. Baderin, International Human Rights and Islamic Law (Oxford U. Press, 2003) 42-43.
[84] Mohammad Hashim Kamali, Principles of Islamic Jurisprudence (Islamic Texts Society, 1991) 237 (citing several examples including the decision of the second caliph, Umar, to suspend the punishment of amputation for theft, in a time of famine).

than of the Islamic scholars. When confronted with a range of permissible policy choices, the ruler should select the one that best serves the interests of the people, guided by the *maqasid al-Sharia*. According to Kamali, the ruling authority should "select the view it deems to be most beneficial to the community" and once "the ruler authorises a particular interpretation of the Qur'an and enacts it into law, it becomes obligatory for everyone to follow only the authorised version".[85]

2.6. Applying the law: *fatawa* and *ahkam*

The chapter to this point has provided a basic overview of the analytical tools available to Islamic jurists. This part completes the overview by describing the nature of rulings in Islamic law, the end-point of each exercise in legal analysis. This entails the introduction of the concepts of legal opinions (*fatawa*, singular *fatwa*) and binding rulings (*ahkam*, singular *hukm*). The term *ahkam* is also used to refer to the legal rulings found in the sources of law, which indicate whether particular types of actions are permitted or forbidden to believers.

Islamic law as derived by the classical jurists divides acts into five categories: those which are obligatory (*wajib*), recommended (*mandub*), discouraged (*makruh*), forbidden (*haram*), and those on which the law has nothing to say (*mubah*). Jurists infer which of these categories an act falls within by the language the sources use to describe it. An act may 'please' God, or God may attach 'no blame', or He may 'abhor' an action, for example. When God commands an act and failure to perform it "incurs punishment or censure", then that act is obligatory; if it is commanded but no punishment is indicated then it is merely recommended.[86] Likewise acts that God commands abstention from are either discouraged or forbidden, depending whether their performance is to be punished in this life.[87] In mainstream jurisprudence, actions which are encouraged or discouraged are not justiciable.

According to Kamali, the fact that the Quran itself does not explicitly employ this categorisation scheme leaves it open to jurists to modify their interpretation of law to meet changing needs of society, by in effect moving rules of recommendation or discouragement into the firmer classifications of obligatory or forbidden.[88] Jackson however argues that the modern tendency to speak of the substantive rules of Islamic law in a simplified *halal/haram*

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[85] Mohammad Hashim Kamali, Principles of Islamic Jurisprudence (Islamic Texts Society, 1991) 30.
[86] Sherman A. Jackson, Islamic Law and the State: The Constitutional Jurisprudence of Shihab al-Din al-Qarafi (E.J. Brill, 1996) 117.
[87] Sherman A. Jackson, Islamic Law and the State: The Constitutional Jurisprudence of Shihab al-Din al-Qarafi (E.J. Brill, 1996) 117.
[88] Mohammad Hashim Kamali, Principles of Islamic Jurisprudence (Islamic Texts Society, 1991) 40.

dichotomy is potentially dangerous, as for example failure to follow a course that is not obligatory but recommended could be seen as abandonment of the way of the Prophet, but that "properly understood, it might even serve a positive function, by obviating the fact . . . that all actions that are not forbidden must be considered lawful".[89] The doctrine of *ibadat* states that any act which is not forbidden is permitted, even if not necessarily approved of.

The Prophet transmitted the revealed law and demonstrated its use through his own actions. He also issued interpretations of law, through sayings and rulings issued in response to questions placed before him. Early and trusted Companions who had memorised the Quran and the teachings of the Prophet came to serve as adjudicators and explicators of the law. As the era of the Prophet and the Companions came to an end, early jurists specialised in Quranic interpretation, or in the study the *sunna*.[90] Practical legal disputes were settled through either the discretion of clan leaders acting as adjudicators, or recourse to the caliph. With the rapid growth in population and territory of the caliphate, this model became untenable. Umar, the second caliph, appointed the first *qadi*s to exercise his delegated authority as judges, along with other duties such as policing, tax collection, and leading the local community in prayer.[91]

Due to the divine nature of the law, it is impossible to be certain whether or not a particular human interpretation of it is correct. The best jurists can do is make a sincere attempt to discover the law through correct jurisprudential reasoning based on valid proofs. By implication, all *mufti*s may issue *fatawa*, and no *mufti* can gainsay another's *fatwa*. *Mufti*s must be *ulama*, and furthermore "must be pious and of just character and must take religion and law seriously".[92] In themselves, *fatawa* neither settle a case nor set precedent. They are merely opinions of law, which a *mufti* may issue spontaneously or in response to a petitioner's question—which in turn may or may not relate to an actual case. *Qadis* decide cases by final rulings, *ahkam*, which the parties must obey. A *qadi* might elect to follow a *fatwa* submitted by a petitioner, or to independently seek one from a *mufti* regarded as knowledgeable in the particular area of law at issue. Jackson cites the 13th century Maliki jurist Shihab al-Din al-Qarafi as arguing that most even of the recorded opinions of the Prophet were *fatawa* not *hukm*, analogous to *obiter dicta*, and thus strictly speaking do not

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[89] Sherman A. Jackson, Islamic Law and the State: The Constitutional Jurisprudence of Shihab al-Din al-Qarafi (E.J. Brill, 1996) 118.
[90] Wael B. Hallaq, Sharia: Theory, Practice, Transformations (Cambridge U. Press, 2009) 44.
[91] Ira M. Lapidus, Islamic Societies to the Nineteenth Century: A Global History (Cambridge U. Press, 2012) 160 (section co-authored by Lena Salaymeh).
[92] Wael B. Hallaq, The Origins and Evolution of Islamic Law (Cambridge U. Press, 2005) 147.

establish binding precedents.[93] However as the means by which jurists shared the results of their contemplation of the law, *fatawa* became and have remained vital building blocks in the development of legal doctrines.

2.7. Conclusion

While Sharia is immutable, the Prophetic *hadith*, "The differences of opinion (ikhtilaf) among the learned men of my community are [an outcome of] divine grace (rahmah)" shows that its interpretation as Islamic law is meant to evolve, as "such differences of opinion are the basis of all progress in human thinking".[94] Throughout its history, Islamic law has swung between the poles of rationalism and literalism. Both viewpoints are deeply rooted in tradition. The debate that began between the "people of *ra'y*" and "people of *hadith*" in the second Islamic century essentially never ended. The on-going debates over whether the essence of the law resides in its immutable proofs or in the principles that undergird it; over the appropriate role of human reason in discovering and declaring the law; and over whether it is permissible to revisit settled conclusions of law, form a strong undercurrent in the discourse about the proper role of Islam in a system of governance.

Rooted in human rights and resting on the fundamental principle of equality before God, Islamic law presents the modern jurist or state-builder with a highly developed and flexible toolkit. Its foundational proofs support a complex edifice of substantive rules and legal precedents, but at the same time contain strong evidence to support the application of reason to develop new conclusions from first principles. A fundamental tenet of Islam is that God made humans His vicegerents on earth, with the ability to learn and shape society and its use of the divine law within permitted boundaries.

One of the challenges of Islamic law in the 21st century is to map its methods and rules to the modern world of nation-states. Notwithstanding the considerable changes in peoples' identification with particular states and the administrative character of states themselves since the demise of the Ottoman Empire, there is nothing intrinsic to Islamic law that prevents its application in modern governance.

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[93] Sherman A. Jackson, Islamic Law and the State: The Constitutional Jurisprudence of Shihab al-Din al-Qarafi (E.J. Brill, 1996) 215.
[94] Muhammad Asad, The Message of the Quran (Dar Al-Andalus, 1980) 9.

3. Human rights

To develop a thesis that examines the relationship between Sharia as implemented by Islamic states and international human rights standards, it is first necessary to establish a baseline understanding of human rights. Ideally, this understanding would be independent of any particular tradition. In the scope of this thesis, it is more practical simply to identify commonalities between the international paradigm, as expressed in the UN treaty system, and human rights as understood in traditionalist Islamic law. Accordingly, this chapter presents the main conceptual frameworks that underpin these two approaches, then assesses their compatibility with each other. This will allow the remainder of the thesis to perform a more detailed analysis of how Islamic states undertake to fulfil these two visions of human rights via obligations accepted as positive law.

Islamic law incorporates what in modern terms can be understood as a human rights paradigm. As children of God, endowed with a moral sense of right and wrong, humans own certain rights such as life, sustenance, justice and freedom of the person, for which the proofs of law command respect and even active support by others. Although they derive from a different set of first assumptions and are phrased differently, once 'translated' into western human rights terminology the list of basic rights protected under Islamic law bears a striking resemblance to those recognised in the main UN rights treaties. This chapter first compares the philosophical foundations of Islamic and international notions of human rights, acknowledging that they are difficult to completely reconcile in principle. The second and third parts present human rights as traditionally understood in Islamic law, and as enacted in the UN treaty system. The chapter concludes by assessing the mutual compatibility of the main principles underlying Islamic and international human rights law.

3.1. Sources of human rights

This section briefly poses the philosophical question of why humans have inalienable rights, assessing the answer first from an Islamic perspective and then from the point of view of international human rights law. It does so in order to establish that any effort to merge the two viewpoints into a single abstract theory of human rights would be extremely challenging, and is certainly beyond the scope of this thesis. Frankly acknowledging and then sidestepping this issue will enable the rest of the thesis to focus on how Islamic states can satisfy two different legal paradigms of human rights on a simply instrumental level.

Islamic and international human rights law differ in their fundamental justification. Both aspire to universality,[95] in the sense that the rights they describe attach to all humans, and that their proponents consider them to be rooted in universally true principles. Moosa cautions against extrapolating a fundamental compatibility between Islamic and international understandings of human rights from the admittedly "considerable overlap in some of the[ir] concerns and objectives".[96] In Islam, human rights law, like any other law, emanates from the word of God.[97] The international human rights paradigm does not have such a clearly established source, but rests on a set of principles associated with secularism, natural law and democracy.

Islamic law recognises some rights as common to all humans, regardless of religion or other distinguishing factors. The proofs of law usually do not describe these rights as such, but rather leave them implicit in duties placed on the community to treat their fellow humans justly.[98] This applies especially to the ruler, whose divine (and revocable) trust requires rule according to justice.[99] At the same time, individuals incur duties as an integral part of owning irrevocable human rights.[100] One way the Quran reveals its universal scope is by in some verses specifically addressing Muslims ("O believers …"), while others explicitly speak to all humanity ("O humankind …"), indicating that believers and non-believers share a fundamental dignity as children of God.[101] The universality of dignity and rights is also visible in for example the rules of *jihad* that protect even unbelievers, as enemies in combat (for example, prohibitions against mutilation or poisoned weapons) or as prisoners.[102] The

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[95] In the international human rights context, Baderin distinguishes between 'universality', meaning global acceptance that certain basic rights belong to everyone, and 'universalism', the idea that there is "a common universal value consensus for the interpretation and application of human rights law". Mashood A. Baderin, International Human Rights and Islamic Law (Oxford U. Press, 2003) 23-24.

[96] Ebrahim Moosa, *The Dilemma of Islamic Rights Schemes*, XV Journal of Law & Religion 1/2 (2001) 185-215 at 189.

[97] Ebrahim Moosa, *The Dilemma of Islamic Rights Schemes*, XV Journal of Law & Religion 1/2 (2001) 185-215 at 193 ("The crucial point in the Islamic rights scheme is that God is the one who confers rights on persons, via revealed authority although human authority mediates these rights").

[98] See e.g., Mohammed Abed al-Jabri, Democracy, Human Rights and Law in Islamic Thought (I.B. Tauris, 2009) 217 ("What is a right for a person, is a duty due to him").

[99] See below, chapter 5, section 5.4.2.

[100] Mohammad Hashim Kamali, The Dignity of Man: An Islamic Perspective (Islamic Texts Society, 2002) xv ("Obligation is a primary concept, indeed the main focus, of the *Shari'ah*, and it often takes priority over right. Indeed, it is through the acceptance and fulfilment of obligations that individuals acquire certain rights").

[101] Abdulaziz Sachedina, Islam and the Challenge of Human Rights (Oxford U Press, 2009) 82 (contrasting Quran 49:13, "O humankind, We have created you male and female, and appointed you races and tribes, that you may know one another" with Quran 3:102, "O believers, be aware of your spiritual and moral duty"). The Prophet recognised this universal dignity when, being seated, he rose in respect as the bier of a Jew passed, replying to his companions' queries, "Is he not a human being?". Id. 89.

[102] See below, chapter 4, section 4.1.1.

constitutions of Iran, Saudi Arabia and Somalia explicitly recognise the idea of divinely ordained human rights.[103]

International human rights also enjoy, according to their proponents, universal applicability and unquestionable validity. In terms of positive international law this is basically true: with a few exceptions and reservations, the vast majority of states now adhere to at least the first set of UN human rights treaties enacted in the wake of the Universal Declaration of Human Rights (UDHR). What exactly the legal root of internationally understood human rights is, is however not quite clear. The "orthodox international view" rests on the postulates that all humans inherently have rights, that "the denial of certain basic liberties to any human being is universally unacceptable", and that rights accrue to people as individuals.[104] Historically, the modern human rights system is rooted in ancient religious and moral ideas as re-cast and applied to governance in Europe and North America in the seventeenth and eighteenth centuries, galvanized in international terms by the human trauma of the two world wars, and resulting in the UDHR and subsequent efforts to realise its ideals.[105] The preambles to the international bill of rights instruments simply assert their own universal truth. The constitutions of Algeria and Palestine evoke this tradition, promising respectively to protect "fundamental liberties and the Rights of Man and of the citizen" and "[b]asic human rights and liberties".[106]

Given the fundamentally different assumptions they proceed from—the word of God, or the self-evidence of human rights—it is unrealistic for adherents to either the Islamic or the secular western view of human rights to expect to convince members of the other group to abandon their own assumptions.[107] The theological precedents of the modern international human rights paradigm make it tenuous to argue that its secularism *per se* marks it as somehow preferable to its Islamic counterpart. The originators of the Enlightenment ideals

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[103] Constitution of Iran (1979, amended 1989), art. 14 (the government "and all Muslims are duty-bound to treat non-Muslims in conformity with ethical norms and the principles of Islamic justice and equity, and to respect their human rights", albeit excepting any who "engag[e] in conspiracy or activity against Islam and the [state]") (referencing Quran 60:8: "God does not forbid you to deal kindly and justly with those who have not fought against you because of your religion and who have not expelled you from your homes"); Basic Law of Saudi Arabia (1992), art. 26 (Saudi Arabia must "protect human rights in accordance with the Sharia"); Draft Constitution of Somalia (2012), art. 10(1) ("Human dignity is given by God to every human being, and this is the basis for all human rights").

[104] Neville Cox, *The Clash of Unprovable Universalisms—International Human Rights and Islamic Law*, 2 Oxford J Law and Religion 2 (2013) 307-29 at 312-13.

[105] Ed Bates, *History*, in Daniel Moeckli et al., eds., International Human Rights Law, 2nd ed. (Oxford U Press, 2014) 15-32 at 28-31.

[106] Constitution of Algeria (1996, amended 2002), art. 32; Basic Law of Palestine (2005), art. 10(1).

[107] See e.g., Neville Cox, *The Clash of Unprovable Universalisms—International Human Rights and Islamic Law*, 2 Oxford J Law and Religion 2 (2013) 307-29 at 328-29.

underlying the UDHR "did not mean to dispense with religion as such, but simply to be liberated from the authority of the Church and its rituals".[108] On the other hand, the mere claim that all humans *qua* humans enjoy equally a certain set of rights is tautological, and pointing to subsequent wide state acceptance of these rights as proof of their universality is backward-looking.[109] If they arrive at similar enough conclusions, does it matter which principles the two approaches start from? Maybe—because conclusions may change over time, and eventually may collide with firm rules of the other tradition.

3.2. International human rights law

This section provides an overview of international human rights law, so that later chapters can analyse how Islamic states reconcile their efforts to adhere to it with their commitments to govern according to Sharia. The section presents a brief overview of the nature and sources of general international law, then introduces international human rights law and the main components of the UN human rights treaty regimes enacted to realise the aims of the UDHR. It argues that while the system is primarily a western construct, Muslim states exerted some influence on the latter stages of the development of the international bill of rights. This set an important precedent that Islamic states are part of the international human rights system, and can expect to continue to help shape it even as they maintain their fealty to Sharia.

The sources of international human rights law are of the same types as the sources of international law generally, as recognised in article 38(1) of the statute of the International Court of Justice (ICJ): treaties, international custom, shared principles of law, and judicial or academic opinion as "subsidiary means".[110] In principle, "international courts do not make law"; their decisions bind only the parties to the case at hand.[111] Although the ICJ statute does not refer to it, UN Security Council resolutions can also create binding international law.[112] Customary international law forms by states 1) undertaking (or refraining from) actions because 2) they believe they are bound by law to do so—the elements of state practice

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[108] Mohammed Abed al-Jabri, Democracy, Human Rights and Law in Islamic Thought (I.B. Tauris, 2009) 194. To object to the Islamic construction of rights in favour of the western view claiming the latter "is purely 'secular', is not [valid] because it imposes on the concept of 'secularism' meanings that did not hold among the European philosophers who established that theoretical basis". Id. 194-95.

[109] Neville Cox, *The Clash of Unprovable Universalisms—International Human Rights and Islamic Law*, 2 Oxford J Law and Religion 2 (2013) 307-29 at 314-16.

[110] Statute of the International Court of Justice, article 38(1).

[111] Christine Chinkin, *Sources*, in Daniel Moeckli et al., eds., International Human Rights Law, 2nd ed. (Oxford U Press, 2014) 75-95 at 86.

[112] Christine Chinkin, *Sources*, in Daniel Moeckli et al., eds., International Human Rights Law, 2nd ed. (Oxford U Press, 2014) 75-95 at 90.

and *opinio juris*. A custom exists when most states, or most states in a region, consistently act similarly under colour of law.[113] Custom is therefore dynamic, evolving with state actions, in contrast to treaty regimes which evolve by judicial and other types of interpretation.

Indicators of custom can include resolutions of the UN General Assembly and of its Human Rights Council and other formally constituted inter-state bodies, which reveal states' understanding of their obligations. Analogous acts of national governments, including legislation or administrative acts, policy statements, and participation in treaty and other international regimes, can all contribute to the formation of customary international law. It is not always clear whether these demonstrate state practice, *opinio juris*, or both. Treating declarations of policy or principle as satisfying the requirement for state practice seems to assume that states' actions match their words.[114] Treaty and custom are not mutually exclusive—law can come into being as either treaty or custom, then be adopted by the other. It is also conceivable, though unusual, for one to abrogate the other—for a new custom to displace an abandoned treaty, or for a treaty to override rather than affirm existing custom. In cases of conflict, treaties pre-empt custom, but may not violate "a peremptory norm of general international law (jus cogens)", which "is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted".[115]

Legal recognition of human rights arguably dates at least back to Hammurabi,[116] but their international regulation is relatively recent. The shocking abuses that took place before and during the second world war caused the international community, led at first by the victorious allied powers and then by the UN, to revise the basic presumption of international law that states are absolutely sovereign within their own borders. Once they breached this conceptual barrier, states began a process that resulted in a new type of international treaty, one that redounded not to the mutual benefits of the states *per se* (as with for example trade or security treaties), but rather consisted of mutual legal agreement to forego certain aspects of

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[113] There is no precise rule by which to determine if 'enough' states follow a practice for it to qualify as customary. The practice should be extensive, i.e. followed by many states, particularly those whose interests are at stake, and representative, i.e. those states follow it consistently. International Law Association, London Conference (2000), final report of the Committee on Formation of Customary (General) International Law (citing the *North Sea Continental Shelf cases* of the ICJ) 25-26.

[114] Christine Chinkin, *Sources*, in Daniel Moeckli et al., eds., International Human Rights Law, 2nd ed. (Oxford U Press, 2014) 75-95 at 83.

[115] Vienna Convention on the Law of Treaties, article 53.

[116] Ed Bates, *History*, in Daniel Moeckli et al., eds., International Human Rights Law, 2nd ed. (Oxford U Press, 2014) 15-32 at 16.

their sovereignty to the benefit of all persons. The UN human rights treaties that emerged are now the core of an expanding system of international human rights law that encompasses states, international treaty bodies, regional organisations and governments, and civil society actors ranging from non-governmental organisations to academics to multinational corporations. Widely subscribed regional treaties supplement the global human rights regime in Africa, the Americas and Europe. The Arab Charter of Human Rights does likewise for some members of the League of Arab States.

The UN system includes monitoring, reporting and other bodies, some associated with particular treaties and others holding general remits. The most prominent of the latter bodies are the Human Rights Commission, established under the ICCPR with the primary function of receiving and reviewing reports from states party detailing measures taken to implement the rights the treaty protects,[117] and the Human Rights Council, a subsidiary body of the General Assembly.[118] Chinkin considers the work of the UN treaty monitoring bodies "[t]he most important of the common features shared by the treaties[, whose] work has been central to the development of international human rights law".[119]

The International Court of Justice stands formally at the apex of this system, but only states have standing before the ICJ. At the level of individual cases, most binding decisions relating to human rights emerge from regional and national courts. Regionally, the African Court on Human and Peoples' Rights, the European Court of Human Rights and the Inter-American Court of Human Rights can issue binding decisions in specific cases, although of these only the European court may hear complaints raised by individuals. At the international level, the Human Rights Council may hear and assess individual complaints, once domestic remedies are exhausted. States party to the Optional Protocol to the ICCPR agree to allow the Commission to hear individual complaints raised against them. While 120 states have ratified or acceded to the protocol, among Islamic states only Algeria, the Maldives, Somalia and Tunisia, as well as Libya, have done so.

In international human rights law, custom predated treaties. The aspirational 1948 Universal Declaration of Human Rights (UDHR) declared an emergent set of customary human rights norms, in the potent form of an unopposed UN General Assembly resolution (Saudi Arabia,

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[117] International Covenant on Civil and Political Rights, articles 28 (establishment), 40 (functions).
[118] UN General Assembly resolution 60/251 (15 March 2006).
[119] Christine Chinkin, *Sources*, in Daniel Moeckli et al., eds., International Human Rights Law, 2nd ed. (Oxford U Press, 2014) 75-95 at 78.

South Africa and the Soviet bloc abstaining). Two treaties, the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), drafted within the framework of the UN Human Rights Commission,[120] implement many of the rights the UDHR proclaimed. The ICCPR and ICESCR required decades to draft, finally proclaimed by the General Assembly in 1966 and entering into force through state ratifications in 1976. Together these three documents are often referred to as the 'international bill of rights', and form the foundation of modern international human rights law. Seven further UN human rights treaties are now in force, each with a monitoring committee: the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), the Convention on the Rights of the Child (CRC), the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICMW), the International Convention for the Protection of All Persons from Enforced Disappearance (CPED) and the Convention on the Rights of Persons with Disabilities (CRPD).

By the time they were enacted, most of the UN human rights treaties arguably served largely to codify what had become customary international law. In any case, today many of the rules they express are also widely viewed as customary norms. The treaties and their enforcement and monitoring bodies helped to spur the development of an international civil society dedicated to promoting human rights. This proliferation of monitoring and reporting by treaty bodies and civil society actors has added greatly to the academic and juridical sources that traditionally comprised the main subsidiary means of interpreting international law.[121] The UN also considerably influences the soft law of human rights, through General Assembly resolutions as with the UDHR, but also through the work of UN committees and institutions such as the Office of the High Commissioner and the Human Rights Council.

The content of the international bill of rights reflects earlier statements of rights. The early international declarations and treaties drew heavily on the French Declaration of the Rights of Man and the Bill of Rights of the US Constitution. The Declaration promised for example freedom of speech and of the press, and the presumption of innocence, and formalised the

[120] Ilias Bantekas and Lutz Oette, International Human Rights Law and Practice (Cambridge U Press, 2013) 149.
[121] Christine Chinkin, *Sources*, in Daniel Moeckli et al., eds., International Human Rights Law, 2nd ed. (Oxford U Press, 2014) 75-95 at 89 ("Today, such works are more influential in developing human rights law than the writings of more traditional publicists referred to in Article 38(1)(d)").

principle of general freedom, subject to limitation only by law.[122] The US Bill of Rights incorporated due process guarantees arising from English common law, and substantive rights such as freedom of expression and worship, and a prohibition on torture. Increasingly from the 19th century onwards, constitutions have reflected the basic model of curtailing states' power in ways that included protecting individual rights.[123] The modern UN treaties reflect an understanding of "human rights in terms of the right to life, the abolition of the death penalty, the prohibition of torture, the right to privacy, freedom of information and expression, freedom of religion or belief, and the right to vote and to be elected" along with economic "rights to food, healthcare, housing and employment".[124] The ICCPR protects many of the same rights as the national historical examples: life, liberty, property, expression, worship and due process. The ICESCR addresses rights drawn from the development of social democracy in the 19th and 20th century, concerning matters such as health, labour, social welfare and education. States guarantee most of the rights laid out in the ICCPR,[125] but commit only to make best efforts toward fulfilling the rights described in the ICESCR.[126]

From its beginnings, international human rights law has had a western flavour. Mutua ties the international human rights system tightly, even identically, to western liberal democracy.[127] Its ideological origins lie largely in the ideals of Enlightenment era European philosophers, reinforced and made urgent by revulsion at the crimes and the sufferings inflicted in the second world war. When drafting of the bill of rights began in the late 1940s, many states that today have Islamic constitutions had not yet achieved independence. In terms of numbers of delegations and participants present, Muslim nations were thus under-represented particularly at first, but increasingly took part in the debates and drafting of the international bill of rights

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[122] Ed Bates, *History*, in Daniel Moeckli et al., eds., International Human Rights Law, 2nd ed. (Oxford U Press, 2014) 15-32 at 20.
[123] Ed Bates, *History*, in Daniel Moeckli et al., eds., International Human Rights Law, 2nd ed. (Oxford U Press, 2014) 15-32 at 21-22.
[124] Theo van Boven, *Categories of Rights*, in Daniel Moeckli et al., eds., International Human Rights Law, 2nd ed. (Oxford U Press, 2014) 143-56 at 145.
[125] International Covenant on Civil and Political Rights, article 2(1) (committing each state party "to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind").
[126] International Covenant on Economic, Social and Cultural Rights, article 2(1) (committing each state party to "take steps . . . to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant").
[127] Makau wa Mutua, *The Ideology of Human Rights*, 36 Virginia J Intl L (1996) 589-657.

as more of them became independent. When the General Assembly unanimously approved the two conventions, sixteen of today's Islamic states took part.[128]

Although they did not act or vote as a bloc, and often disagreed with one another, in a few areas representatives of Muslim states influenced the text of the ICCPR and ICESCR. Waltz groups their main contributions under five themes: religious freedom, particularly the right to change religion; equality of men and women in marriage; social justice and the indivisibility of political from socioeconomic rights; peoples' right of self-determination; and implementation measures along with the right to petition.[129] Representatives of Muslim states referred to Islam relatively rarely, but especially in discussions about religious freedom, marriage and the emphasis on socioeconomic rights, their aggregate contributions reflected Islamic values, as well as concern about allowing an international agreement to establish rules of personal status and family law, where religious rulings held sway in many Muslim countries. According to Waltz, a review of the drafting and adoption history of the bill of rights shows that Muslim states' efforts were necessary to produce the final language regarding freedom to change religion and "the boldest statement of gender equality" in the ICCPR and ICESCR, as well as "the clearest statement of universality [in] the UDHR" and the inclusion in these covenants of the right to self-determination.[130]

The international human rights system is still basically a western construct, but reflects enough similarity to Islamic norms that Islamic states can readily accede to it and participate as full members. As there are now over a dozen Islamic states party to each of the main treaties, and many Islamic states participate in the workings of the monitoring committees, they along with other OIC member states can influence the further development of international human rights law. Islamic law remains relatively unobtrusive at the international level, while international human rights law has demonstrably gained the adherence of most Islamic states. Nonetheless, especially now that Islamic states have started to build a modern Islamic view of international human rights law,[131] the two paradigms exert a certain gravitational pull on each other. Islamic law enters the international arena as Islamic states'

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[128] Afghanistan, Algeria, Egypt, Iran, Iraq, Jordan, Kuwait, Malaysia, Mauritania, Morocco, Pakistan, Saudi Arabia, Somalia, Syria, Tunisia and Yemen, as well as Indonesia, Lebanon, Libya, Sudan and Turkey. See Susan Waltz, *Universal Human Rights: The Contribution of Muslim States*, 26 Hum Rts Quarterly 4 (November 2004) 799-844 at 806-07.

[129] Susan Waltz, *Universal Human Rights: The Contribution of Muslim States*, 26 Hum Rts Quarterly 4 (November 2004) 799-844 at 813-37.

[130] Susan Waltz, *Universal Human Rights: The Contribution of Muslim States*, 26 Hum Rts Quarterly 4 (November 2004) 799-844 at 837.

[131] See below, chapter 7.

values inform their negotiation and participation in agreements and institutions. Mutua argues that this indicates an opportunity to rethink some international standards along Islamic lines, as since the UDHR was pronounced the western state has changed to more resemble an ideal Islamic state, as the 20th century universal social welfare state has overtaken the 19th century minimalist republican model.[132] International law influences Islamic law through encouraging Islamic states to search for implementations of Islamic law that fit international norms.

3.3. Human rights in classical Islam

Following the overview of the international human rights system, which Islamic states now participate in, this section presents an understanding of universal human rights as described in the proofs of Sharia. Such an understanding is critical to establish the second set of rights the legal systems of Islamic states must respect, in addition to those described in international law. It is based largely on analyses of the proofs of law presented by modern Muslim scholars. The first of its two subsections outlines the core Islamic principles of universal human dignity, freedom and equality that underpin human rights in Sharia. Of these, as Muslim scholars acknowledge and as later sections of this thesis will discuss, the Islamic understanding of equality can be problematic when viewed from the perspective of international law. The second subsection outlines the substantive rights found in the traditional Islamic system, which resemble but are not the same as those expressed in the international bill of rights. The resulting union of two sets of rights defines the core rights that an Islamic state desiring to follow international law as well as Sharia should uphold.

Pre-modern jurists did not formally develop a distinct human rights sub-field of *fiqh*. But a set of rights is visible in Sharia, for example implied in mirror-image duties owed by others to each person, or made explicit in the proofs by statements instructing humans to apply their own understanding or follow their own preferences in certain regards. Muslim jurists since the middle ages have recognised a system of rights (*haqq*) within Islam, including rights of God such as observance of the five pillars of Islam, but also rights of individuals which "can be general, like the right to health, to have children, to safety or, they could be specific, such as protecting the right of a property-owner or the right of a purchaser and seller in commercial transactions".[133] In addition to the specific rights and duties they prescribe, the

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[132] Makau wa Mutua, *The Ideology of Human Rights*, 36 Virginia J Intl L (1996) 589-657 at 597-98.

[133] Ebrahim Moosa, *The Dilemma of Islamic Rights Schemes*, XV Journal of Law & Religion 1/2 (2001) 185-215 at 191-92. The 16th century Egyptian jurist Ibn Nujaym "in discussing property rights made a very clear case that human beings are bearers of rights, without stipulating a reciprocal duty". Id. at 191.

Islamic proofs provide evidence of guiding principles to further inform a system of individual rights that has significant similarities to modern international human rights regimes.

3.3.1. Rights-enabling principles

Universal human dignity, individual freedom and equality form the foundation of Islamic human rights. The Quran and the teachings of the Prophet clearly indicate a respect for the innate dignity of each person, Muslim or not. The core principle of Islam that whatever is not forbidden is permitted logically implies a general freedom for individuals to believe and act as they please, subject to restriction only by explicit rules of law, based on Sharia or the needs of the community. Finally, notwithstanding differences of opinion over whether its notion of equality squares with a modern western or international understanding, Islam brought to 7th century Arab society a revolutionary "vision of creating an egalitarian society".[134]

Preserving human dignity (*karāma*) is central to Sharia. Recognition of and respect for a shared, universal human dignity is fundamental to Islam.[135] The Quran affirms the dignity of "all human beings without limitations or qualifications of any kind".[136] Kamali equates the Islamic ruler's duty to pursue the five objectives of Sharia (*maqasid al-Sharia*) with recognition of, and a commitment to uphold, human dignity.[137] In Weeramantry's view, Islam emphasises the same intrinsic human dignity that forms "the underlying basis of modern doctrines of human rights".[138] Sachedina does not go quite so far, but argues that recognising such dignity can, together with the Quran's universalist vision of a single human community under God and the fact that God has endowed humans with an intuitive sense of morality, "serve as a minimalist foundation for human rights in Islam".[139] While it is certainly incumbent on an Islamic state to act to uphold and seek to enhance human dignity, respect for dignity, while prerequisite to ensuring respect for human rights, is not in itself sufficient.[140] Ensuring dignity does not necessarily prevent for example governmental interference in

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[134] Mohammad Hashim Kamali, Freedom, Equality and Justice in Islam (Islamic Texts Society, 2002) 47.
[135] See e.g., Ebrahim Moosa, *The Dilemma of Islamic Rights Schemes*, XV Journal of Law & Religion 1/2 (2001) 185-215 at 209 ("The Qur'an and the teachings of the Prophet explicitly entrench human dignity as a fundamental ethical norm in human conduct. Islamic law and ethics have an established philosophy that was designed to protect human dignity").
[136] Mohammad Hashim Kamali, The Dignity of Man: An Islamic Perspective (Islamic Texts Society, 2002) 1.
[137] Mohammad Hashim Kamali, The Dignity of Man: An Islamic Perspective (Islamic Texts Society, 2002) 90. The objectives are protection of life, religion, intellect, family and property.
[138] C. G. Weeramantry, Islamic Jurisprudence: An International Perspective (Macmillan, 1988) 63-64.
[139] Abdulaziz Sachedina, Islam and the Challenge of Human Rights (Oxford U Press, 2009) 93.
[140] Jack Donnelly, *Human Rights and Human Dignity: An Analytic Critique of Non-Western Conceptions of Human Rights*, 76 American Poli Sci Review 2 (June, 1982) 303-16 at 307.

private life, or shutting citizens out of participation in government, or attaching differing sets of rights based on social status.

Individual freedom is a second main wellspring of universal human rights in Islam. It arises from core tenets such as the injunction that that which is not forbidden is permitted, and from numerous instructions encouraging believers to seek knowledge and understanding and to discuss community affairs amongst themselves. God endowed people with the ability to decide their own actions, because they can only truly follow Sharia by freely choosing to do so.[141] The Prophet's "basic task was to inform the people and then leave them at liberty to make their own choices. They are, in other words, themselves responsible for the manner in which they exercise their freedom of choice".[142] Kamali argues that although the classical proofs and jurists do not often use the term freedom (*hurriyyah*), they establish a presumption of freedom through frequent use of language of permission (e.g., "has been made lawful"; "there is no blame"; "who has ever forbidden you?"), a freedom rendered yet broader by al-Shatibi's insight that the proofs of law also indicate a "state of forgiveness [that] falls between that which the *Shari'ah* has declared forbidden and that which it has declared permissible".[143] Although individual freedom is the basic presumption, it remains "circumscribed by the needs of society and by the fact that the individual is a social being".[144] The Maldives explicitly constitutionalises this principle, guaranteeing citizens they are "free to engage in any conduct or activity" within the limits of Sharia and express provisions of law.[145]

Equality is a third fundamental principle of Islam,[146] about whose interpretation proponents of Islamic law and of international human rights have often disagreed. The Islamic proofs strongly enjoin equality.[147] There is a fundamental tension between this basic principle,

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[141] C. G. Weeramantry, Islamic Jurisprudence: An International Perspective (Macmillan, 1988) 75 (citing Muhammad Iqbal for the argument that freedom of choice is prerequisite to goodness).
[142] Mohammad Hashim Kamali, Freedom, Equality and Justice in Islam (Islamic Texts Society, 2002) 18.
[143] Mohammad Hashim Kamali, Freedom, Equality and Justice in Islam (Islamic Texts Society, 2002) 29. Al-Shatibi cited a hadith in support of this principle, "God has made certain things permissible and others forbidden. . . . As for that regarding which God has remained silent, this is forgiven", while the Companion Ibn Abbas is reported "to have said in this connection that things to which the Qur'an has made no reference-these are the ones that God has forgiven". Id. 30.
[144] C. G. Weeramantry, Islamic Jurisprudence: An International Perspective (Macmillan, 1988) 75.
[145] Constitution of the Maldives (2008), art. 19.
[146] See e.g., Mohammad Hashim Kamali, Freedom, Equality and Justice in Islam (Islamic Texts Society, 2002) 50-52 (citing Quran 49:13 and 4:1, and the Prophetic *ahadith* "O people! Your Creator is one, and you are all descendants of the same ancestor. There is no superiority of an Arab over a non-Arab, or of the black over the red, except on the basis of righteous conduct" and "people are as equal as the teeth of a comb").
[147] Mohammed Abed al-Jabri, Democracy, Human Rights and Law in Islamic Thought (I.B. Tauris, 2009) 230-31.

exemplified by the actions of the Prophet and the early Muslim rulers, and the rulings of early influential jurists who "endorsed hierarchical features of local social structures, treating them as if they were mandated by Islamic law".[148] Baderin argues that "[t]he idea of superiority of men over women" drawn from Quran 2:228 (reading in part, "And women shall have rights similar to the rights against them, according to what is equitable; but men have a degree above them") and 4:34 (in part, "Men are the protectors and maintainers of women") is too general, as those verses specifically addressed the family as an institution.[149] Rather, they simply reflected the leadership and protective roles men played in society, where leadership did not connote superiority but merely the need to designate a leader for any group endeavour, and responsibilities to protect and maintain the family did not imply authority over women.[150]

Even without the accretions of classical juristic rulings, there remains a basic tension between the modern humanist ideal of absolute equality, and the fact that at some points the Islamic proofs endorse differential treatment between men and women, Muslims and non-Muslims, and slaves and free persons. In the specific context of legal proceedings, equality has always been basic to Islam: rulers, citizens and judges were all equally beholden to the law.[151] Where the proofs refer to differences in status between persons, they usually do so with reference to piety, with other distinctions arising largely by way of enjoining those with greater means to support those endowed with less.[152] Kamali concludes based on the proofs of law and the acts of the early caliphs "that equality remains the overriding principle and norm of the *Shari'ah* in gender-related matters, but it remains in the meantime open to considerations of justice, public interest (*maslahah*) and the prevailing realities of society".[153] Similarly, the proofs of law accord non-Muslims equality at law except in matters relating to religious belief or practice.[154] Based on "the preponderance of evidence in the sources . . . some of the instances

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[148] Ann Elizabeth Mayer, Islam and Human Rights, 4th ed. (Westview Press, 2007) 99.
[149] Mashood A. Baderin, International Human Rights and Islamic Law (Oxford U. Press, 2003) 134-35.
[150] Mashood A. Baderin, International Human Rights and Islamic Law (Oxford U. Press, 2003) 135-36.
[151] C. G. Weeramantry, Islamic Jurisprudence: An International Perspective (Macmillan, 1988) 76-77.
[152] Mohammed Abed al-Jabri, Democracy, Human Rights and Law in Islamic Thought (I.B. Tauris, 2009) 232-33. See also Mohammad Hashim Kamali, Freedom, Equality and Justice in Islam (Islamic Texts Society, 2002) 49 (Quranic verses that rank some people above others indicate "mainly spiritual distinction in the realm of *'ibādah*. As for the sphere of transactions (*mu'āmalāt*) and men's relations among themselves, the *Shari'ah* is affirmative on equality in basic rights, and the spiritual distinction[s] . . . are not taken into account"). Kamali cites for example Quran 61:166 (God has "elevated some of you in rank above others-that he may try you by what He has given you"), 16:71 ("God has favoured some of you over others in the provision of means") and 46:19 ("to all are [assigned] ranks according to their deeds. God will recompense their deeds") as signalling differences. Id. 48-49.
[153] Mohammad Hashim Kamali, Freedom, Equality and Justice in Islam (Islamic Texts Society, 2002) 72.
[154] Mohammad Hashim Kamali, Freedom, Equality and Justice in Islam (Islamic Texts Society, 2002) 80-90.

of inequality between Muslims and non-Muslims, and also between men and women, are justified and do not therefore alter the basic position of general equality between them".[155]

These basic principles, along with specific injunctions from the Islamic proofs, provide a foundation for an Islamic understanding of human rights law. The explicit text of the Quran and *ahadith* envisions a society based on rights and duties. Since the early days of Islam, however, the understanding of Islamic law has evolved and expanded to respond to changes in society. Like any other area of Islamic law, in situations where rulings of *fiqh* are absent or, arguably, outdated, Islamic human rights law must evolve new rules guided by the basic principles of Sharia. In the area of human rights, dignity, freedom and equality are among the most important of those principles for law-makers and courts to consider as they continue to develop and apply Islamic law.[156]

3.3.2. An Islamic human rights framework

The set of human rights that Islamic law guarantees overlaps considerably with the international bill of rights. The main substance of Islamic human rights law derives from two sources: explicit Sharia rulings, and the ruler's use of the law within the allotted realm of *siyasah Sharia*. In interpreting and applying the law, the ruler must be guided by the principle of *maslahah*, the public good: "the overall objective and purpose of the *Shari'ah* is the promotion of human welfare and prevention of harm *(maslahah)*".[157] In the area of the law that relates to individual rights, the principles of human dignity, freedom and equality should guide the ruler's understanding of the public interest.

These traditionally accepted priorities of Sharia can translate into the language of modern international human rights. Based on his examination of the proofs of Sharia, al-Jabri identifies the fundamental Islamic human rights as "the right to life and its enjoyment, the rights to belief, to knowledge, to disagree, to *al-shura* (consultation), to equality and justice, in addition to the rights of the oppressed".[158] These rights accrue to "all human beings with no exception".[159] A society that does not guarantee them cannot equitably apply "the *shari'ah*

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[155] Mohammad Hashim Kamali, Freedom, Equality and Justice in Islam (Islamic Texts Society, 2002) 80.
[156] The constitution of the Maldives articulates these values, requiring its courts and tribunals to "promote the values that underlie an open and democratic society based on human dignity, equality and freedom". Constitution of the Maldives (2008), art. 68.
[157] Mashood A. Baderin, International Human Rights and Islamic Law (Oxford U. Press, 2003) 42.
[158] Mohammed Abed al-Jabri, Democracy, Human Rights and Law in Islamic Thought (I.B. Tauris, 2009) 251.
[159] Mohammed Abed al-Jabri, Democracy, Human Rights and Law in Islamic Thought (I.B. Tauris, 2009) 240.

punishments".[160] Furthermore, the Quran indicates a strong respect for privacy. For example the Quran forbids entering a home without permission, the Prophet forbade reading another's private correspondence, and the Caliph Umar is said to have accepted his subjects' admonition that he could not accuse them based on evidence improperly obtained.[161]

In addition to its duty to respect the basic rights of all persons, an Islamic state owes its citizens an extensive set of civil and political rights. Asad reasons based on Prophetic *ahadith* that an Islamic constitution should include "a clause to the effect that the lives, persons, and possessions of the citizens are inviolable, and that none shall be deprived of his life, freedom, or property, except by due process of law".[162] Mawdudi argues similarly, and additionally finds that the proofs of law require the state to ensure its citizens' freedoms of expression, association, conscience and religious belief, and their rights to participate in their own governance and against being made to sin.[163] The state must ensure the general right of privacy, to "guarantee the inviolability of a citizen's home, private life, and honor".[164] The proofs of law admonish an Islamic ruler against spying on the people in any way, particularly as the atmosphere of suspicion it engenders can cause society to "begin[] to suffer from a state of general distrust and suspicion".[165]

Islamic law recognises socioeconomic rights. The most important of these requires provision for the needy and disadvantaged. As an adjunct to the basic rights recognised in the Quran and *ahadith*, the Quran describes supplementary rights of "the 'weak oppressed'" (*al-mustad'afun*), who are those lacking enough wealth or power to enable them to enjoy their rights without special care.[166] These supplemental rights, realised as "the right to *al-zakat*" (the Islamic alms tax) and "the right to charity",[167] are as important as the other human rights

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[160] Mohammed Abed al-Jabri, Democracy, Human Rights and Law in Islamic Thought (I.B. Tauris, 2009) 251 ("Without putting an end to poverty, ignorance and the injustice of the rulers and the injustices of the strong against the weak, the *hudud* will remain exposed to doubt. And, the Prophetic *hadith* says, 'Avoid the *hudud* [penalties] when in doubt'").

[161] C. G. Weeramantry, Islamic Jurisprudence: An International Perspective (Macmillan, 1988) 71-72.

[162] Muhammad Asad, The Principles of State and Government in Islam, 2nd ed. (Islamic Book Trust, 1980) 84 (citing on the authority of Muslim, "your lives and your possessions shall be [] inviolable among you" and "The blood, property and honour of a Muslim must be sacred [*haram*] to every [other] Muslim").

[163] Abul A'la Maudidi, Human Rights in Islam ,2nd ed. (Islamic Publications Ltd., 1995) 22-34.

[164] Muhammad Asad, The Principles of State and Government in Islam, 2nd ed. (Islamic Book Trust, 1980) 84-85 (citing Quran 104:1, 49:12 and 24:27, as well as two Prophetic *ahadith*).

[165] Abul A'la Maudidi, Human Rights in Islam ,2nd ed. (Islamic Publications Ltd., 1995) 24-25 (citing Prophetic *ahadith* reported by Abu Dawud and Mu'awiya to the effect that a ruler who spies on the people will ruin them).

[166] Mohammed Abed al-Jabri, Democracy, Human Rights and Law in Islamic Thought (I.B. Tauris, 2009) 240. According to the Quran this includes "the old (of the fathers, mothers and kin), the poor, the needy, orphans, the wayfarer, slaves and prisoners". Id. 241.

[167] Mohammed Abed al-Jabri, Democracy, Human Rights and Law in Islamic Thought (I.B. Tauris, 2009) 243.

in Islam as they "form the bases of the full enjoyment of the general basic rights".[168] By early consensus this treatment was extended to non-Muslims who entered into a covenant.[169]

In modern terms, al-Jabri sees the verses and *ahadith* regarding the rights of the oppressed as constituting a social welfare guarantee that "covers the right to medical care, unemployment benefit, and the right to pension benefit".[170] According to Asad the state must also uphold the promise of the proofs of law of "that minimum of material well-being without which there can be no human dignity, no real freedom and, in the last resort, no spiritual progress",[171] a view Mawdudi concurs in.[172] In order to enable understanding and progress, an Islamic state should also provide free and compulsory education.[173] These are essential components of "the right to rational development", the fulfilment of which is necessary to enable humans to meet their responsibility to understand and apply Sharia.[174]

The core principles of Islam support a coherent system of individual rights within an Islamic society. In the "rights scheme in traditional Muslim jurisprudence . . . civil and devotional obligations are accorded the same moral status".[175] That is, duties toward society are as obligatory as prayer. Similarly, Islamic human rights are monolithic—there is no conceptual separation between civil and political and socioeconomic rights, as in the international bill of rights. How one assesses the Islamic human rights paradigm depends considerably on what one compares it to. Measured against the customary tribal norms of the Arabian Peninsula where it arose, Islam brought substantial advances in areas such as procedural rights, economic rights and women's rights.[176] Over the subsequent centuries, some of the substantive rules of Islamic law have come to be seen as disabling rather than advancing universal rights, partly because times have changed and partly because other cultures where

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[168] Mohammed Abed al-Jabri, Democracy, Human Rights and Law in Islamic Thought (I.B. Tauris, 2009) 240.
[169] Mohammed Abed al-Jabri, Democracy, Human Rights and Law in Islamic Thought (I.B. Tauris, 2009) 247.
[170] Mohammed Abed al-Jabri, Democracy, Human Rights and Law in Islamic Thought (I.B. Tauris, 2009) 246 (citing the 9th century jurist Ibn Hazm to argue that Islamic alms and charity equate to social security).
[171] Muhammad Asad, The Principles of State and Government in Islam, 2nd ed. (Islamic Book Trust, 1980) 87-88.
[172] Abul A'la Maudidi, Human Rights in Islam ,2nd ed. (Islamic Publications Ltd., 1995) 31.
[173] Muhammad Asad, The Principles of State and Government in Islam, 2nd ed. (Islamic Book Trust, 1980) 86-87.
[174] Khaled Abou El Fadl, *The Human Rights Commitment in Modern Islam*, in Zainah Anwar (ed), Wanted: Equality and Justice in the Muslim Family (Musawah, 2009) 113-78 at 140-41. This implies guarantees of a minimum standard of living, safety and education, and "freedom of conscience, expression, and assembly with like-minded people". Id. 141.
[175] Ebrahim Moosa, *The Dilemma of Islamic Rights Schemes*, XV Journal of Law & Religion 1/2 (2001) 185-215 at 192.
[176] Nisrine Abiad, Sharia, Muslim States and International Human Rights Treaty Obligations: A Comparative Study (British Institute of International and Comparative Law, 2008) 2-20.

Islam is introduced lack traditions similar to those of ancient Arabia. Generalising Islamic rules to apply to a time and place different from those of their revelation requires "an accurate knowledge of the language, the style and the historicity of [the] texts, the 'occasions of revelation' and the intents of *al-shari'ah* relative to those texts".[177] The core conceptual question may again be whether the norms the Prophet introduced were meant to remain static rules for all time, or to indicate the direction in which Muslim society should evolve.

3.4. Compatibility of Islamic law and international human rights

This final section of the chapter highlights the significant degree to which international and Islamic views of human rights coincide. This is partly a matter of underlying principles, and partly of substantive rights. Establishing this relatively large zone of compatibility allows the remainder of the thesis to retain a narrow focus on positive legal obligations rather than moral principles, and on the specific instruments Islamic states use to realise the rights foreseen in both international and Islamic law. Finally, starting by acknowledging the areas of agreement enables full exploration of the disagreements without losing sight of the overall theme that Islamic states can indeed remain true to both Sharia and international human rights law.

Although they approach human rights from what may be fundamentally incompatible starting points (the will of God versus international consensus as reflected in customs, institutions and treaties), Islamic law and international law arrive at many similar rules.[178] This alone does not "justify the grafting of presumptions from one system to the other and in doing so packaging Muslim notions of rights as compatible to modern human rights practices",[179] but the overlap is not limited to substantive conclusions of law. In important ways, the respective basic principles the two systems are grounded in also coincide. Al-Jabri argues that the Enlightenment amalgamation of religious faith with the application of independent human reason coheres "with the Islamic attitude which establishes human rights on reason (*al-'aql*) and *al-fitrah* (nature), covenant and *al-shura* (consultation)".[180] Cox argues that focusing not on the ideological differences between fundamentalist interpretations of Islam and secular views on human rights but on common principles may improve mutual understanding—for example both blasphemy and hate speech can be understood as offensive speech, and a veil as

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[177] Mohammed Abed al-Jabri, Democracy, Human Rights and Law in Islamic Thought (I.B. Tauris, 2009) 210.
[178] C. G. Weeramantry, Islamic Jurisprudence: An International Perspective (Macmillan, 1988) 120-21.
[179] Ebrahim Moosa, *The Dilemma of Islamic Rights Schemes*, XV Journal of Law & Religion 1/2 (2001) 185-215 at 189.
[180] Mohammed Abed al-Jabri, Democracy, Human Rights and Law in Islamic Thought (I.B. Tauris, 2009) 194-95.

a particular implementation of a wider principle that when in public people should cover body parts that local society sees as sexualised.[181]

Basic principles of Islamic law render it naturally accommodating of international human rights standards.[182] Islamic law can connect with the international human rights paradigm through shared core principles such as the innate dignity of humans.[183] In the widespread view of modern Muslim scholars, according to Moosa, not just the Islamic view but "the pith of the modern human rights debate is about the preservation of human dignity".[184] In al-Jabri's analysis, Quran 17:70, which affirms the high standing of "the sons of Adam" among God's creation, along with supporting verses "establish a concept of man fully compatible with the modern European concept".[185] Baderin identifies a key similarity between international and Islamic understandings of human rights in that both presume individuals may do as they please, barring legitimate restraint by a political authority, justified for example by the need to keep people from violating one another's rights (such as by crime).[186] Kamali understands the Islamic principle of equality of persons as reflecting into modern Islamic constitutions in clauses guaranteeing equality before the law, before the courts, in employment opportunities and in "general duties and obligations such as . . . taxation and military service".[187] Sachedina argues that "the Shari'a does not advance a concept of egalitarian citizenship" but rather "simply divides the populace into Muslim members, with full privileges, and non-Muslim minorities, with protected status".[188] Nevertheless, Islamic law would not forbid an Islamic state from extending equal rights to non-Muslims.

Islam takes a noticeably community-oriented approach to human rights. Its main priorities for social relations appear to be to maintain peace, piety and social justice. This contrast with the focus on the individual that characterises international human rights law represents a point of potential misunderstanding. It need not, however, present a practical impediment, as the

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[181] Neville Cox, *The Clash of Unprovable Universalisms—International Human Rights and Islamic Law*, 2 Oxford J Law and Religion 2 (2013) 307-29 at 328.
[182] Al-Jabri identifies freedom and equality as the foundational principles of human rights under both an Islamic and an international understanding. Mohammed Abed al-Jabri, Democracy, Human Rights and Law in Islamic Thought (I.B. Tauris, 2009) 180-81, 196-99, 200-01.
[183] Abdulaziz Sachedina, Islam and the Challenge of Human Rights (Oxford U Press, 2009) 92-93.
[184] Ebrahim Moosa, *The Dilemma of Islamic Rights Schemes*, XV Journal of Law & Religion 1/2 (2001) 185-215 at 209.
[185] Mohammed Abed al-Jabri, Democracy, Human Rights and Law in Islamic Thought (I.B. Tauris, 2009) 212-13.
[186] Mashood A. Baderin, International Human Rights and Islamic Law (Oxford U. Press, 2003) 45.
[187] Mohammad Hashim Kamali, Freedom, Equality and Justice in Islam (Islamic Texts Society, 2002) 49-50 (citing Samir Aliyah Qad, Nazariyyah al-Dawlah fi'l-Islam (Mu'assasah al-Jami'iyyah, 1980) 86).
[188] Abdulaziz Sachedina, Islam and the Challenge of Human Rights (Oxford U Press, 2009) 77.

community is composed of individuals, whose interests the community must look after. In Islam therefore, the focus on community can buttress as well as constrain the rights of individuals, especially but not only with respect to socioeconomic rights such as sustenance and education. Many of the gaps and inconsistencies that appear in the classical Islamic human rights system when viewed from a western perspective are much less striking in the context of a correct Islamic society whose members can be relied on to honour their duties toward others. Like Islam defines duties that *de facto* give rise to rights, international human rights imply corresponding duties.[189] Baderin finds the aims of the ICCPR of "[enhancing] human dignity by fostering an ideal human community that guarantees freedom from fear and want; civil and political freedoms that lead to justice, and peace and general well-being" to be "commensurate with the general provisions and ultimate objective of the *Shari'ah*".[190]

Notwithstanding their fundamentally different starting points, many elements of the Islamic human rights system dovetail with modern international standards. There are undeniably areas of friction as well. Whether this makes it inevitable that either Islamic or international law must in general displace the other in any given jurisdiction is debatable. Baderin argues that differences in underlying "political and legal philosophy" do not dictate "complete discord" between international human rights and Islamic law.[191] Morgan-Foster argues that western human rights discourse could gain by re-emphasising individual duties as an integral component of rights, emulating the Islamic approach in this respect.[192] In Baderin's view, "rather than contradicting" international human rights law, Islamic law "should be able to contribute to the realization of its ideals and also to the achievement of its universal observation, especially in the Muslim world", based on the two legal regimes' shared aims of "the enhancement of human dignity and the promotion of human welfare".[193]

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[189] See e.g., Samantha Besson, *Justifications*, in Daniel Moeckli et al., eds., International Human Rights Law, 2nd ed. (Oxford U Press, 2014) 34-52 at 40 (rights can be abstract, whereas duties are context-specific, "by reference to a concrete threat to the protected interest". A single right can create multiple duties that "evolve with time and place").

[190] Mashood A. Baderin, International Human Rights and Islamic Law (Oxford U. Press, 2003) 50.

[191] Mashood A. Baderin, International Human Rights and Islamic Law (Oxford U. Press, 2003) 31.

[192] Jason Morgan-Foster, *Third Generation Rights: What Islamic Law Can Teach the International Human Rights Movement*, 8 Yale Hum Rts & Development L J (2005) 67-116.

[193] Mashood A. Baderin, International Human Rights and Islamic Law (Oxford U. Press, 2003) 32.

4. Islamic law and international law

The main question of this thesis is whether and how Islamic states can simultaneously implement Sharia and adhere to internationally recognised human rights norms. Since most such norms are now expressed in international treaties, and also ensconced in customary international law, it is instructive to establish whether an Islamic state can formally submit to international law. In principle, a negative answer would not prove an Islamic state cannot uphold human rights to the same standards as international law (albeit for different reasons), but a positive answer would render subsequent analysis much more straightforward. In light of the fact that most Islamic states do formally subscribe to the international bill of rights, a finding that such actions violate Sharia would make the thesis difficult to pursue further, as it would have to admit that most modern Islamic states do not uphold Sharia in their external relations. Accordingly, this chapter advances the thesis by establishing that Islamic law does not prevent, and indeed probably encourages, participation of Islamic states in the treaty regimes and other institutions that compose modern international law.

Modern Islamic states have a complex relationship with international law. Sharia has an international aspect, both generally as a universal supreme law, and specifically in its subset that deals with international relations, *siyar*. *Siyar* can help to inform an Islamic state's understanding of its commitments under general international law (understood to encompass treaties, customary international law, and regimes such as the UN or WTO),[194] but at times its norms may clash with the prevailing understanding of that international law. Many but by no means all Islamic states address the potential for conflict through constitutional clauses stating which body of law is supreme,[195] or via reservations or declarations alongside their international treaty commitments.[196] The result is a wide variance across Islamic states in the relationship between Sharia and international law, with implications for the degree to which Islamic states can adopt international human rights standards in their municipal legal orders.

International law and Islamic law are easily portrayed as fundamentally at odds. But in fact they have interacted and to some extent coevolved for centuries. The main Islamic theories of international law grew from the 8th-century works of Abu Hanifa and his pupil al-Shaybani.

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[194] Unless otherwise specified, the term 'international law' is used in this sense throughout this chapter.
[195] See below, chapter 6, introductory remarks.
[196] See below, chapter 7, section 7.1.1.

The founding thinkers of European international law were surely aware of their ideas.[197] For example, Weeramantry argues that the evidence of the travels, studies, contacts and correspondence of Hugo Grotius shows that Islamic law and scholarship could have significantly influenced his work, unacknowledged due to "the intensely Catholic and Christian atmosphere" then prevailing around European scholars.[198] Although they were at best under-represented in the early development of the international legal system, today Islamic states are influential members of the main international legal regimes and law-making bodies. Thus to a degree, general international law is itself influenced by Islamic legal theory and state practice. In light of this coevolution, it is unsurprising that although they proceed from different basic principles, Islamic law and international law often arrive at similar rules.

This chapter traces the development of Islamic international law from a set of interfaith and intercommunity norms established by the Prophet and the early caliphs to the aggregated legal frameworks, including Sharia, which bind modern Islamic states. It consists of four parts. The first and largest part discusses *siyar*, the subset of classical Islamic law that governs the external relations of the *umma*. Two of its components continue to inform Islamic international law today: the law of *jihad*, and the rules governing interactions with non-Muslims in the community. The second part examines Islamic international law from a modern perspective, demonstrating that Sharia is capable of coexisting with international law and that Islamic states can and do participate as full members of the international system without compromising their adherence to the faith. The third part briefly considers how Islamic states use the means available in the modern structures of international law to advance the ancient aims of *jihad*, which include the propagation of the call to Islam and the effort to realise the Islamic vision of a global order of peace, piety and social justice. The final part concludes that the evolution of Islamic international law and the readiness of modern Islamic states to participate in the international system have created the preconditions for Islamic states to realise the human rights principles found in the Islamic sources and proofs both as a matter of Islamic law, and by adhering to international instruments.

4.1. *Siyar*: the Islamic law of external relations

[197] See e.g., Majid Khadduri, War and Peace in the Law of Islam (Johns Hopkins Press, 1955) 58 ("St. Thomas Aquinas, who was acquainted with Muslim writings, formulated his theory of just war along lines similar to the Islamic doctrine of the jihad. St. Thomas and other Medieval writers influenced in their turn the natural law theories of the sixteenth, seventeenth, and eighteenth centuries").
[198] C. G. Weeramantry, Islamic Jurisprudence: An International Perspective (Macmillan, 1988) 151-58.

This part describes the main aspects of the classical law of Islamic external relations and their connections to the modern international law of Islamic states. It demonstrates that Sharia is receptive to international law. The part consists of two sections, which draw out the principles of *siyar* that bear on the external relations of Islamic states from the two predominant areas of al-Shaybani's focus: the laws of *jihad* and of the treatment of members of minority religious groups. Both sets of rules remain influential today, as components of Sharia, and through their influence on the international law that Islamic states subscribe to.

Whereas international law originated between European states, Islamic law traditionally classified people by religion and political affiliation rather than nationality.[199] Yet from the very early days of the Islamic state, Islamic law has developed norms applicable to relations between Muslim citizens and outsiders. These collectively became known as *siyar* (literally, 'practices'; singular *sirah*).[200] In principle *siyar* was a stop-gap, "a temporary institution" to regulate relations with non-Muslims until Islam would eventually subsume the entire world.[201] This perspective prevented recognition of other nations as equals, and led to a law of nations that "was not based on mutual consent or reciprocity, but on [Islamic rulers'] own interpretation of their political, moral and religious interest".[202] Nonetheless, as the Islamic state grew to interact with other sovereigns and non-Muslim groups and individuals, *siyar* developed through juristic refinement and the acts of pious caliphs to provide a legal basis for the external dealings of the *umma*.

Siyar as a set of ideas developed primarily in the Hanafi school of jurisprudence, its first exponent being Abu Hanifa himself.[203] His pupil al-Shaybani "became known as 'the father of Muslim international law' due to his remarkable treatise, *al-Siyar al-Kabir* (the Major *Siyar*)".[204] Al-Shaybani aggregated and presented rulings regarding relations between the Muslims and other communities that could be drawn from the proofs of law. The rulings and their evidences were largely received from Abu Hanifa, catalogued and occasionally refined

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[199] Mahmood Ahmad Ghazi (tr), Kitab al-Siyar al-Saghir by Muhammad ibn al-Hasan al-Shaybani (Islamic Research Institute, 1998) 19-20 (introduction).
[200] Mohamed Elewa Badar, *Ius in Bello under Islamic International Law*, 13 Intl Crim L Rev 593-625 at 600 ('*siyar*' is "derived from the verb *sara -yasiru* (to move). *Sirah* is a technical term in the Islamic sciences meaning the bibliography of the Prophet while its plural form, *siyar,* refers to legal matters") (citing Bouzenita).
[201] Majid Khadduri, War and Peace in the Law of Islam (Johns Hopkins Press, 1955) 44. Khadduri prefers the term "law of nations" over "international law" because it is broad enough to encompass earlier legal regimes that extended across nations within a single civilization, but were not truly international. Id. 43-44.
[202] Majid Khadduri, War and Peace in the Law of Islam (Johns Hopkins Press, 1955) 45.
[203] Mohamed Elewa Badar, *Ius in Bello under Islamic International Law*, 13 Intl Crim L Rev 593-625 at 600.
[204] Mohamed Elewa Badar, *Ius in Bello under Islamic International Law*, 13 Intl Crim L Rev 593-625 at 600 (citing al-Ghunaimi).

by al-Shaybani and his senior colleague Abu Yusuf. While there is substantial agreement with the other *madhahib*, as the rulings are grounded in the Quran and widely-respected *ahadith*, there are also areas of divergence. Malik and al-Shafi'i ruled differently on particular points, often as a consequence of the Hanafite tendency to rely more on *maslahah* than the other schools do. Malik stayed closer to the traditions and customs of Medina, while al-Shafi'i constructed an influential theory of Islamic international law based on a presumption of hostile relations with unbelievers.[205]

Throughout its early development, Islamic law operated within the theoretical dichotomy of *dar al-harb* and *dar al-Islam*. This framework contemplated neither permanent political disunity, nor equality of standing between the Islamic caliphate and other states. Munir, however, questions Khadduri's characterisation of the *dar al-harb* as lacking competence to enter into durable legal agreements, based on Quranic references to other nations and the Prophet's entry into agreements with other sovereigns.[206] This makes it difficult to speak of *siyar* as standing in the same relationship to Islamic law as modern international law does to municipal laws of states. Rather, it is a subset of Sharia that governs how Muslims should behave when they interact with other peoples. Today, al-Shaybani's *Kitab al-Siyar al-Saghir* (The Shorter Book on International Law) is the most authentic early *siyar* treatise available. It is a product of its times: for example, it states more rules, often quite intricate, relating to the distribution of war booty than to any other single sub-topic. To relate *siyar* to the modern meaning of Islamic international law requires first identifying its underlying principles, relating them to the main justificatory principles of Islamic law, and accounting for state practice of the enlightened Islamic past.

4.1.1. *Jihad*

Islamic international law begins with *jihad*.[207] As with international law, a large part of early Islamic international law evolved as rules of war. Early rulings of *siyar* "dealt mostly with the law of war, since the Muslims faced major threats from the beginning and were surrounded

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[205] Muhammad Munir, *Public International Law and Islamic International Law: Identical Expressions of World Order*, 1 Islamabad L Rev 3 & 4 369-430 at 398.

[206] Muhammad Munir, *Public International Law and Islamic International Law: Identical Expressions of World Order*, 1 Islamabad L Rev 3 & 4 369-430 at 406-07.

[207] Labeeb Ahmed Bsoul, *Historical Evolution of Islamic Law of Nations/Siyar: Between Memory and Desire*, 17 Digest of Middle East Studies 1 (Spring 2008) 48-67 at 51 ("the field gradually expanded to cover international political relations in general, a natural progression to the outcome of *jihād* and the expansion of the Islamic state" (footnote omitted)).

by many enemies. They, therefore, had to develop laws and regulations to communicate with other states".[208]

This section serves two purposes. The first is to establish that *jihad* doctrine bears a strong similarity to modern international laws of war and international humanitarian law, so much so that numerous authors have proposed that these areas of international law may have been derived from Islamic sources. The second purpose is to show that *jihad* remains relevant to the international obligations of an Islamic state. The section accomplishes these purposes in three subsections. The first establishes that *jihad* carries a general meaning of striving for Islam, of which armed conflict is only one possible manifestation. The second subsection discusses the components of *jihad* that are analogous to modern doctrines of *jus ad bellum* and *jus in bello*, and how their similarities indicate a general compatibility between Sharia and international law. The final subsection examines the responsibilities of an Islamic state that flow from *jihad* doctrine, when applied in an international context in which peace is the normal frame of relations between nations, rather than the presumption of war that prevailed when Islamic law first developed.

4.1.1.1. *Jihad*: General and martial meanings

This subsection examines the range of meanings that have attached to *jihad* since the Prophet's time. It demonstrates that *jihad* is an integral part of an Islamic state's duties under Sharia, specifically its *siyar* subset, but that this does not necessarily require an Islamic state to engage in war or even non-violent forms of hostility. While the Quran sanctions and in some circumstances requires combat against unbelievers, it also calls for other forms of *jihad* that can include peacefully sharing the message of Islam. The latter, broad understanding is both older and newer than the understanding of *jihad* as war, as the verses describing it were largely revealed in Mecca before the *Hijra*, then revisited by Islamist thinkers in the wake of the demise of the Ottoman Empire and the colonial era. When the Prophet and the caliphs led the Islamic state, and when the classical jurists developed their theories, war was understood as the normal state of international relations, absent a declaration of friendship or peace. In order to implement Sharia in their international dealings now that peace is the norm among states, absent a declaration of hostility, Islamic states may need to reinterpret *jihad* more in line with its broader meaning.

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[208] Labeeb Ahmed Bsoul, *Historical Evolution of Islamic Law of Nations/Siyar: Between Memory and Desire*, 17 Digest of Middle East Studies 1 (Spring 2008) 48-67 at 51.

Jihad means 'struggle'.[209] It is linguistically related to *ijtihad*,[210] hinting at a broad meaning that could for example encompass a personal struggle to understand. The Quran frequently uses it in the phrase "*al-jihad fi sabil Allah*", struggle "in the path of God", which Afsaruddin understands to imply that "human striving [may] be accomplished in multiple ways".[211] Khadduri interprets *jihad* in God's path to mean "the spread of the belief in Allah and in making His word supreme over the world".[212] The 14th century Hanbali jurist Ibn Qayyim al-Jawziyyah found four types of *jihad* in the Quran and *sunna*, each with four sub-types. The types are "i) jihad against the self; ii) jihad against the unbelievers; iii) jihad against the hypocrites; and iv) jihad against the agents of corruption", each subdivided into "a) jihad of the heart; b) jihad of the tongue; c) jihad by wealth; and d) jihad by person".[213] Khadduri sees these as "ways in which [according to the *ulama*] the believer may fulfill his jihad obligation: by his heart; his tongue; his hands; and by the sword".[214] The first of these, the inner struggle against evil, "was regarded as the greater jihad. The second and third are mainly fulfilled in supporting the right and correcting the wrong. The fourth is precisely equivalent to the meaning of war, and is concerned with fighting the unbelievers and the enemies of the faith".[215] Mawdudi conceived *jihad* in universal terms, as an ideological struggle aimed at the overthrow of illegitimate rulers by non-lethal means, and the eventual establishment of a global Islamic polity.[216]

Jihad then has a general meaning that indicates exertion, and a specific one meaning war. It "may be regarded as a form of religious propaganda that can be carried on by persuasion or by the sword".[217] The first revelations regarding *jihad* that came to the Prophet in Mecca demonstrated its non-violent aspect, establishing "that to bear patiently the wrong doing of

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[209] According to Mawdudi, the "nearest correct [English] meaning" of *jihad* is "to exert one's utmost endeavour in promoting a cause". Abul A'la Maududi, Jihad in Islam (Holy Koran Publishing House, 2006) (address delivered 13 April, 1939 in Lahore) 5.

[210] Caner Dagli, *Jihad and the Islamic Law of War*, in Ghazi bin Muhammad et al., eds., War and Peace in Islam: The Uses and Abuses of Jihad (Royal Islamic Strategic Studies Centre, 2013) 56-98 at 58.

[211] Asma Afsaruddin, *Views of* Jihad *Throughout History*, in Mashood Baderin, ed., International Law and Islamic Law (Ashgate, 2008) 97-101 at 97.

[212] Majid Khadduri, War and Peace in the Law of Islam (Johns Hopkins Press, 1955) 55 (citing Quran LXI, 10-13).

[213] Mohammad Hashim Kamali, *Introduction*, in Ghazi bin Muhammad et al., eds., War and Peace in Islam: The Uses and Abuses of Jihad (Royal Islamic Strategic Studies Centre, 2013) xi-xvii at xiv.

[214] Majid Khadduri, War and Peace in the Law of Islam (Johns Hopkins Press, 1955) 56.

[215] Majid Khadduri, War and Peace in the Law of Islam (Johns Hopkins Press, 1955) 56-57.

[216] Abul A'la Maududi, Jihad in Islam (Holy Koran Publishing House, 2006) (address delivered 13 April, 1939 in Lahore) 3 ("Now 'Jihad' only refers to waging war with the tongue and pen"), 6 ("Islam wishes to destroy all states and governments" opposed to it and to "set up a [universal] state on the basis of its own ideological programme").

[217] Majid Khadduri, War and Peace in the Law of Islam (Johns Hopkins Press, 1955) 56.

others and to forgive those who cause them harm is the superior course of action".[218] These verses mostly emphasised persuasion: the Prophet "seemed to have been satisfied by warning his people against idolatry and inviting them to worship Allah".[219] Later Medinan verses introduced force "as a "last resort" option", after efforts "at negotiations and peaceful proselytization among the Meccans had failed".[220] These revelations "often expressed [*jihad*] in terms of strife, and there is no doubt that in certain verses the conception of jihad is synonymous with the words war and fighting".[221] Thus the manifestations of *jihad* came to include armed conflict—what Ibn Qayyim might classify as *jihad* by person—carried out against unbelievers (or false believers). This aspect of *jihad* came to predominate in the works of classical jurists,[222] and to partially guide the international conduct of the caliphate. Later classical and modern jurists revived the idea of *jihad* having a broader meaning that could, but did not necessarily require the use of force.

These oscillating views, between understanding *jihad* in strictly martial terms or more broadly, arguably show that *jihad* may be interpreted generally as requiring the *umma* to strive to defend and spread the faith. In its outwardly directed aspect, *jihad* was the never-ending struggle to bring new lands and peoples into the *dar al-Islam*. It is questionable whether in modern times this requires actual political control. Some 12th century and later scholars were willing to assimilate to the *dar al-Islam* any "territory in which Muslims were free to practice their religion", and 19th/20th century modernists such as Muhammad Abduh and Muhammad Rashid Rida "explicitly affirm[ed] that peaceful coexistence was the normal state of affairs between the Islamic and non-Islamic worlds".[223]

4.1.1.2. *Jihad* as war

This subsection examines *jihad* within its limited definition as a type of war. It demonstrates that, based on the revelations of the Quran and the acts of the Prophet and other early leaders,

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[218] Asma Afsaruddin, *Views of* Jihad *Throughout History*, in Mashood Baderin, ed., International Law and Islamic Law (Ashgate, 2008) 97-101 at 97 (citing Quran 42:40-43, 29:59, 16:42).
[219] Majid Khadduri, War and Peace in the Law of Islam (Johns Hopkins Press, 1955) 56. Khadduri cites as evidence Quran 29:5: ""He who exerts himself (jahada), exerts only for his own soul," which expresses the jihad in terms of the salvation of the soul rather than a struggle for proselytization". Id.
[220] Asma Afsaruddin, *Views of* Jihad *Throughout History*, in Mashood Baderin, ed., International Law and Islamic Law (Ashgate, 2008) 97-101 at 98.
[221] Majid Khadduri, War and Peace in the Law of Islam (Johns Hopkins Press, 1955) 56.
[222] Asma Afsaruddin, *Views of* Jihad *Throughout History*, in Mashood Baderin, ed., International Law and Islamic Law (Ashgate, 2008) 97-101 at 99 (by about the middle of the second Islamic century (9th century), the scholars had developed the ideas of *dar al-Islam* and *dar al-harb*, and juristic and administrative use equated *jihad* with *qital* (fighting)).
[223] Asma Afsaruddin, *Views of* Jihad *Throughout History*, in Mashood Baderin, ed., International Law and Islamic Law (Ashgate, 2008) 97-101 at 99-100.

siyar developed rules governing when an Islamic state should go to war, and how it should conduct wars. These rules formed an integral part of the foundation of Islamic international law. They also show that Sharia places a high value on peaceful relations between an Islamic state and its neighbours and recognises a universal human dignity that renders it unlawful for Muslims to mistreat even those who wage war against them, and who mistreat them.

Jihad doctrine regulated the conditions under which war could (or must) be initiated, and its conduct once under way—analogous to *jus ad bellum* and *jus in bello*. Islam was revolutionary not in calling for war in the form of *jihad*, but in outlawing warfare other than *jihad*, with its strict rules of initiation and conduct. Until the Prophet's time, custom had limited when and how war could be pursued, but had not challenged the basic presumption that conflict or incipient conflict was the normal state of affairs. The Islamic rules of war emphasised that the purpose of *jihad* was not conquest *per se*, but to protect the community and spread Islam, thereby establishing a zone of peace (*dar al-Islam*). Sharia also placed duties on the Muslims governing the treatment of their adversaries as well as non-combatants they encountered during warfare. *Jihad* being a religious duty, rules regarding its conduct amounted to divinely mandated obligations owed to non-Muslims. Establishing these had the effect of recognising some rights as universal—accruing even to those who had not accepted Islam. The overall result was the Arabian Peninsula's first effective law of war.

4.1.1.2.1. When to fight

Sharia limited the freedom of the *umma* to wage war. War now required sanction. Fighting to defend the *dar al-Islam* when under attack is obligatory, an individual duty. However if there is a duty of *jihad* in the sense of externally directed fighting, it lies on the community and therefore takes place only on the initiative of the imam. Many modernists deny any duty of offensive *jihad*, grounding their arguments in the original proofs of law and arguments of some early jurists. Others argue based on the Prophet's tradition of launching at least one expedition per year, and on the wars waged by the Rashidun Caliphs, that the Islamic community had a duty to wage aggressive war. Such wars must, however, be aimed at preserving and expanding the faith.

The Quran exhorts the Muslims to particular ardour against polytheists, to fight them "totally as they fight you totally" and to "[s]lay the polytheists wherever you find them, and take

them, and confine them, and lie in ambush for them everywhere".[224] This could indicate particular opprobrium against those who deny the fundamental principle of *tawhid*, the oneness of God. Or—in view of the events in process at the time of their revelation—it might reflect the mortal danger posed to the fledgling Islamic state in Medina by its foes in Mecca. While the Medinan revelations may have abrogated those received earlier in Mecca, it is also possible they represented different means of realising the same aim, the means tailored to the conditions facing the *umma* at the respective times.[225] Thus the subsequent practice whereby just Islamic rulers sometimes chose not to pursue war against unbelievers would not be an innovation, but simply a choice by the imam to apply the rules pronounced in Mecca as better suited to the situation of the day. In this view, *jihad* may permit the use of force, but does not require it except in self-defence—which of course international law also permits.

Sharia requires individual Muslims to fight "in circumstances of emergency".[226] *Jihad* is obligatory on individuals who find themselves "in the rows of battle", and when Muslim lands are invaded or "the ruler calls for a general enlistment and participation upon those legally capable".[227] According to al-Shafi'i and al-Ghazali, if outsiders attacked a Muslim town that could not defend itself, then Muslim cities near enough to do so must come to its defence.[228] Likewise, nearby Muslims must fight in aid of women and children, whether Muslims or non-Muslim citizens; this extends to fighting alongside rebel Muslims attacked by non-Muslims.[229] Ibn Taymiyyah cited the battle of the Trench—in which Medina was besieged, until the Muslims broke out and subsequently pursued their enemies—as demonstrating that fighting to defend the community in time of need was obligatory on all

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[224] Quran 9:36 and 9:5, quoted in Muhammad ibn Idris al-Shafi'i, *Al-Risala fi Usul al-Fiqh* (Majid Khadduri tr, 2nd ed.) (The Islamic Texts Society, 1987) 83.

[225] See e.g., Sohail H. Hashmi, *Interpreting the Islamic Ethics of War and Peace*, in Sohail H. Hashmi, ed., Islamic Political Ethics: Civil Society, Pluralism, and Conflict (Princeton U. Press, 2002) 194-216 at 211 ("The jurists who contend that the sword verses provide a general rule superseding earlier revelation argue that belief is the decisive factor in establishing immunity from attack. Since verse 9:5, in their view, commands Muslims to fight all polytheists, only women and children (who were specifically designated by the Prophet as immune) are prohibited targets. All able-bodied polytheist males, whether actually fighting or not, may be killed. Other jurists, who do not consider the peace verses to have been abrogated, maintain that capacity to fight is the only appropriate consideration, and therefore include old men, women, children, peasants, slaves, and hermits among prohibited targets").

[226] John Kelsay, Arguing the Just War in Islam (Harvard U. Press, 2007) 117.

[227] Abdul-Azeem Badawi, The Concise Presentation of the Fiqh of the Sunnah and the Noble Book (Jamaal al-Din M. Zarabozo tr, International Islamic Publishing House, 2007) 657-58.

[228] John Kelsay, Arguing the Just War in Islam (Harvard U. Press, 2007) 116.

[229] Mahmood Ahmad Ghazi (tr), Kitab al-Siyar al-Saghir by Muhammad ibn al-Hasan al-Shaybani (Islamic Research Institute, 1998) 66 (al-Shaybani, ¶ 99) (if Muslims living under an agreement in the *dar al-harb* notice the non-Muslims passing by with captives taken in the *dar al-Islam*, they must "revoke the covenant and fight for Muslim women and children" if able to do so; this is one of the few cases where Muslims are required *not* to uphold their agreements).

Muslims, but the pursuit "was voluntary fighting to increase the prestige of the religion and frighten the enemy".[230]

It would be misleading to understand the doctrine of *jihad* as necessarily encouraging the instigation of war. War was the normal state of affairs on the Arabian Peninsula in the 7th century. Until Islam transformed the region, the tribes were essentially always at war—sometimes actually fighting, but always presumed hostile, absent agreement to the contrary.[231] Rather than introducing war, the Quran "redirect[ed] energies that were already being expended", to forge a community among the Muslims.[232] Over time, in the context of a fragmented Islamic polity and the apparently indefinite existence of non-Muslim states, "the classical concept of the perpetual jihad or state of war became anachronistic".[233] *Jihad* is a duty of the whole *umma*, thus of the imam as their delegate. It is a duty in perpetuity. By the mid-Abbasid period (10th century), however, the view prevailed that the caliph's duty to wage military *jihad* had "essentially lapsed".[234] Afsaruddin questions whether the duties postulated by many classical jurists are duly grounded in the Quran and proofs of law, in view of contemporaneous arguments of jurists less closely affiliated with state authorities who "would endorse only a defensive *jihad* in response to a prior act of aggression by enemy forces and did not regard the combative *jihad* to be a religious obligation".[235]

In its offensive or defensive form, the purpose of *jihad* is to preserve the faith. In the classical understanding, according to Hallaq, *jihad* "is narrowly driven by a single concern, namely, the conversion of unbelievers to the Islamic faith".[236] Jackson argues that this call is not for a 'holy war', but to defend the physical safety of the Muslim community: "peace, i.e., the repelling of aggression, rather than conversion to Islam was the ultimate aim of this fighting".[237] Exhortation was needed, because otherwise the Muslims might tend to revert to

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[230] John Kelsay, Arguing the Just War in Islam (Harvard U. Press, 2007) 117 (quoting Ibn Taymiyyah, *Siyasat al-Shar'iyya*, in Ibn Taimiya on Public and Private Law in Islam, Omar A. Farrukh trans. (Beirut: Kayats, 1966) 147).

[231] Fred M. Donner, *The Sources of Islamic Conceptions of War*, in John Kelsay and James Turner Johnson, eds., Just War and Islam: Historical and Theoretical Perspectives on War and Peace in Western and Islamic Traditions (Greenwood Press, 1991) 31-69 at 34.

[232] Sherman A. Jackson, *Jihad and the Modern World*, in Mashood Baderin, ed., International Law and Islamic Law (Ashgate, 2008) 233-254 at 242.

[233] C.G. Weeramantry, Islamic Jurisprudence: An International Perspective (Macmillan, 1988) 148.

[234] Asma Afsaruddin, *Views of* Jihad *Throughout History*, in Mashood Baderin, ed., International Law and Islamic Law (Ashgate, 2008) 97-101 at 99.

[235] Asma Afsaruddin, Striving in the Path of God: *Jihad* and Martyrdom in Islamic Thought (Oxford U. Press, 2013) 4.

[236] Wael B. Hallaq, Sharia: Theory, Practice, Transformations (Cambridge U. Press, 2009) 333.

[237] Sherman A. Jackson, *Jihad and the Modern World*, in Mashood Baderin, ed., International Law and Islamic Law (Ashgate, 2008) 233-254 at 242-43 (citing Quran 8:61, 2:193, 4:89-90).

loyalty to and reliance on the old order based on clans and tribes—for in Mecca, many unbelievers were also neighbours and relatives.[238] The *dar al-Islam* had to be established before it could expand.[239] This necessitates a broader understanding of *jihad*, even within its purely martial sense, than that of the classical jurists who considered conversion to be its sole aim. Today, *jihad* "is not an end in itself but a means towards peace, freedom of conscience and justice".[240] A modern understanding of *jihad* would opt for peaceful means if possible, but might not entirely rule out violence. Mawdudi posits *jihad* as an ideological struggle of, at the individual level, persuasion not coercion; however, "force of arms" may be necessary to remove oppressive or immoral governments that do not allow the development of a properly Islamic society.[241] According to Weeramantry, *jihad* in the form of warfare can also "legitimately be employed for throwing off a foreign yoke – the principle of self-determination which modern international law endorses".[242]

4.1.1.2.2. How to fight

The law of *jihad* recognises a universal human dignity. The conduct of *jihad* is "governed by the fundamental principles of necessity, humanity and chivalry".[243] In many aspects its rules make no distinction between treatment of Muslims and of non-Muslims, even when the latter are recognised as enemies. Military necessity can justify some deviation from the basic rules, but not cruelty or wanton destruction. By requiring that even unbelievers be treated correctly, even if they mistreat Muslims, the law of *jihad* demonstrates that Sharia contains core principles that can support a universalist view of human rights, and deals according to law even with outsiders who have not established peaceful relations with the *umma*.

The sources and proofs of law leave no doubt that *jihad* is a highly restricted type of warfare.[244] Its rules reflect the aims of Sharia: protecting life, religion, intellect, progeny and

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[238] Sherman A. Jackson, *Jihad and the Modern World*, in Mashood Baderin, ed., International Law and Islamic Law (Ashgate, 2008) 233-254 at 242.
[239] See e.g. John Kelsay, Arguing the Just War in Islam (Harvard U. Press, 2007) 119 (As part of the duty "to establish and protect the practice of Islam" the ruler "fights to extend or protect the hegemony of Islamic values in what one might call "geopolitical space."").
[240] Mohammad Hashim Kamali, *Introduction*, in Ghazi bin Muhammad et al., eds., War and Peace in Islam: The Uses and Abuses of Jihad (Royal Islamic Strategic Studies Centre, 2013) xi-xvii at xvi.
[241] Abul A'la Maududi, Jihad in Islam (Holy Koran Publishing House, 2006) (address delivered 13 April, 1939 in Lahore) 18-19.
[242] C.G. Weeramantry, Islamic Jurisprudence: An International Perspective (Macmillan, 1988) 148.
[243] Mohamed Elewa Badar, *Ius in Bello under Islamic International Law*, 13 Intl Crim L Rev 593-625 at 605.
[244] See e.g. Sohail H. Hashmi, *Interpreting the Islamic Ethics of War and Peace*, in Sohail H. Hashmi, ed., Islamic Political Ethics: Civil Society, Pluralism, and Conflict (Princeton U. Press, 2002) 194-216 at 210-11 (quoting Quran 2:190: "And fight in God's cause against those who wage war against you, but do not transgress

property. Even unbelievers and polytheists could escape the Muslims' hostility through professing belief in Allah and paying the *zakat*, as could people of the book by acceding to Muslim rule and paying the *jizya*.[245] Muslims engaged in *jihad* must grant quarter when asked, treat prisoners humanely and honour safe conducts. They must not inflict undue suffering on their enemies in combat. They must not harm non-combatants, mutilate or torture foes, use poisoned weapons, unnecessarily destroy property or allow children to fight. Abu Bakr provided one of the most often cited summaries of the Islamic rules of warfare in his instructions to a commander:

> "I advise you ten things: Do not kill women or children or an aged, infirm person. Do not cut down fruit-bearing trees. Do not destroy an inhabited place. Do not slaughter sheep or camels except for food. Do not burn bees and do not scatter them. Do not steal from the booty, and do not be cowardly".[246]

The prohibitions on attacking non-combatants and wanton destruction of property imply abstention from the use of indiscriminate weapons. Badar argues that the rules against using fire, flooding and poisoning the enemy's water supply amount to a ban on the use of weapons of mass destruction "because only those weapons that can differentiate between combatants and non-combatants are permissible".[247] At the same time, the Quran and *sunna* command the Muslims to use the kinds of weapons used against them,[248] which appears to create an exception to the general ban. This suggests that possession of those weapons might be appropriate, but not first use. Nonetheless, al-Shaybani considered flooding, fire or siege weapons permissible if necessary to win the battle, even if the enemy had among them Muslim women and children who might thereby be harmed.[249]

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limits, for God loves not the transgressors", the limits being shown through the actions of the Prophet and the Rashidun Caliphs).

[245] See Muhammad ibn Idris al-Shafi'i, *Al-Risala fi Usul al-Fiqh* (Majid Khadduri tr, 2nd ed.) (The Islamic Texts Society, 1987) 83 (quoting Quran 9:5, "if [the polytheists] repent and perform the prayer and pay the zakat, then set them free"; a Prophetic *hadith*, "I shall continue to fight the unbelievers until they say: 'There is no god but God,' if they make this pronouncement they shall be secured their blood and property"; and Quran 9:29, "Fight . . . those who have been given the Book, until they pay the jizya out of hand and have been humbled").

[246] Aisha Abdarahman at-Tarjumana and Yaqub Johnson (tr), Malik's Muwatta, Book 21, Number 21.3.10.

[247] Mohamed Elewa Badar, *Ius in Bello under Islamic International Law*, 13 Intl Crim L Rev 593-625 at 611.

[248] Mohamed Elewa Badar, *Ius in Bello under Islamic International Law*, 13 Intl Crim L Rev 593-625 at 611 (citing Quran 2:194 and 16:126, commanding reciprocity in "degree of aggression" and applying "the same punishment which had been inflicted on" the Muslims, and instructions of Abu Bakr to "fight them with the same weapon they fight you with").

[249] Mahmood Ahmad Ghazi, trans., Kitab al-Siyar al-Saghir by Muhammad ibn al-Hasan al-Shaybani (Islamic Research Institute, 1998) 55 (al-Shaybani, ¶ 55).

Sharia recognises the basic humanity even of enemies in war. The Prophet and the other early leaders required their armies to behave honourably and to refrain from unnecessary cruelty, particularly mutilation of the living or the dead.[250] The use of poison was restricted or even forbidden, although there were no apparent "restrictions on the degree of force that could be used".[251] The Prophet forbade the burning of foes. Even if provoked by like acts, Muslims may not mutilate their foes whether dead or alive, as revealed by a Quranic verse after the Prophet and his followers vowed to do so in revenge for the mutilation of the bodies of Muslims at the battle of Uhud.[252] Similarly, even when their companions held hostage are executed, the Muslims may not retaliate by killing those of the enemy they hold.[253] The Muslims were required to bury those killed in battle, whether Muslims or enemies, and to return bodies to their enemies if requested, without accepting payment.[254]

Quarter (*aman*) had to be given when asked, and could be extended generally as well. The purpose is "to prevent bloodshed and protect life",[255] and to afford the enemy the opportunity to hear the word of God.[256] *Aman* also subsumes safe conduct, allowing formal enemies to enter and stay in the Islamic state, conditionally and for non-hostile purposes. Both quarter and safe conduct are grounded in Quran 9:6: "And if anyone of the polytheists seeks your protection, then protect him until he hears the word of God. Then, afterwards, escort him to his place of safety".[257] As the polytheist would presumably remain in the *dar al-Islam* if he converted, the latter command implies that after hearing the word of God, the polytheist may

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[250] Mahmood Ahmad Ghazi (tr), Kitab al-Siyar al-Saghir by Muhammad ibn al-Hasan al-Shaybani (Islamic Research Institute, 1998) 43(al-Shaybani, ¶ 1) (the Prophet would tell his soldiers "Do not misappropriate; do not commit treachery; do not mutilate [the dead]; and do not kill a child"); C.G. Weeramantry, Islamic Jurisprudence: An International Perspective (Macmillan, 1988) 136.

[251] C.G. Weeramantry, Islamic Jurisprudence: An International Perspective (Macmillan, 1988) 138 (citing Singh, 1973, pp. 216-17 for examples of jurists who forbade poison on sharp weapons, or forbade it entirely, and the lack of juristic objection to the Emperor Babur's inaugural use of artillery).

[252] Mohamed Elewa Badar, *Ius in Bello under Islamic International Law*, 13 Intl Crim L Rev 593-625 at 620 (citing Quran 16:126-27).

[253] Mohamed Elewa Badar, *Ius in Bello under Islamic International Law*, 13 Intl Crim L Rev 593-625 at 619 (citing juristic consensus and the example of Mu'awiyah who declined to execute Roman hostages when the emperor violated their treaty by killing Muslims he held).

[254] Mohamed Elewa Badar, *Ius in Bello under Islamic International Law*, 13 Intl Crim L Rev 593-625 at 621. See also Mahmood Ahmad Ghazi, trans., Kitab al-Siyar al-Saghir by Muhammad ibn al-Hasan al-Shaybani (Islamic Research Institute, 1998) 46 (al-Shaybani, ¶ 21) (a polytheist "fell in the ditch and died. Muslims were offered some money in consideration of his corpse". They inquired of the Prophet, who "forbade them [to accept that money]") (brackets in original). Abu Hanifa held that Muslims could accept a price for bodies taken "in the [dar al-harb] outside the Muslim camp", reasoning that since booty was an object of war it must be permissible to accept money willingly offered, but Abu Yusuf strongly objected, arguing that this could not justify the selling of corpses, generally a forbidden practice. Id., 82 (al-Shaybani, ¶ 162).

[255] Mohamed Elewa Badar, *Ius in Bello under Islamic International Law*, 13 Intl Crim L Rev 593-625 at 616 (citations omitted).

[256] C.G. Weeramantry, Islamic Jurisprudence: An International Perspective (Macmillan, 1988) 138 (citing Quran 9:6 and the Prophet's announcement offering quarter to the people of Mecca after its conquest).

[257] Mohamed Elewa Badar, *Ius in Bello under Islamic International Law*, 13 Intl Crim L Rev 593-625 at 616.

choose not to follow it, and freely depart. An unbeliever in the *dar al-Islam* under safe conduct is guaranteed protection of body and property. Commerce is permitted, but items of military use acquired in the *dar al-Islam* may not be taken back to the *dar al-harb*.[258]

In addition to forbidding the killing of children, Sharia prohibits the use of child soldiers. According to a widely reported *hadith*, the Prophet forbade Ibn Umar to join the Muslims in battle at age fourteen, but allowed him to fight the following year.[259] Shafi'i jurists hold that even if of age, a youth must have his parents' permission to join in the fighting.[260] Similarly, Malik ruled that even after a man had prepared and equipped himself for *jihad*, if a parent forbade him then he should "put it off for another year".[261] This reflects the importance of protecting the family or progeny as one of the main purposes of Islamic law.

Muslim armies may not destroy property "except when it is a military necessity to do so".[262] The Prophet gave clear instructions against destruction of buildings, cultivated lands, fruit trees and livestock in enemy territory.[263] Abu Bakr also forbade his soldiers from taking "from the provisions of the enemy more than they needed".[264] Islamic laws of war display "a concern for the preservation of natural vegetation, crops and livestock", forbidding harm to them except as needed for food.[265] Islamic forces may only "inflict damage on the property of their enemies to the extent necessary to overcome them. Most jurists do not permit the unnecessary slaughter of animals, the destruction of homes, the cutting down of fruit trees, or the use of fire".[266]

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[258] Mahmood Ahmad Ghazi, trans., Kitab al-Siyar al-Saghir by Muhammad ibn al-Hasan al-Shaybani (Islamic Research Institute, 1998) 63 (al-Shaybani, ¶ 88) (this included slaves and beasts of burden as well as weapons; the *harbi* could only replace his weapon with one of like kind (i.e. a sword for a sword, not for a bow) of like or inferior quality).

[259] Abdul-Azeem Badawi, The Concise Presentation of the Fiqh of the Sunnah and the Noble Book (Jamaal al-Din M. Zarabozo tr, International Islamic Publishing House, 2007) 656.

[260] Mohamed Elewa Badar, *Ius in Bello under Islamic International Law*, 13 Intl Crim L Rev 593-625 at 623.

[261] Aisha Abdarahman at-Tarjumana and Yaqub Johnson (trs), Malik's Muwatta, Book 21, Number 21.5.14.

[262] Mohamed Elewa Badar, *Ius in Bello under Islamic International Law*, 13 Intl Crim L Rev 593-625 at 613.

[263] Mohamed Elewa Badar, *Ius in Bello under Islamic International Law*, 13 Intl Crim L Rev 593-625 at 613.

[264] C.G. Weeramantry, Islamic Jurisprudence: An International Perspective (Macmillan, 1988) 136 (citing Nussbaum, 1954, p. 52).

[265] C.G. Weeramantry, Islamic Jurisprudence: An International Perspective (Macmillan, 1988) 137. There was some disagreement about how far this protection extends, as for example Shafi'i would permit destruction of animals "if they would strengthen the enemy" while Malik and Abu Hanifa held otherwise. Id.

[266] Sohail H. Hashmi, *Interpreting the Islamic Ethics of War and Peace*, in Sohail H. Hashmi, ed., Islamic Political Ethics: Civil Society, Pluralism, and Conflict (Princeton U. Press, 2002) 194-216 at 212.

What level of necessity justifies deviation from the general rule is debatable. The question implicates a proportionality principle relating the need to the level of destruction.[267] In one example under the Prophet, the Muslims cut an enemy tribe's palm trees "to make them surrender during a bloodless siege that lasted for six nights"—though some jurists considered that Abu Bakr's apparently absolute rule against cutting fruit trees showed what the Prophet would have done in later circumstances, thus abrogating the earlier, exceptional practice.[268] Al-Shaybani gave greater weight to the goal of weakening the enemy, recommending for example the slaughter and burning of already-gathered livestock to prevent their benefiting the enemy.[269] Notwithstanding Abu Bakr's admonition against destroying "an inhabited place", al-Shaybani "saw no harm in the demolition of the villages of the Territory of War which came in their way".[270]

4.1.1.3. *Jihad* and international law

Whether or not there is a causal relationship, the similarity in substantive rules between Islamic and modern international law shows a convergence of values that could carry over into human rights discourse. At least as they concern war, the norms of international law are not at all foreign to Islamic states. The rules restricting when the ruler may initiate *jihad* resemble the doctrine of just war that later developed in Europe.[271] The rules of conduct of *jihad* presaged later humanitarian law, as the first "mature elaboration of these rules in the context of a system of international law".[272] The degree to which the rules European states eventually adopted grew out of Islamic precedents is not clear, but the large zone of congruence between the two systems at least suggests compatibility between Islamic law and international law.

In contrast to the early centuries, modern Muslim states exist in a world where peace is the norm and war the exception, rather than the reverse. The external relations of the Muslim

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[267] See e.g., Mohamed Elewa Badar, *Ius in Bello under Islamic International Law*, 13 Intl Crim L Rev 593-625 at 611 (citing John Kelsay, 'Arguments Concerning Resistance in Contemporary Islam', in Richard Sorabji and David Rodin (eds), *The Ethics of War: Shared Problems in Different Traditions* (Ashgate, Aldershot, 2007) 65).
[268] Mohamed Elewa Badar, *Ius in Bello under Islamic International Law*, 13 Intl Crim L Rev 593-625 at 614.
[269] Mahmood Ahmad Ghazi (tr), Kitab al-Siyar al-Saghir by Muhammad ibn al-Hasan al-Shaybani (Islamic Research Institute, 1998) 49 (al-Shaybani, ¶ 35).
[270] Mahmood Ahmad Ghazi (tr), Kitab al-Siyar al-Saghir by Muhammad ibn al-Hasan al-Shaybani (Islamic Research Institute, 1998) 49 (al-Shaybani, ¶ 36).
[271] Majid Khadduri, War and Peace in the Law of Islam (Johns Hopkins Press, 1955) 59 (*jihad* is "the litigation between Islam and polytheism; it is also a form of punishment to be inflicted upon Islam's enemies and the renegades from the faith. Thus in Islam, as in Western Christendom, the jihad is the *bellum justum*").
[272] C.G. Weeramantry, Islamic Jurisprudence: An International Perspective (Macmillan, 1988) 134 (citing al-Ghunaimi, 1968, p. 85).

community naturally presumed a state of war to exist between *dar al-Islam* and *dar al-harb*, in contrast to the modern presumption of peace or at least non-hostility between states that have not declared themselves at war. This raises the possibility that even if expansive *jihad* is obligatory, its expression in terms of war is obsolete as its main purposes may now be more efficiently and more surely accomplished without military force, by tools such as persuasion and participation in public discourse. Khadduri traces a plausible path of influence from *jihad* doctrine to "St. Thomas Aquinas, who was acquainted with Muslim writings" and "natural law theories" which then influenced Grotius, eventually leading to the post-World War I just war doctrine "of outlawing war, save that against an aggressor".[273]

A common set of principles informs the rules of *jihad* and modern international humanitarian law. Islamic law, in Munir's estimation, "has influenced international humanitarian law to a great extent".[274] Badar finds parallels between Islamic and international rules of *jus in bello*. For example, prohibition of attacks on civilians, hostage taking, torture and unnecessary destruction now have counterparts in the Geneva Conventions and the Rome Statute of the ICC.[275] The rule that participants in combat must be at least fifteen years old matches that of the Geneva Conventions Additional Protocol I.[276] The use of poisonous weapons is a war crime under the Rome Statute,[277] reflecting a rule of *siyar*. While admitting that international humanitarian law may not be traceable to Islamic origins, Cockayne argues that the participation since 1856 of Islamic states in its development has led to mutual adaptation of the two systems and "substantial congruence" in many conclusions relating to the conduct of war.[278] Weeramantry sees Islamic law as capable of "contributing an important strand with which to strengthen current norms of humanitarian law", especially in light of the growing concern of international law with unconventional or massively destructive weapons.[279]

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[273] Majid Khadduri, War and Peace in the Law of Islam (Johns Hopkins Press, 1955) 58.
[274] Muhammad Munir, *Public International Law and Islamic International Law: Identical Expressions of World Order*, 1 Islamabad L Rev 3 & 4 369-430 at 415.
[275] Mohamed Elewa Badar, *Ius in Bello under Islamic International Law*, 13 Intl Crim L Rev 593-625 at 603.
[276] Mohamed Elewa Badar, *Ius in Bello under Islamic International Law*, 13 Intl Crim L Rev 593-625 at 606.
[277] Mohamed Elewa Badar, *Ius in Bello under Islamic International Law*, 13 Intl Crim L Rev 593-625 at 609.
[278] James Cockayne, *Islam and International Humanitarian Law: From a Clash to a Conversation between Civilizations*, 84 Intl Review of the Red Cross 847 (September 2002) 597-625 at 622 (listing as areas where congruence has developed: "crimes, the limitation of belligerent conduct, protection of civilians (including restrictions on targeting women, children and elderly persons), prisoners of war, restrictions on the treatment of occupied territory and property, spies, perfidy, ruses of war, illegal means of warfare, and criminal responsibility" (citations omitted)).
[279] C.G. Weeramantry, Islamic Jurisprudence: An International Perspective (Macmillan, 1988) 138. Thus far there has been relatively little examination of the Islamic ethics relating to weapons of mass destruction, beyond a sense that Islamic states should acquire nuclear weapons, but strictly as a deterrent or second-strike weapon. Sohail H. Hashmi, *Interpreting the Islamic Ethics of War and Peace*, in Sohail H. Hashmi, ed., Islamic Political

The core principles guiding interactions with non-Muslim communities that emerged through *jihad* continue to inform Islamic international law today. The point of *jihad* was always to defend and spread the faith. In the Prophet's time, this often required war. Today, action by "speech and writing" as well as by armed force can further the ultimate aim of *jihad*, an "ideology and welfare programme . . . of well-being for all humanity".[280] The core obligation of *jihad* is for the Muslim community to strive to spread the *da'wah*. In all its manifestations, *jihad* doctrine displays a consistent regard for the life, intellect, property, progeny and religion even of non-Muslims, which only the overriding aim of physically protecting the *dar al-Islam* can justify infringing. The result is a law of inter-community conduct that appreciates an intrinsic value of personhood and a respect for God's creation, and that thus can provide a foundation for a broader Islamic international law that aims to bring to fruition the Islamic vision of an ideal, transnational society.

4.1.2. Treatment of non-Muslims

This section examines how *siyar* addresses relations between an Islamic state and individual non-Muslims. After *jihad*, the next largest share of the rulings that al-Shaybani recorded concerned this set of topics. Understanding how Sharia deals with non-hostile foreigners required the classical jurists to develop principles that resonate today, establishing for example that non-Muslim can be citizens in an Islamic state. The first of three subsections sets out the basic rules of Sharia that applied to foreigners in the caliphate generally. The second subsection details the legal status of non-Muslim citizens, and the third examines the smaller set of rulings affecting the *mu'amalat* obligations of Muslims when outside the *dar al-Islam*. The aim is to establish how an Islamic state balances the ideal of constructing a purely Islamic society against the practical benefits to the *umma* of interacting with outsiders, whether emissaries, visitors or foreign residents.

As the *dar al-Islam* expanded, Islamic law evolved to account for ongoing, peaceful interactions between Muslims and non-Muslims, often in the wake of a peace treaty. The pact of *dhimmah* developed, under which some non-Muslims (*ahl al-dhimma*, or commonly, *dhimmis*) were allowed to live in the *dar al-Islam*, protected in return for a tax, and could continue to practice their own faiths. Using the *dhimmah* and the rules of *aman* (safe

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Ethics: Civil Society, Pluralism, and Conflict (Princeton U. Press, 2002) 194-216 at 213-14 ("Most scholars cite the Quranic verse "Hence, make ready against them whatever force and war mounts you are able to muster, so that you might deter thereby the enemies of God" (8:60) as justification for developing nuclear weaponry").

[280] Abul A'la Maududi, Jihad in Islam (Holy Koran Publishing House, 2006) (address delivered 13 April, 1939 in Lahore) 7.

conduct), and the basic principles of Islam, the classical jurists constructed a tiered system of rights accruing to non-Muslims peacefully present in the *dar al-Islam*. Less urgently, questions also arose regarding the rights and obligations of Muslims in the *dar al-harb*. Although arguably the *dhimmah* institution lost its relevance after the end of the Ottoman caliphate, the system of rights it helped to develop provides evidence of which rights Islamic law can recognise as universal, rather than extending only to the faithful, and how an Islamic state might accommodate or restrain their exercise by non-believers to maintain the Islamic nature of its society.

4.1.2.1. Non-Muslims in the *dar al-Islam*

Citizenship in the caliphate usually derived from faith and physical presence. In principle, any Muslim could become a citizen simply by remaining for fifteen days in territory under the caliph's rule. Modern Islamic states do not grant citizenship so easily, nor do most of them require profession of Islam as a criterion.[281] Following the verse "there is no compulsion in religion" and the tradition that originated with the Prophet, an Islamic state tolerates the presence of unbelievers. At least three types of rights accrue to non-Muslims, depending on their connection to the state. Some rights are universal, such as against being arbitrarily killed; some attach to persons present under *aman*; and some belong specifically to citizens, including *dhimmis*.

According to Berween, four principles should inform how non-Muslims are treated in an Islamic state: equality as all created by God; fair administration of justice; kindness; and respect and honour.[282] In the caliphate, the implications of these principles depended upon the legal status of the individual. Absent an agreement to the contrary, the default status under Islamic jurisdiction for a person hailing from the *dar al-harb* was that of slave. A *harbi* found in the *dar al-Islam* without a safe conduct guarantee is "considered to be the slave of anyone who takes him captive",[283] unless bearing letters of identification as an emissary of a foreign

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[281] Mohammad Hashim Kamali, Citizenship and Accountability of Government: An Islamic Perspective (Islamic Texts Society, 2011) 106 (reviewing 1960s and 1970s citizenship laws of Saudi Arabia, Egypt, Tunisia, Bahrain, the UAE, Syria and Iraq, as well as the citizenship provisions of the Constitution of Malaysia; of these, Bahrain, Egypt and Syria require knowledge of Arabic; Bahrain, the UAE, Syria and Iraq apply a reduced length of required residence to persons of Arab origin). Only Muslims may become citizens of the Maldives. Constitution of the Maldives (2008), art. 9(d).

[282] Mohamed Berween, *Non-Muslims in the Islamic State: Majority Rules and Minority Rights*, in Mashood A. Baderin, ed., International Law and Islamic Law (Ashgate, 2008) 599-611 at 603-05.

[283] Mahmood Ahmad Ghazi (tr), Kitab al-Siyar al-Saghir by Muhammad ibn al-Hasan al-Shaybani (Islamic Research Institute, 1998) 63 (al-Shaybani, ¶ 91).

ruler.[284] (A slave nonetheless retains rights against ill treatment as well as positive rights such as expression, religious practice and property rights.) Based on the Prophet's injunction against mistreatment of *dhimmis*, "Muslim jurists established the basic principle in Islamic jurisprudence, which states that: 'they [non-Muslims] shall have the same obligations and rights as we'", implying that an Islamic state must adhere to the principles of basic civil equality and subjecting all members of society to the rule of law.[285]

Once a foreign state establishes a treaty with the Islamic state, it "becomes a *dar al-'ahd*, the abode of treaty, and its subjects need no extra permission from the Muslim state to enter the latter's territory for a sojourn".[286] Otherwise, the contract of safe conduct (*'aqd al-aman*) allows the *musta'min* (the person granted safety) temporarily to move freely within, and exercise all the basic rights of a non-Muslim citizen in, the Islamic state.[287] Any Muslim may grant safe conduct.[288] *Aman* lasts for a fixed term or until the person concerned leaves the *dar al-Islam*, but it "might be repudiated by the Imam at any time if it is discovered that the *musta'min* has used it for harmful purposes or when termination is deemed to be in the interest of the community".[289]

Islamic law governs the acts of *harbis* and other visitors while in the *dar al-Islam*.[290] This remains true to an extent even where those acts do not immediately affect Muslims. For example, contracts made among *harbis* while in the *dar al-Islam* under a guarantee are enforceable.[291] Strong though contract law is in Islam, it nonetheless must yield to the

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[284] Mahmood Ahmad Ghazi (tr), Kitab al-Siyar al-Saghir by Muhammad ibn al-Hasan al-Shaybani (Islamic Research Institute, 1998) 63 (al-Shaybani, ¶ 89). Al-Shaybani and Abu Yusuf would grant freedom to one such who "embraces Islam before being made captive", in disagreement with their teacher Abu Hanifa, who would consider the person a slave regardless, belonging to the *umma* collectively as *fay'*. Id. (al-Shaybani, ¶ 91).

[285] Mohamed Berween, *Non-Muslims in the Islamic State: Majority Rules and Minority Rights*, in Mashood A. Baderin, ed., International Law and Islamic Law (Ashgate, 2008) 599-611 at 607 (quoting Muhammad Qutb, *Islam the Misunderstood Religion*, 5th ed. (Rome: Islamic European Cultural Centre tr, 1984) 166).

[286] Mohammad Hashim Kamali, Citizenship and Accountability of Government: An Islamic Perspective (Islamic Texts Society, 2011) 108-09.

[287] Mohammad Hashim Kamali, Citizenship and Accountability of Government: An Islamic Perspective (Islamic Texts Society, 2011) 110.

[288] Mohammad Hashim Kamali, Citizenship and Accountability of Government: An Islamic Perspective (Islamic Texts Society, 2011) 110-11. The Hanafis would extend this right also to non-Muslim citizens, acting "with permission of the authorities". Id. 111.

[289] Mohammad Hashim Kamali, Citizenship and Accountability of Government: An Islamic Perspective (Islamic Texts Society, 2011) 112.

[290] Mohammad Hashim Kamali, Citizenship and Accountability of Government: An Islamic Perspective (Islamic Texts Society, 2011) 109 ("Foreign visitors, both Muslim and non-Muslim, are under the jurisdiction of Muslim courts during their stay, and Islamic law was generally applied to them") (cting Zuhayli, *Huquq al-Insan*, 131).

[291] Mahmood Ahmad Ghazi (tr), Kitab al-Siyar al-Saghir by Muhammad ibn al-Hasan al-Shaybani (Islamic Research Institute, 1998) 63 (al-Shaybani, ¶ 90) ("no intervention will be made" regarding any agreements undertaken while still in the *dar al-harb*).

imperative of allowing Muslims to reside in the Islamic state (to better enable them to live by Sharia). For example, a citizen of the *dar al-harb* who purchases a Muslim or *dhimmi* slave may not remove that slave to the *dar al-harb*.[292] A *harbi* slave who converts to Islam while in the *dar al-Islam* should be sold there and the price paid to the owner in the *dar al-harb*.[293]

Equal enforcement of the law is balanced against the interests of the *umma* in other regards as well. A Muslim who kills a *harbi* who is in the *dar al-Islam* under *aman* is not subject to *qisas* (retribution in kind), but must "pay the *diyah* [blood money, i.e. compensation] of a Muslim freeman".[294] Some, but not all, acts of *harbis* with legal significance retain that significance in relation to Muslims. For example animals slaughtered by People of the Book are permitted to Muslims,[295] but if a woman has two husbands in the *dar al-harb* and she and one husband become Muslims, they must marry each other again.[296] One possible explanation is that an act should be repeated under Islamic sanction if possible, but where impossible, other monotheistic rituals suffice if the result benefits the Muslims. These and similar rulings represent the jurists' efforts to make reasonable compromises between doctrinal purity and *maslahah* in the form of prosperity and peaceful relations with other communities.

4.1.2.2. The *dhimmah* regime

Muslim jurists developed the theory of the *dhimmah* pact as a legal framework for the reality of non-Muslims residing permanently within the Islamic polity. Kamali explains the *dhimmah* as "basically a creation of necessity of the times of conquest".[297] Because of the Quranic injunction "there is no compulsion in religion", each conquest added to the caliphate "two groups of people, one of whom accepted the new religion and acquired the same rights and duties as the Muslims", while the other submitted to Islamic law and adjudication but

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[292] Mahmood Ahmad Ghazi (tr), Kitab al-Siyar al-Saghir by Muhammad ibn al-Hasan al-Shaybani (Islamic Research Institute, 1998) 62 (al-Shaybani, ¶ 86).
[293] Mahmood Ahmad Ghazi (tr), Kitab al-Siyar al-Saghir by Muhammad ibn al-Hasan al-Shaybani (Islamic Research Institute, 1998) 63 (al-Shaybani, ¶ 88).
[294] Mahmood Ahmad Ghazi (tr), Kitab al-Siyar al-Saghir by Muhammad ibn al-Hasan al-Shaybani (Islamic Research Institute, 1998) 64 (al-Shaybani, ¶ 93).
[295] Mahmood Ahmad Ghazi (tr), Kitab al-Siyar al-Saghir by Muhammad ibn al-Hasan al-Shaybani (Islamic Research Institute, 1998) 65 (al-Shaybani, ¶ 95).
[296] Mahmood Ahmad Ghazi (tr), Kitab al-Siyar al-Saghir by Muhammad ibn al-Hasan al-Shaybani (Islamic Research Institute, 1998) 65 (al-Shaybani, ¶ 94).
[297] Mohammad Hashim Kamali, Citizenship and Accountability of Government: An Islamic Perspective (Islamic Texts Society, 2011) 113-14. The theory of the pact developed as a way to enable the rulers to provide the necessary adjudication and protection of persons and property, "in line, more or less, with the agreement that the Prophet had concluded with the Christians of Najran and the people of Bahrain". Id. 114 (citing Baladhuri, *Futuh al-Buldan*; Zuhayli, *Haqq al-Hurriyyah* 146).

kept to their own religious beliefs and practices.[298] *Dhimmi* status was available to all non-Muslims wishing to remain in the *dar al-Islam*, not only *ahl al-kitab* (People of the Book).[299] At its base it is a simple arrangement. Non-Muslims may remain in the community and benefit from its protection, in return for obeying its laws and paying an annual poll tax, the *jizyah*, "at a rate similar to *zakah*" (the alms tax due from Muslims).[300] There were many variations on this model, largely expressed in discrete peace treaties. The common threads are recognition of the reality of different religious communities sharing more or less the same space, and an understanding of the need for and monetary cost of military protection.

The *dhimmah* is in principle permanent. It "can only be concluded by the head of state or his delegates, and once concluded it cannot be revoked", except "when the *dhimmi* embraces Islam, when he joins the enemies, or when they act in consort and jointly declare war on the Muslims".[301] *Dhimmis* agreed to follow Islamic law except in personal status and devotional matters.[302] Non-Muslim citizens must obey the laws of Islam "with respect to the rights of humans, that is, with respect to contracts and dealings, compensation for injuries and damages and fixed prescribed punishment".[303] They must also refrain from acts of aggression against the Muslims and from "cursing Allah and His Messenger".[304] Violations of these conditions would not end the pact,[305] but would elicit punishment under Islamic law. In return, the Muslims were "forbidden to fight [the *dhimmis*], their wealth must be protected,

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[298] Mohammad Hashim Kamali, Citizenship and Accountability of Government: An Islamic Perspective (Islamic Texts Society, 2011) 114.
[299] Mohammad Hashim Kamali, Citizenship and Accountability of Government: An Islamic Perspective (Islamic Texts Society, 2011) 110.
[300] Mohammad Hashim Kamali, Citizenship and Accountability of Government: An Islamic Perspective (Islamic Texts Society, 2011) 114. The amount of the *jizyah* should vary depending on the level of wealth of those subject to it. Abdul-Azeem Badawi, The Concise Presentation of the Fiqh of the Sunnah and the Noble Book (Jamaal al-Din M. Zarabozo tr, International Islamic Publishing House, 2007) 665.
[301] Mohammad Hashim Kamali, Citizenship and Accountability of Government: An Islamic Perspective (Islamic Texts Society, 2011) 109.
[302] Mohammad Hashim Kamali, Citizenship and Accountability of Government: An Islamic Perspective (Islamic Texts Society, 2011) 109-10. *Dhimmis* were exempt from laws regulating "personal and customary matters such as marriage, divorce and inheritance where *Shari'ah* allows them to practice their own customs and traditions". Id. 110.
[303] Abdul-Azeem Badawi, The Concise Presentation of the Fiqh of the Sunnah and the Noble Book (Jamaal al-Din M. Zarabozo tr, International Islamic Publishing House, 2007) 663 (citing *Manár as-Saheel,* vol. 2 298).
[304] Abdul-Azeem Badawi, The Concise Presentation of the Fiqh of the Sunnah and the Noble Book (Jamaal al-Din M. Zarabozo tr, International Islamic Publishing House, 2007) 664.
[305] Mohammad Hashim Kamali, Citizenship and Accountability of Government: An Islamic Perspective (Islamic Texts Society, 2011) 109 (the pact "is not revocable even when the *dhimmi* commits blasphemy, refuses to pay the poll-tax (*jizyah*) or commits murder, adultery and theft", although most non-Hanafi jurists hold that refusal to pay the *jizyah* can also justify revocation).

their honour is to be respected, their freedom is guaranteed and they are not to be harmed".[306] Jurists such as Ibn Taymiyyah recognised that *dhimmis* "may be fought only if they violate the terms of their treaty with the Muslim ruler".[307] Negation of the *dhimmah* pact left the non-Muslims concerned in the same status as prisoners of war, who could accept Islam or leave the ruler to choose to release, ransom or kill them.[308]

Because *dhimmi* communities most often joined the *dar al-Islam* via a specific treaty, the terms of the pact could vary case by case. The basic agreement "provided a formula by which the Muslim conquerors established a pattern of relations with the people they ruled", around which rulers exercised their discretion under *siyasah Sharia* to enter into agreements for the benefit of the *umma*.[309] The ruler could not allow practices that violated Islamic norms in the public space, but could evidently waive the *jizyah*, for example.[310] Kamali cites a treaty of Umar with a Christian Turkish tribe, extending protection in exchange for the tribe agreeing "to help the Muslims in the event of military engagement with the Romans"; a peace agreement "with the people of Cyprus, who did not offer resistance"; the peace agreement made between Umar's governor and the Egyptian Copts, which did not mention *jizyah*; and Umar's agreement with the Christians of Jerusalem, whereby he also agreed to forbid Jewish settlement in the Christian area, in order to secure the surrender of the city's fortifications.[311] In these cases it appears that the ruler linked *jizyah* to the cost of conquest rather than to doctrinal imperative, as the agreements secured either peace without the risk and cost of battle, or a promise to share those risks and costs against a dangerous potential future foe.

Emon frames the Islamic law relating to religious minorities as a balancing of individual rights against the public interest. The main elements are "the dhimmi's private property interests that he holds as an individual, the limits on the dhimmi in light of his tradition's requirements, and lastly, the public good defined by reference to Islamic norms and general

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[306] Abdul-Azeem Badawi, The Concise Presentation of the Fiqh of the Sunnah and the Noble Book (Jamaal al-Din M. Zarabozo tr, International Islamic Publishing House, 2007) 662 (citing Al-Sayyid Sabiq, *Fiqh as-Sunnah,* vol. 3 64-65 and quoting Quran 9:29).

[307] John Kelsay, Arguing the Just War in Islam (Harvard U. Press, 2007) 119-20.

[308] Abdul-Azeem Badawi, The Concise Presentation of the Fiqh of the Sunnah and the Noble Book (Jamaal al-Din M. Zarabozo tr, International Islamic Publishing House, 2007) 664.

[309] Mohammad Hashim Kamali, Citizenship and Accountability of Government: An Islamic Perspective (Islamic Texts Society, 2011) 114-15.

[310] Al-Shafi'i endeavoured to capture this phenomenon in legal theory by adding an intermediate classification, *dar al-sulh* (territory of covenant) between *dar al-harb* and *dar al-Islam* to cover those with whom the Islamic state had made an agreement, but who did not pay the *jizyah*, but most jurists simply assimilated this group to the *dar al-Islam*. Muhammad Munir, *Public International Law and Islamic International Law: Identical Expressions of World Order*, 1 Islamabad L Rev 3 & 4 369-430 at 406.

[311] Mohammad Hashim Kamali, Citizenship and Accountability of Government: An Islamic Perspective (Islamic Texts Society, 2011) 114 (citations omitted).

rules".[312] The recognition of *dhimmis* as presumptively full members of the Islamic polity implied "an Islamic duty of every Muslim to respect non-Muslims who are citizens of Islamic states", treating them first as worthy fellow citizens protected by the ruler.[313] Ultimately, in Emon's view, the *dhimmah* regime was not so much reflective of "tolerance or intolerance, harmony or persecution" but an evolved system for coping with "the larger, more difficult, and arguably globally shared challenge of governing pluralistically".[314] The essentially equal economic rights of *dhimmis* and the ever-present option to convert to Islam left non-Muslims in the caliphate free to choose whether to remain somewhat apart from Muslim society, or to integrate fully into it.

In modern terms, *dhimmis* are citizens. The question then becomes, which is more fundamental in an Islamic state: religion, or citizenship? Kamali sees citizenship as the starting point, with some distinctions based on faith. In Kamali's view the *dhimmah* regime is obsolete. It depended on the existence of the two parties to the agreement, the *dhimmis* and the caliphate, and did not survive the historical discontinuity that colonial rule represented.[315] In its stead, Kamali proposes the non-denominational *muwatanah* (citizenship) status which the Prophet recognised in all tribes party to the Constitution of Medina, Jewish and pagan as well as Muslim, and which confers citizenship "by the fact of birth and residence" without requiring an agreement.[316] Mawdudi, by contrast, would transpose the classical *dhimmah* into modern times, placing faith first. An Islamic government should allow non-Muslim citizens "perfect freedom of religious belief and permits them to act according to their creed", so long

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[312] Anver M. Emon, *Religious Minorities and Islamic Law: Accommodation and the Limits of Tolerance*, in Islamic Law and International Human Rights Law: Searching for Common Ground? (Oxford U Press, 2012) 323-43 at 336 (citing Badr al-Din al-'Ayni, *al-Binaya Sharh al-Hidaya*, ed Ayman Salih Sha'ban (Beirut: Dar al-Kutub al-'Ilmiyya, 2000), 13:495).

[313] Mohamed Berween, *Non-Muslims in the Islamic State: Majority Rules and Minority Rights*, in Mashood A. Baderin, ed., International Law and Islamic Law (Ashgate, 2008) 599-611 at 608 (quoting A. Rahman Doi, *Non-Muslims under Shari'ah* (Brentwood MD: International Graphics 1979) 96: "Therefore, if anyone persecuted a non-Muslim even by uttering insulting words, he or she has in reality broken his pledge to Allah and His Messenger and also his pledge to the religion of Islam").

[314] Anver M. Emon, *Religious Minorities and Islamic Law: Accommodation and the Limits of Tolerance*, in Islamic Law and International Human Rights Law: Searching for Common Ground? (Oxford U Press, 2012) 323-43 at 338.

[315] Mohammad Hashim Kamali, Citizenship and Accountability of Government: An Islamic Perspective (Islamic Texts Society, 2011) 113. The post-colonial Muslim states were not successor states "to any of the previous regimes—neither to the colonial state, nor to the Islamic state that might have existed preceding it. The *dhimmi* status also terminated as a result". Id. 115.

[316] Mohammad Hashim Kamali, Citizenship and Accountability of Government: An Islamic Perspective (Islamic Texts Society, 2011) 113. Modern Muslims "do not live in a dichotomous world of *dar al-Islam* and *dar al-harb*, but in the world of the *ummah*, the nation state, and their natural homeland respectively". Id. 134.

as their practices do not "fatally affect the public interest from the viewpoint of Islam".[317] This would require adherence to Islamic strictures regarding usury, gambling, prostitution and other vices, decency-based restrictions on the media and observance of "the minimum standards of modesty in dress as required by Islamic law".[318] The difference is more one of philosophy than of substance: from either viewpoint, non-Muslims could follow their own ways in private, but would be expected to respect Islamic norms in the public space.

4.1.2.3. Muslims outside the *dar al-Islam*

Once the caliphate had settled into relatively stable borders and Muslims visited and engaged in peaceful intercourse and commerce in other polities, jurists had to consider whether Sharia travelled with them. In the classical view, Islamic legal jurisdiction extends only as far as does the *dar al-Islam*. Quran 8:72 absolves the new Medinese community from protecting those left outside: "And those who believed but did not migrate, you are not responsible for their protection (*wilayah*) until they migrate".[319] According to al-Shaybani, the Prophet instructed his soldiers to invite polytheists who agreed to convert to Islam to relocate to the Muslim territory, and if they refused to "tell them that they are like other non-resident Muslims: they shall be subject to the injunctions of Allah applicable to other Muslims; however they shall have no share in *fay'* of the state [i.e. public property] or in the spoils of war".[320]

According to most jurists, Islamic law accompanies travellers outside the *dar al-Islam* only to a limited extent. Al-Shaybani and Abu Hanifa would permit Muslims who are in the *dar al-harb* under safe conduct to profit from transactions normally forbidden in Islam (for example, *riba* or dealing in alcohol or pork) because it amounts to "tak[ing the *harbis*'] money with their permission", but Abu Yusuf would not allow such transactions.[321] But Muslims who

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[317] Abul A'la Maududi, Jihad in Islam (Holy Koran Publishing House, 2006) (address delivered 13 April, 1939 in Lahore) 27. While other religions may permit some of what Islam forbids, in Mawdudi's view an Islamic state cannot "permit such cultural activities … which, from the viewpoint of Islam are corrosive of moral fibres and fatal". Id. 28.

[318] Abul A'la Maududi, Jihad in Islam (Holy Koran Publishing House, 2006) (address delivered 13 April, 1939 in Lahore) 27-28.

[319] Quoted in Mohammad Hashim Kamali, Citizenship and Accountability of Government: An Islamic Perspective (Islamic Texts Society, 2011) 97. Kamali questions Mawdudi's conclusion that this verse shows that domicile is a prerequisite for citizenship in an Islamic state because "it draws a direct analogy between two somewhat different situations, namely of migrating under the threat of persecution, as in the early days of Islam, and migrating in peacetime that may well be a matter of choice". Id. 98.

[320] Mahmood Ahmad Ghazi (tr), Kitab al-Siyar al-Saghir by Muhammad ibn al-Hasan al-Shaybani (Islamic Research Institute, 1998) 43 (al-Shaybani, ¶ 1).

[321] Mahmood Ahmad Ghazi (tr), Kitab al-Siyar al-Saghir by Muhammad ibn al-Hasan al-Shaybani (Islamic Research Institute, 1998) 64 (al-Shaybani, ¶ 92).

happen to be in the *dar al-harb* may not take part in war between groups of *harbis* (except to defend themselves) "because [in such conflicts] the laws of polytheism are supreme".[322] Ghazi identifies a principle of reciprocity in al-Shaybani's ruling that no compensation is owed for a Muslim killed while in the *dar al-harb*, as none would be owed if the Muslim had killed a *harbi* outside Islamic jurisdiction.[323]

Al-Shaybani disapproved of Muslims committing treacherous acts in the *dar al-harb*, and of Muslims who know of the acts purchasing goods or slaves gained thereby.[324] If Muslims make a pact of friendship with a group of *harbis* who are later taken captive by another group of *harbis*, the Muslims may purchase them as slaves; however they may not do so if the captors are Muslims as this would entail complicity in treachery by Muslims.[325] In the first case al-Shaybani would disapprove but would not void the sale; in the latter, which would involve breaking a formal pact, he would void it.[326] This distinction shows that while contracts of sale are not lightly voided, external agreements have higher standing.

4.2. Islamic international law

This second part of the chapter draws the connection from classical *siyar* to modern Islamic international law. It is divided into four sections. The first of these discusses how the nature of the proofs of *siyar* enables it to continue to evolve in the modern era, in a way somewhat similar to the ongoing evolution of international law. The next two sections examine from an Islamic point of view two prerequisites to engagement with international law, the recognition of states as sovereign and equal, and the permissibility of entering into treaty commitments. The final section argues that, building on the fundamental principles of classical *siyar*, Islamic states are making use of modern institutions of international law to participate as full members of the international system, and to construct new frameworks capable of supporting a specifically Islamic international law.

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[322] Mahmood Ahmad Ghazi (tr), Kitab al-Siyar al-Saghir by Muhammad ibn al-Hasan al-Shaybani (Islamic Research Institute, 1998) 66 (al-Shaybani, ¶ 98).
[323] Mahmood Ahmad Ghazi (tr), Kitab al-Siyar al-Saghir by Muhammad ibn al-Hasan al-Shaybani (Islamic Research Institute, 1998) 65, note 112 (explaining al-Shaybani, ¶ 96).
[324] Mahmood Ahmad Ghazi (tr), Kitab al-Siyar al-Saghir by Muhammad ibn al-Hasan al-Shaybani (Islamic Research Institute, 1998) 65 (al-Shaybani, ¶ 96).
[325] Mahmood Ahmad Ghazi (tr), Kitab al-Siyar al-Saghir by Muhammad ibn al-Hasan al-Shaybani (Islamic Research Institute, 1998) 66 (al-Shaybani, ¶ 97).
[326] Mahmood Ahmad Ghazi (tr), Kitab al-Siyar al-Saghir by Muhammad ibn al-Hasan al-Shaybani (Islamic Research Institute, 1998) 65-66 (al-Shaybani, ¶ 96-97).

By the time of the early Abbasid caliphate, classical *siyar* had begun to reach its conceptual limits. Perhaps if the caliphate had remained strong and united longer than it did, juristic theory would have evolved to account for prolonged coexistence with non-Muslim states, and for a multiplicity of Muslim states. As it is, the traditional *siyar* doctrine dividing the world into Muslims and non-Muslims, with only the former represented by a truly legitimate sovereign, "is outdated and the practice of Muslim governments, communities and the Muslim diaspora indicate new norms of *Siyar*", as seen in UN membership, "participation in the formulation of various human rights and other treaties, accession to these treaties, as well as the formation of the Organization of Islamic Conference and its Charter".[327] Now that avowedly Islamic states are again active on the world stage, apparently content to remain politically independent of one another, their actions serve as did the acts and rulings of the early caliphs, to build customary precedent through demonstrating the understanding of knowledgeable and trusted Muslim leaders of how they should conduct the community's external relations. International Islamic associations, especially the OIC, provide venues to demonstrate consensus.

4.2.1. Compatibility of *siyar* and international law

This section introduces how Islamic international law evolves, in order to show how it can continue to develop and coexist with general international law. This requires comparing *siyar*'s use of the Islamic sources and proofs to the sources of international law. *Siyar* and public international law share a beguiling similarity in the methodology used to develop them. This should not however obscure the fundamental fact of divergent sources of law. Sharia is God's law. International law, although theological and moral principles certainly play a role, is rooted in the agreements and acts of states. The section aims to provide a conceptual background against which the thesis will then argue that Islamic states are evolving a new Islamic international law that respects the classical precedents, but also extends them, in coexistence with an international system built from diverse legal traditions.

Being not a separate body of law, but Sharia as applied to a particular topic (the external relations of the *umma*), *siyar* derives from the same sources and proofs as the rest of Islamic law:[328] the Quran, *sunna*, *ijma* and *qiyas*. Thus there is no conceptual separation between the

[327] Mohamed Elewa Badar, *Ius in Bello under Islamic International Law*, 13 Intl Crim L Rev 593-625 at 601-02.
[328] C.G. Weeramantry, Islamic Jurisprudence: An International Perspective (Macmillan, 1988) 130.

international and municipal law of an Islamic state.[329] More than most other areas of Islamic law, however, *siyar* is prone to develop through the actions of rightly guided Islamic rulers, because the Prophet passed and revelation ended before the Islamic state had become a significant international actor. As *siyar* is the "the sum total of the rules and practices of Islam's intercourse with other peoples", its proofs must include treaties, public statements of the caliphs and "the opinions and interpretations of the Muslim jurists on matters of foreign relations".[330] Its evidences include "arbitral awards, treaties, pacts and other conventions, official instructions to commanders, admirals, ambassadors and other State officials, the internal legislation for conduct regarding foreigners and foreign relations, the custom and usage".[331] While lawyers continue to debate whether international law is part of a greater natural law (monist) or if it owes its import to its basis in state authority (dualist), *siyar* as part of Sharia is clearly monist.[332]

Khadduri considers the particular proofs of *siyar* analogous to the sources recognised in Article 38(1) of the ICJ Statute. He compares Article 38(1)'s "agreement, custom, reason and authority" to (respectively) "rules expressed in treaties with non-Muslims"; the *sunna*; the applications of law by the caliphs and the *fiqh* derived through juristic methods; and the ultimate authority of the Quran and the Prophetic *ahadith*.[333] Ford sees less convergence. In his view, the grounding in the Islamic proofs of the ruler's prerogative to make agreements with non-Muslim polities is questionable, the Prophet's example having shown only that the leader of the global *umma* can enter into agreements, which may not apply to individual Islamic rulers.[334] Furthermore, Ford argues, custom's role in Islam differs from in international law because it cannot sanction derogation from the immutable proofs and even *jus cogens* norms are not necessarily permanent like those derived from *ijma*.[335] *Qiyas* is

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[329] Mahmood Ahmad Ghazi (tr), Kitab al-Siyar al-Saghir by Muhammad ibn al-Hasan al-Shaybani (Islamic Research Institute, 1998) 19 (introduction).
[330] Majid Khadduri, War and Peace in the Law of Islam (Johns Hopkins Press, 1955) 47.
[331] Mohamed Elewa Badar, *Ius in Bello under Islamic International Law*, 13 Intl Crim L Rev 593-625 at 601.
[332] C.G. Weeramantry, Islamic Jurisprudence: An International Perspective (Macmillan, 1988) 131.
[333] Majid Khadduri, War and Peace in the Law of Islam (Johns Hopkins Press, 1955) 48.
[334] Christopher A. Ford, *Siyar-ization and its Discontents: International Law and Islam's Constitutional Crisis*, 30 Texas Intl L J (1995) 499-533 at 521 (citing *Aramco*, 27 I.L.R. 117, 163 (1963)). Ford argues that the Prophet's actions showed only that the sole imam may engage with unbelievers on behalf of the *umma*, and thus the 1963 ARAMCO arbitration that declared otherwise erred in presuming its own conclusion (predicating the Saudi King's power to treat on "the principle of liberty to contract within the limits of the Divine Law" is unavailing, if one such limit is that only the universal imam may enter into such a contract). In this view, predicating the ruler's right to enter into treaties on the general freedom of contract under Sharia amounts merely to rationalisations of state acts by jurists, who postulated "the power of secular rulers to conduct foreign relations unfettered by *shari'at* second-guessing". Id.
[335] Christopher A. Ford, *Siyar-ization and its Discontents: International Law and Islam's Constitutional Crisis*, 30 Texas Intl L J (1995) 499-533 at 522-24.

logically similar to reasoning from juristic principles as in Article 38(1)(c) but of limited scope internationally because "Islamic legal theory *has* been so specific with respect to the core of doctrinal principles governing relations with the *dar al-harb*"; relying on case law is foreign to Islam and although juristic writings are a longstanding source of authority in Islamic law, their scope for expansion is limited by the restrictions of needing to fit within the *madhahib* and the tendency of classical jurists to defer to secular authority.[336]

The debate over whether the respective proofs are logically similar may not matter beyond possibly providing a framework for international and Islamic lawyers to understand each other. There is however at least one significant conceptual difference between *siyar* and international law, in that states have no special standing under *siyar*. As an application of general Sharia rather than a regime unto itself, *siyar* places duties directly on individuals.[337] Islamic international law has in principle always allowed individuals to invoke its provisions.[338] Al-Shaybani reports that the Prophet said, "Muslims are one hand against all others; their blood is equal unto each other; even their juniormost has an obligation to honour their guarantee".[339] Therefore not just the state, but all citizens must honour a treaty made by the ruler. This is crucial to the application of Islamic law to reinforce human rights law, as unlike under European-derived international law which runs between states, citizens of an Islamic state presumptively own the right to seek redress under international Islamic law in their own right.

The rules and techniques of *fiqh* provide the tools by which *siyar* can continue to evolve. Whether exercised by the *ulama* or a wider public, renewed *ijtihad* would surely make use of traditional methods such as *qiyas* and *maslahah* to adapt the principles of Islam to modern international affairs. Alternatively, while Ford is correct that *taqlid* is not equivalent, or even closely similar, to the common law doctrine of *stare decisis*,[340] there is scope for the use of judicial decisions and other precedents as persuasive authority in developing Islamic law over time, much as in civil law jurisdictions. Whether as a *fatwa*, a juristic opinion, or a *hukm*, an

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[336] Christopher A. Ford, *Siyar-ization and its Discontents: International Law and Islam's Constitutional Crisis*, 30 Texas Intl L J (1995) 499-533 at 525-30.

[337] Majid Khadduri, War and Peace in the Law of Islam (Johns Hopkins Press, 1955) 45 ("the Muslim law of nations was ordinarily binding upon individuals rather than territorial groups").

[338] Mahmood Ahmad Ghazi (tr), Kitab al-Siyar al-Saghir by Muhammad ibn al-Hasan al-Shaybani (Islamic Research Institute, 1998) 20-21 (introduction).

[339] Mahmood Ahmad Ghazi (tr), Kitab al-Siyar al-Saghir by Muhammad ibn al-Hasan al-Shaybani (Islamic Research Institute, 1998) 47 (al-Shaybani, ¶ 29).

[340] Christopher A. Ford, *Siyar-ization and its Discontents: International Law and Islam's Constitutional Crisis*, 30 Texas Intl L J (1995) 499-533 at 529 (discussing the use of precedent in the context of article 38(1)(d) of the ICJ Statute).

actual legal ruling, Islam has a longstanding practice of recognition and deference to the authority of learned jurists' application of the law to cases. Likewise, Islamic rulers can set precedents to inform future leaders how they should exercise their discretion to interpret the law in the public sphere. Nonetheless, the fact that *siyar* is God's immutable law makes it unlikely that its methodology can ever converge completely with that of a system grounded in state action.

4.2.2. Reciprocity and state recognition

This section begins the analysis of how Islamic states grounded in fundamentalist principles can partake of modern international law. It addresses the threshold issue of whether an Islamic state can formally acknowledge the existence of other states and interact with them. In order for Islamic international law to evolve much beyond classical *siyar*, it is necessary to establish that it can accept sovereign equality among states, and the existence of multiple independently governed Islamic states. The first is readily shown in the *sunna*. The second, though true in fact since at least the early Abbasid caliphate, only began to gain acceptance in modern times, and remains controversial in theory.

Reciprocal recognition of sovereigns is the cornerstone of international law, but alien to classical *siyar*, which in principle recognised only God's authority and a single, universal Islamic state.[341] Ford argues that this presumption of a single Islamic entity casts doubt on basic issues such as reciprocity, and whether Islam even permits treaties with unbelievers.[342] Arguably however, a principal of reciprocity has informed relations between Muslims and non-Muslims since it "was applied in Islamic history by 'Umar".[343] Even earlier, the Prophet recognised and conducted diplomatic relations with the Christian Abyssinian kingdom and the Byzantine Empire, and traded with Mecca even while at war with Mecca. The Prophet's diplomatic relations were "chiefly religious in character", but as political considerations became more important the classical caliphs "were in almost continuous diplomatic negotiation with the Byzantine emperors on peace treaties, payments of tribute, exchanges of

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[341] See e.g., Mohamed Elewa Badar, *Ius in Bello under Islamic International Law*, 13 Intl Crim L Rev 593-625 at 601 ("The classical doctrine of *Siyar* makes a division of the world into Muslims and non-Muslims comparable to that of the classical Roman division between Romans and barbarians, without recognizing equal status for the other party. In this sense the Islamic classical doctrine played an equivalent role to that of the Greco-Roman Laws as a remote shape of modern international law") (citing Khadduri; al-Ghunaimi).

[342] Christopher A. Ford, *Siyar-ization and its Discontents: International Law and Islam's Constitutional Crisis*, 30 Texas Intl L J (1995) 499-533 at 504.

[343] Muhammad Munir, *Public International Law and Islamic International Law: Identical Expressions of World Order*, 1 Islamabad L Rev 3 & 4 369-430 at 407.

prisoners and payments of ransoms",[344] demonstrating recognition by state action. Ford may be correct that in principle *siyar* could recognise no sovereigns other than God and the imam, but in practice—and eventually, in principle too—the caliphs recognised other rulers, treating them according to the protocols that apply to sovereign rulers.[345] This "[s]tate practice", Weeramantry argues, "elevated the principle of recognition to a definite place in Islamic international law".[346] The entrenchment of a need to make treaties and otherwise conduct relations with the non-Islamic world necessitated *de jure* as well as *de facto* recognition, which with the fragmentation of the caliphate "produced a new theory of international relations – no longer a relationship of hostility but one of enduring peace".[347]

The fragmentation of the Abbasid caliphate added another new dimension, as a multiplicity of Islamic states came to coexist under the nominal suzerainty of the Abbasid caliph or a rival or pretender. In these circumstances "the caliph gave recognition to the other Islamic states within the domain of Dar-al-Islam. Thus the caliphs recognised several Islamic rulers in Central Asia and India. The Moghul emperors likewise recognised Islamic sovereigns both in India and outside".[348] This did not however require much evolution of Islamic international law, as the various rulers already bore duties to one another and to their peoples by virtue of being fellow Muslims. State-to-state relations between Islamic states "came to be governed by general principles of international law no different from those between an Islamic nation and a non-Islamic one".[349]

The fact that the first Islamic state recognised and treated with other sovereigns overshadows the arguments of classical jurists that the universalism of Islam and the supremacy of the caliph rendered other rulers unworthy interlocutors. Since the Umayyad and early Abbasid

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[344] C. G. Weeramantry, Islamic Jurisprudence: An International Perspective (Macmillan, 1988) 142 (citing Khadduri and Liebesny, 1955, p. 370).

[345] C. G. Weeramantry, Islamic Jurisprudence: An International Perspective (Macmillan, 1988) 143 (citing as an example the 1535 agreement between Suleiman and the king of France, "Article 1 of [which] set at rest any notion that Islamic states would not grant recognition to non-Islamic, for it asserted that a 'valid and sure peace would be established between the two states and reciprocal rights granted to the subjects of each nation in the territory of the other'").

[346] C. G. Weeramantry, Islamic Jurisprudence: An International Perspective (Macmillan, 1988) 143 ("the caliphs, the Moghul emperors and other Islamic sovereigns recognised and exchanged diplomatic envoys with numerous European, Central Asian and Indian non-Muslim states"). The constitutions of the Comoros and Mauritania presume reciprocal recognition of sovereignty, by conditioning the domestic legal force of international agreements they enter into on their implementation by the counterparties. Constitution of the Comoros (2001), art. 10; Constitution of Mauritania (1991, amended 2006), art. 80.

[347] C.G. Weeramantry, Islamic Jurisprudence: An International Perspective (Macmillan, 1988) 148.

[348] C. G. Weeramantry, Islamic Jurisprudence: An International Perspective (Macmillan, 1988) 143. Sixteenth-century correspondence shows the Islamic sovereigns of India and Gujerat remonstrating with each other based on the Quranic injunctions to honour promises. Id. 141.

[349] C.G. Weeramantry, Islamic Jurisprudence: An International Perspective (Macmillan, 1988) 148.

eras, when *siyar* developed into a sophisticated set of rules and principles for dealing with non-Muslims, Muslim rulers and jurists have had to confront developments in the international community that their predecessors did not face. Even in the early caliphate, the actions of pious rulers shaped the rulings of *siyar* (as reported by al-Shaybani) to a much greater degree than they did other areas of Islamic law, as a natural consequence of the caliph's use of executive power. One must either accept that it remained possible for the actions of righteous rulers to expand the understanding of the law, at least when faced with unprecedented situations, or find a principled reason to accept the acts of the early Umayyad caliphs while rejecting those of for example Harun al-Rashid or Salah ul-Din or Suleiman the Magnificent as evidences of *siyar*.

4.2.3. Treaties – *pacta sunt servanda*

This section establishes that Islamic states share a natural affinity for participating in treaties under international law. It first lays out some similarities between *siyar* and the international law of treaties, particularly the principle that agreements must be honoured, *pacta sunt servanda*. It then demonstrates that early Islamic rulers did in fact enter into treaty relations with other sovereigns, although in so doing they expanded on the limited precedents the Prophet established during his rule over what amounted to a city-state. Finally it argues that modern Islamic states make use of treaties as a way to continue to develop Islamic law and to harmonise it across national borders, through entering into agreements subject to international arbitration in case of dispute, and through explicitly assigning treaty terms a place in their domestic legal orders.

Like international law, *siyar* rests on a bedrock principle that agreements must be honoured.[350] Historically the rule *pacta sunt servanda* was so strong in Islamic law that even when treaty "purposes and terms . . . were apparently contrary to some principles of Islam" (and thus the ruler had in theory lacked the authority to agree to them), "this was resolved in favour of the treaty's binding nature".[351] Its justification however differs considerably between Islamic and international law: divine commands in the former case and evolved

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[350] C.G. Weeramantry, Islamic Jurisprudence: An International Perspective (Macmillan, 1988) 132 (Quran 2:177 enjoins the believers not to "turn your faces towards East or West, but . . . to fulfil the contracts which ye have made" . . . . "The Prophet himself had set forth the principle *pacta sunt servanda*. He called upon Muslims to perform their treaties in good faith").

[351] Mohamed Elewa Badar, *Ius in Bello under Islamic International Law*, 13 Intl Crim L Rev 593-625 at 602 (quoting Quran 5:1 ("O ye who believe! fulfil (all) obligations") and 16:91 ("Fulfil the Covenant of Allah when ye have entered into it, and break not your oaths after ye have confirmed them")).

customary practice in the latter.[352] This makes it difficult to assert that they share compatible values rather than simply arriving at similar substantive rules for independent reasons.

Siyar and international treaty law share further similarities. Weeramantry observes that the doctrines reported by al-Shaybani include amendment, impracticability due to changed circumstance and renunciation, "basic aspects of the modern law of treaties".[353] *Siyar* may even more firmly bind stronger states to their "contractual and other obligations towards the weaker" than does international law because "the Islamic state [views] itself as being only a trustee of power", not a sovereign power in the sense of international law.[354] The Muslims' fulfilling of the Prophet's promise to the Quraysh, by leaving Mecca "even when they were strong enough to remain in the city", showed that treaty terms must be honoured even if they "may operate against the more powerful party".[355] Acknowledging a higher sovereign does not disable an Islamic state's prerogative to enter into agreements within the modern system of international law; on the contrary, Islamic rulers must not only uphold the agreements they make, but also apply them in full accordance with the obligation Sharia places on the ruler to deal justly even with unbelievers. Thus even when making a peace agreement that does not subject a foreign ruler to Sharia, the Islamic state may not agree to leave that ruler "free to rule his people and run his government as he likes by killing people, hanging them and doing with them other acts that are not permissible in Islam".[356]

Unsurprisingly, in view of the origin of Islam in the warring Arabian Peninsula and the relatively early development of *jihad* doctrine, peace treaties are the main focus of classical Islamic treaty law. Classical doctrine permitted the ruler to conclude treaties with non-Muslims, "but to ensure that Islam never lost sight of its millennial goals . . . limited the permissible duration of any such treaty to only ten years", renewable once.[357] Only the standard treaty of submission and *jizyah* is permitted, "unless the Muslims are in a state of weakness and therefore the ruler decides in their specific circumstances to agree, during that

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[352] See e.g., United Nations Conference on the Law of Treaties, First session, 28th meeting of the Committee of the Whole (18 April 1968, A/CONF/39/C.1/SR.28), ¶ 65 (statement of Mr Briggs, USA) ("the *pacta sunt servanda* rule had come down through the ages as a self-evident truth. Both comparative law and the history of legal systems showed that it had gained universal acceptance; it had been found to be a legal necessity").
[353] C.G. Weeramantry, Islamic Jurisprudence: An International Perspective (Macmillan, 1988) 140.
[354] C.G. Weeramantry, Islamic Jurisprudence: An International Perspective (Macmillan, 1988) 131 (citing Quran 16:91, 92).
[355] C.G. Weeramantry, Islamic Jurisprudence: An International Perspective (Macmillan, 1988) 140.
[356] Mahmood Ahmad Ghazi (tr), Kitab al-Siyar al-Saghir by Muhammad ibn al-Hasan al-Shaybani (Islamic Research Institute, 1998) 60 (al-Shaybani, ¶ 80).
[357] Christopher A. Ford, *Siyar-ization and its Discontents: International Law and Islam's Constitutional Crisis*, 30 Texas Intl L J (1995) 499-533 at 503-04.

stage, to accept a treaty of some sort".[358] If asked by the unbelievers, the imam may conclude an unconditional peace treaty of indefinite duration if he deems it in the Muslims' interest, but he should renounce it if he later finds it harmful,[359] or fears betrayal.[360] The possibility of renunciation proceeds from the absence of an example of the Prophet agreeing to a treaty of indefinite term, and from the *fiqh* principle that *maslahah* (community interest) should guide the ruler's exercise of his discretionary authority under *siyasah Sharia*. It amounts to certain sanction for a cease-fire, but leaves room for debate regarding permanent peace.

Modern Islamic states show a propensity to form permanent treaties, particularly with one another. This may reflect an added degree of trust in a counterparty committed to adherence to Sharia in addition to international law, as well as shared political interests and simple geographic proximity. Powell's study of treaty participation from 1945-2008 by 25 "Islamic law states" showed they are more prone to enter into bilateral treaties with one another under the aegis of the ICJ's compromissory jurisdiction, than are other states.[361] Only 15 of the 57 OIC members—mostly in West Africa but including Egypt, Pakistan and Somalia among Islamic states—have accepted compulsory ICJ jurisdiction over their treaties generally.[362]

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[358] Abdul-Azeem Badawi, The Concise Presentation of the Fiqh of the Sunnah and the Noble Book (Jamaal al-Din M. Zarabozo tr, International Islamic Publishing House, 2007) 654 (citing Sayyed Qutb, *adh-Dhilal*).

[359] Mahmood Ahmad Ghazi (tr), Kitab al-Siyar al-Saghir by Muhammad ibn al-Hasan al-Shaybani (Islamic Research Institute, 1998) 61 (al-Shaybani, ¶ 82).

[360] Abdul-Azeem Badawi, The Concise Presentation of the Fiqh of the Sunnah and the Noble Book (Jamaal al-Din M. Zarabozo tr, International Islamic Publishing House, 2007) 654.

[361] Emilia Justyna Powell, *Islamic law states and the International Court of Justice*, 50 J Peace Research 2 (March 2013) 203-17 at 205 ("Islamic law dyads . . . have the largest number of bilateral compromissory treaties memberships") (summarising Mitchell & Powell (2011: 217)). Powell defines "Islamic law states" as "states that officially and directly apply sharia to a substantial part of personal, civil, commercial or criminal law". Id. at 209.

[362] The others are Cameroon, Cote d'Ivoire, Djibouti, Gambia, Guinea, Guinea-Bissau, Nigeria, Senegal, Sudan, Suriname, Togo and Uganda. Constitutional reference to peaceful dispute resolution, recognition of custom in national law, and democratic forms of government and membership in multiple "peace-promoting international organizations" correlated significantly with accepting compulsory jurisdiction. Emilia Justyna Powell, *Islamic law states and the International Court of Justice*, 50 J Peace Research 2 (March 2013) 203-17 at 213, 212, 215. Powell observes that Islamic law and international law share "a deep appreciation for custom", which might help to account for the attractiveness of the ICJ as a forum, as "states whose domestic laws rely partly on custom [were] ten times more likely to accept the ICJ's compulsory jurisdiction". Id. at 212. Conversely, participation in regional organisations was associated with less use of compulsory ICJ jurisdiction, as Islamic law states tend to prefer "non-binding peaceful resolution methods available through regional regimes [which offer] an opportunity to call on other Islamic states or Islamic third parties for help in settlement". Id. at 215. Factors associated with foregoing ICJ jurisdiction included an Islam-oriented public education system and requiring religious oaths of office-holders, factors chosen to indicate "Islamic law states whose domestic laws embrace traditional sharia principles". Id. at 213-14 (both factors correlated with compromissory jurisdiction, but not enough to be statistically significant. However states that include Islamic teaching in public education "are 15 times less likely to recognize [compulsory jurisdiction], and belong, on average, to only two treaties with compromissory clauses, compared with eight for states that have secular education systems. . . . Similarly . . . Islamic law states whose constitutions explicitly require a religious oath from public officials are 21 times less likely to commit to the ICJ via optional clause"). In addition, the greater a state's commitment to Islamic principles (measured by how often its constitution mentions God or Sharia), the less likely it was to agree to

More have been willing to include compromissory clauses giving the ICJ jurisdiction over disputes arising out of particular treaties.[363] Powell explains this as reflecting a preference of Islamic law states to limit both the subject matter and the possible disputants that might bring them before the ICJ.[364] Pre-agreement on a forum reflects trust between the parties that, should a disagreement arise, they will first try to bargain toward a mutually acceptable resolution, rather than resorting to international litigation.

Participation in treaty regimes and bilateral treaties can enable Islamic states to mutually harmonise their laws. Particularly in the Arabian Peninsula and the Maghreb, international agreements substantially affect domestic law. Ratified treaties have direct effect in Bahrain, Kuwait, Oman and Qatar.[365] By contrast, the power of the constitutional courts of Afghanistan, Algeria and Tunisia to review international agreements affirms the supremacy of the respective constitutions.[366] However, international agreements still have greater force than ordinary laws in Algeria, the Comoros, Mauritania and Tunisia.[367]

Treaties, with fellow Muslims or with unbelievers, have long been recognised as permissible and even beneficial under Sharia. The Islamic state engaged in treaty relations from the start—indeed, it began as a treaty with and among Medinan tribes. In the caliphate, treaty commitments "towards non-Islamic states were accorded full recognition".[368] Badar argues that Islam's failure thus far "to win the whole world" renders the making of treaties with non-

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compulsory jurisdiction, but the more likely to enter into treaties with compromissory clauses. Id. at 214 (using the frequency with which a constitution mentions God or Islamic law as a proxy for "the depth of a state's commitment to Islamic precepts").

[363] Emilia Justyna Powell, *Islamic law states and the International Court of Justice*, 50 J Peace Research 2 (March 2013) 203-17 at 204.

[364] Emilia Justyna Powell, *Islamic law states and the International Court of Justice*, 50 J Peace Research 2 (March 2013) 203-17 at 214-15.

[365] Constitution of Bahrain (2002), art. 37; Constitution of Kuwait (1962), art. 70(1); Basic Statute of Oman (1996, amended 2011), art. 76; Constitution of Qatar (2004), art. 68 (certain types of treaties, including "those relating to the . . . public or private rights of the citizens", must first be "issued as a law"). The provisions in Bahrain, Kuwait and Qatar require ratification and publication in the official gazette.

[366] Constitution of Afghanistan (2003), art. 121(the Supreme Court may review "laws, decrees, inter-state treaties, and international covenants"); Constitution of Algeria (1996, amended 2002), art. 165 (the Constitutional Council "rules on the constitutionality of treaties, laws and negotiations" either before or after they are enacted"); Constitution of Tunisia (2014), art. 120 (the Constitutional Court reviews a treaty the president submits to it before signing the draft law approving it). Tunisia's constitution makes the rule explicit: "International treaties shall, where no contradiction with the provisions of the present Constitution exists, be respected". Id., art. 15.

[367] Constitution of Algeria, art. 132; Constitution of the Comoros (2001), art. 10; Constitution of Mauritania (1991, amended 2006), art. 80; Constitution of Tunisia (2014), art. 20 (ratified treaties "have a status superior to that of laws and inferior to that of the Constitution").

[368] C.G. Weeramantry, Islamic Jurisprudence: An International Perspective (Macmillan, 1988) 130. "Muslims were obliged to honour their treaties even with non-believers 'to the end of their term' (*Qur'an* IX:4) and 'not to break oaths after making them' (*Qur'an* XVI:93)". Id. 140.

Muslims "not only permitted, but encouraged in order to prevent conflicts".[369] Although its provenance in Islamic tradition may remain debatable, participation in international and bilateral treaties has become the norm. This facilitates Islamic states' participation in, and influence on, the international legal order. It can also serve as a means to promote Islamic solidarity. By entering into and abiding by treaties with each other, and by importing international treaties into the national legal order, Islamic states are building a transnational Islamic legal regime. The OIC is one prominent manifestation of this phenomenon.

4.2.4. Islamic states and international law

This section summarises how Islamic states apply the modern machinery of international law to facilitate their interactions with each other and the global community. International law has evolved since its beginnings in treaties, alliances and war. States now routinely engage one another through permanent deliberative bodies, courts, arbitration tribunals and other machinery, as well as simply by referring to international law in their discussions. The section highlights some of the main indicators of Islamic states' recognition of and participation in international legal regimes, concluding that it represents a significant and increasing evolution from *siyar* toward a modern Islamic system of international law.

Today, there appears to be a consensus among Islamic states that they can and should participate in the international system. OIC member states agree to "be guided and inspired by the noble Islamic teachings and values" but also "commit themselves to [act according to] the purposes and principles of the United Nations Charter".[370] All OIC members are UN members, except for Palestine which has Permanent Observer status. The constitutions of Algeria, the UAE and Yemen reaffirm their commitment to the UN Charter.[371] Participation in regional organisations is almost universal. All Islamic states from the Atlantic to the Iranian border are members of the Arab League. In Africa (including the Comoros), all states except Morocco are members of the African Union. Islamic states have served on the UN Security Council and the Human Rights Council.[372] Most OIC member states are also

[369] Mohamed Elewa Badar, *Ius in Bello under Islamic International Law*, 13 Intl Crim L Rev 593-625 at 602.
[370] Charter of the Organisation of Islamic Cooperation (amended 2008), art. 2(1).
[371] Constitution of Algeria (1996, amended 2002), art. 28 (Algeria "subscribes to the principles and objectives of the Charter of the United Nations"); Constitution of the United Arab Emirates (1971, amended 1996), art. 12 (foreign policy should be based on "the principles of the charter of the United Nations and ideal international standards"); Constitution of Yemen (1991, amended 2001), art. 6 (also specifying the UDHR and the Charter of the Arab League, as well as generally accepted principles of international law).
[372] Islamic states elected to the Security Council for at least one term since1946 include Algeria, Bahrain, Egypt, Jordan, Kuwait, Malaysia, Morocco, Oman, Pakistan, Qatar, Tunisia and the UAE. Iran, Iraq, Mauritania, Oman and Syria have served on the Council as well, but were not then under Islamic constitutions. Saudi Arabia was

members of the World Trade Organisation, although eight Islamic states are outside it including two of the largest, Iran and Iraq.[373]

Although they joined the system relatively recently, Islamic states have at times succeeded in influencing international debates. Delegations from Persia and Turkey participated in the 1899 and 1907 peace conferences in The Hague, and while wielding far less influence than the main European powers, contributed substantially to "the discussion on the ability of international humanitarian law to accommodate differing religious heritages".[374] Within the UN framework, explicit recognition of specifically Islamic priorities is rare, but Muslim states for example influenced the General Assembly to recognise the Islamic principle of *kafala* in a 1986 declaration regarding adoption.[375]

The constitutions of Islamic states, particularly those on or near the Arabian Peninsula, often emphasise commitments to international law. The constitutions of Qatar and Yemen reaffirm their respect for international treaties.[376] The United Arab Emirates bases its foreign policy on "ideal international standards".[377] Somalia and Yemen's constitutions affirm general international law as a source of guiding principles.[378] As all of these constitutions give prominent place to Islamic law in the national legal order,[379] the fact that they highlight their commitments to international law indicates a belief that Islamic law and international law can

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elected in 2013 but declined to take the seat. Most Islamic states have served at one time or another on the Human Rights Council. In 2015 Islamic members included Algeria, the Maldives, Morocco, Pakistan, Qatar, Saudi Arabia and the UAE.

[373] As of 26 January 2015, all OIC member states are also in the WTO except Afghanistan, Algeria, Azerbaijan, the Comoros, Iran, Iraq, Kazakhstan, Lebanon, Libya, Palestine, Somalia, Sudan, Syria (OIC membership suspended) and Turkmenistan.

[374] James Cockayne, *Islam and International Humanitarian Law: From a Clash to a Conversation between Civilizations*, 84 Intl Review of the Red Cross 847 (September 2002) 597-625 at 608.

[375] UN General Assembly, document No. A/41/896 of 20 November 1986. See Muhammad Munir, *Islamic International Law (*Siyar*): An Introduction*, 40 Hamdard Islamicus 4 (October-December 2012) 37-60 at 54-55 (citing Jamshed A. Hamid, "International Law and Pakistan's Domestic Legal Order", 4 *Asian Yearbook of International Law*, (1994), 137; and Jamshed A. Hamid, *The Status of Treaties in Islam: A Comparison with Contemporary Practice*, (Islamabad: Shariah Academy, 2001), 130-131).

[376] Constitution of Qatar (2004), art. 6 ("The State shall respect the international charters and conventions, and strive to implement all international agreements, charters, and conventions it is party thereof"); Constitution of Yemen (1991, amended 2001), art. 6 (also specifying the UDHR and the Charter of the Arab League, as well as generally accepted principles of international law).

[377] Constitution of the United Arab Emirates (1971, amended 1996), art. 12.

[378] Constitution of Yemen (1991, amended 2001), art. 6 (also specifying the Charter of the Arab League); Draft Constitution of Somalia (2012), art. 3(4) (founding principles of Somalia include promoting "general standards of international law").

[379] All four constitutions include clauses aimed at ensuring legislation complies with Islamic law. Constitution of Qatar (2004), art. 1 (Sharia is "a main source" of legislation); Constitution of Somalia (2012), art. 2(3) (laws that fail to comply with general principles of Sharia may not be enacted); Constitution of the United Arab Emirates (1971, amended 1996), art. 7 (Sharia is "a principle source of legislation"); Constitution of Yemen (1991, amended 2001), art. 3 (Sharia is "the source of all legislation"). Somalia recognises the supremacy of Sharia over the constitution. Draft Constitution of Somalia (2012), art. 4(1).

be compatible. By contrast, the reference in the Basic Law of Saudi Arabia to "[i]nternational agreements and laws" specifically for "rules and procedures" governing extradition hints at a narrow scope for international law when compared to the strong Islamic supremacy evident in the Basic Law.[380]

Recent decades have seen growing engagement of Islamic states with international legal institutions. Agreeing to bring disputes to the ICJ reflects a usage of international institutions to further the commitment to peaceful dispute resolution that Islamic states have made via the OIC Charter.[381] Islamic law states utilise the mechanisms made available by the international system, selecting arbitrators from Islamic states so as to give greater weight and familiarity (in the sense of a familiar legal background) to the decisions.[382] In Powell's analysis, agreements between Islamic law states are more likely to "[end] the issue at stake" than where "Western law" states are concerned, and "Islamic law dyads also exhibit the highest rates of agreement compliance and have the largest number of bilateral compromissory treaties memberships".[383] Effectively, these states are applying the procedural tools of international dispute resolution, without risking conflict with Islamic principles by adopting substantive rulings from a secular source. This provides scope for Sharia to guide international law, as between Islamic states. At the level of international courts, however, Islamic law has had little impact yet. In a 2007 survey of all cases brought to the ICJ, Lombardi found only two decisions making any mention of Islamic law, and seven separate opinions urging the court in general terms to take Islamic law into account, particularly when invoking custom as a source of international law.[384]

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[380] Basic Law of Saudi Arabia (1992), art. 42. The Basic Law subordinates itself entirely to the Quran and the Prophetic *sunna*. Id., art. 1.

[381] Charter of the Organisation of Islamic Cooperation (amended 2008), art. 27 ("The Member States, parties to any dispute, the continuance of which may be detrimental to the interests of the Islamic Ummah or may endanger the maintenance of international peace and security, shall, seek a solution by good offices, negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement or other peaceful means of their own choice. In this context good offices may include consultation with the Executive Committee and the Secretary-General.").

[382] Emilia Justyna Powell, *Islamic law states and the International Court of Justice*, 50 J Peace Research 2 (March 2013) 203-17 at 205 (Islamic states "have been particularly likely to use methods that allow them to include sharia in the process of dispute resolution", such as by employing mediation or conciliation with an Islamic third party, the method of "78% of attempts at peaceful resolution in territorial disputes of Islamic law states"). This means may not suit strict interpretations of Islam, however, which discourage agreements based on unknown future events, e.g. the selection of an arbitrator. Id. at 208.

[383] Emilia Justyna Powell, *Islamic law states and the International Court of Justice*, 50 J Peace Research 2 (March 2013) 203-17 at 205 (summarising Mitchell & Powell (2011: 217)).

[384] Clark B. Lombardi, *Islamic Law in the Jurisprudence of the International Court of Justice: An Analysis*, 8 Chicago J Intl L 1 (Summer 2007) 85-118 at 94.

Today, Islamic states are heavily invested in the concept of international law. The exposition as *siyar* of the rules of war and other standards for interacting with non-Muslim communities prepared the ground for states committed to Sharia to join as full actors in the international system. Islam has long accepted international treaties, mediation and arbitration, and formalised the regulation of war long before the state system emerged. Saudi Arabia evinces a certain ambivalence, implicitly circumscribing recognition of international law in its Basic Law and thus far declining to sit on the UN Security Council, but at the same time has not hesitated to take part in the Human Right Council and numerous bilateral and multilateral treaty regimes. Otherwise, Islamic states now participate enthusiastically and wield influence in all major international fora. At the same time, especially in the creation of the OIC and in utilising the compromissory jurisdiction of the ICJ, Islamic states are utilising international institutions to work together to continue to develop international law within Islamic parameters. Because the possibility of complete human understanding of Sharia departed with the Prophet, Islamic law like international law must continue to develop. In today's context of a multiplicity of states whose peoples share a transnational vision of Islamic society, a modern Islamic system of international law can become a powerful framework within which to advance the interests of the global *umma*.

4.3. *Da'wah*: propagating the faith

This final main part of the chapter looks at how Islamic states, having engaged with the international system, can use their participation in that system to pursue Islamic aims. The *da'wah*, or call to proselytise, was a foundational principle of the original Islamic state, which in fact preceded that state. Since Islam is not just a set of religious beliefs, but a complete way of life that includes rules of government and international relations, promotion of Islamic goals is a legitimate foreign priority policy of an Islamic state. It is a logical modernisation of the ancient collective duty of *jihad*, defending the *dar al-Islam* and spreading its call, but through persuasion rather than force.

Some modern constitutions require the state to promote the understanding and growth of Islam. This includes supporting institutions that advance and disseminate Islamic learning and requiring public education to include instruction in Islam, and orienting foreign policy toward Islamic priorities and Islamic solidarity. These are measures that can promote Islam abroad, as well as advancing Islamic aims such as peace and social justice that do not necessarily require religious conversion. The part consists of two sections. The first of these

presents some measures Islamic states have taken to integrate religious learning into their constitutional orders. The second examines the call to pursue a foreign policy based on Islamic solidarity found in several Islamic constitutions, a call which international Islamic instruments such as the OIC Charter elaborate in more detail.

4.3.1. Islamic research and education

This section presents one approach Islamic states take to integrating Sharia into their participation in international relations, spreading knowledge and understanding of Islam. According to Asad's analysis of the Quran and the Prophetic *sunna*, an Islamic state must "propagate the teachings of Islam to the world at large".[385] Several Islamic constitutions require the state to aid believers and potentially others, in pursuit of what Ibn Qayyim might have called *jihad* of the heart or tongue. Especially in the regions near the original Islamic lands in the Arabian Peninsula, Islamic constitutions often mandate the effort to advance the *da'wah* through research and education, sometimes explicitly requiring Islamic studies as a component of the public education system.

The paradigmatic Islamic scholarship centre is Egypt's Al-Azhar, one of the world's oldest continuously operating higher education institutes. Egypt's constitution establishes Al-Azhar as an independent institution that serves as "the main authority for religious sciences, and Islamic affairs" and is "responsible for preaching and disseminating the religious sciences and the Arabic language in Egypt and the world".[386] The Basic Law of Saudi Arabia similarly provides for a "senior Ulema body" with responsibilities relating to research and the issuance of *fatawa* based on the Quran and the Prophetic *Sunna*.[387] The constitutions of Iran and Saudi Arabia enjoin the state generally to promote research and the advancement of understanding of Islam.[388] Those of Bahrain, Kuwait and Saudi Arabia admonish the state to protect the heritage of Islam; Bahrain and Kuwait tie this to the effort to advance human civilisation generally.[389]

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[385] Muhammad Asad, The Principles of State and Government in Islam, 2nd ed. (Islamic Book Trust, 1980) 33.
[386] Constitution of Egypt (2014), art. 7. This may represent a recent reduction in Al-Azhar's advisory role, as the 2012 constitution required the government to consult "Al-Azhar Senior Scholars . . . in matters pertaining to Islamic law". Constitution of Egypt (2012), art. 4.
[387] Basic Law of Saudi Arabia (1992), art. 45 (deferring to a law the body's composition and functions, and details of research administration and of delivering *fatawa*).
[388] Constitution of Iran (1979, amended 1989), art. 3(4) (the government must promote research in Islamic studies); Basic Law of Saudi Arabia (1992), art. 29 ("The State shall . . . encourage scientific research, protect the Islamic and Arab heritage, and contribute towards Arab, Islamic and human civilization").
[389] Constitution of Bahrain (2002), art. 6 ("The State safeguards the Arab and Islamic heritage [and] contributes to the advancement of human civilization"); Constitution of Kuwait (1962), art. 12 ("The State safeguards the

To ensure the Islamic nature of their society and to support spreading the *da'wah* abroad, some Islamic states institutionally promulgate it at home. A logical modern extension of the *da'wah* is the use of the national education system to inculcate Islamic understanding. The learning circles that gathered around particular scholars during the classical caliphate were deeply integrated into broader society, but only tenuously tied to government institutions. Most constitutions enacted since the 19th century acknowledge public education as a state duty. In the Muslim world, the 1876 Ottoman constitution set this precedent, with the proviso that state education should not interfere with local religious education.[390] In the post-colonial era, Islamic states begin to incorporate a duty of specifically Islamic education in their constitutions. In 1956 Pakistan's constitution made teaching of the Quran compulsory.[391] Egypt's 1971 constitution was the first to explicitly merge religious education into the mandate to provide public primary education.[392] Both examples reflected the growing influence of modernist Islamism, in Pakistan directly through Mawdudi's input into the constitutional drafting, and in Egypt through the influence of the call by Qutb and others to extend Islamic learning to the general public.[393] Today, the constitutions of Egypt, Pakistan and Saudi Arabia give high priority to establishing Islamic education.

In all, six modern Islamic states constitutionalise a commitment to religious education: Bahrain, Egypt, the Maldives, Pakistan, Saudi Arabia and Somalia. Egypt's 2014 constitution retains the basic approach of its predecessor, mandating religion as a core subject in all pre-university education.[394] Somalia follows a similar approach, requiring Islamic instruction in all schools except for private "[s]chools owned by non-Muslims".[395] Pakistan's constitution makes instruction in the Quran and *sunna* compulsory for Muslims, and requires the state to "provide facilities" to this end, but without explicitly tying this in to the general public education system as in Egypt.[396] Bahrain's constitution recognises religious instruction as a

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heritage of Islam and of the Arabs and contributes to the furtherance of human civilization."); Basic Law of Saudi Arabia (1992), art. 23 ("The State shall protect the Islamic Creed, apply the Sharia, encourage good and discourage evil, and undertake its duty regarding the Propagation of Islam").

[390] Ottoman Constitution (1876), arts. 15, 16.

[391] Constitution of Pakistan (1956), art. 25(2)(b).

[392] Constitution of Egypt (1971), arts. 18 (universal, mandatory primary education), 19 ("Religious education shall be a principal subject in the courses of general education").

[393] Bradley J. Cook, *Islamic versus Western Conceptions of Education: Reflections on Egypt*, 45 International Review of Education 3/4 (1999) 339-57 at 346-50.

[394] Constitution of Egypt (2014), art. 24.

[395] Draft Constitution of Somalia (2002), art. 30(8).

[396] Constitution of Pakistan (1973, amended 2012), art. 31(1), (2)(a). Regarding Muslims, the state should also "encourage and facilitate the learning of Arabic", ensure correct publication of the Quran, and promote "the observance of the Islamic moral standards". Id., art. 31(2)(a), (b).

national responsibility, but leaves the details unspecified.[397] Saudi Arabia's Basic Law goes further than Pakistan or Egypt, making Islam paramount in a national education system whose first purpose "is to implant the Islamic Creed in the hearts of all youths".[398] The constitution of the Maldives likewise makes instilling obedience to and love for Islam a main aim of education.[399]

If a defining characteristic of an Islamic state is that it should be governed by Islamic law, then state-sponsored education in Islam is tantamount to a civic education course. Too few states constitutionally require such education to consider it a norm of Islamic constitutions. Those that do so, however, include the largest and most prototypically Islamic states in three regions. Each of Egypt, Pakistan and Saudi Arabia has a long enough history of avowedly Islamic governance to support a constitutional commitment to Islamic education for Muslims, as well as the economic resources to construct and operate the necessary institutions. Iran represents a notable exception, as its otherwise firmly Shi'ite (Twelver Ja'fari) constitution apparently devolves religious education to the citizens' preferred sects, which include other Islamic schools as well as Zoroastrianism, Judaism and Christianity.[400] Iran's approach is arguably at least as 'Islamic' as the others, harking back to the classical tolerance of pluralism in the faith and the acknowledged right of other monotheistic communities to maintain their own beliefs and practices.

4.3.2. Islamic foreign policy

This section establishes that the principle of solidarity among the transnational Muslim community frames how Islamic states use the machinery of modern international law to advance their foreign policies. Any state's first responsibility is to its citizens. An Islamic state bears a second level of responsibility, as leader and protector of a part of the global *umma*. The section connects this principle of Islam to the commitments to Islamic solidarity found in the constitutions of some OIC member states, and to the priorities stated in the OIC Charter, which supplies content for a principle of solidarity among Islamic states. Fulfilling this commitment to Islamic solidarity, while also pursuing Islamic aims of peace and social justice for the entire, religiously diverse community of nations, is the overarching goal of modern Islamic international law.

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[397] Constitution of Bahrain (2002), art. 7(b) ("The law regulates care for religious and national instruction in the various stages and forms of education").
[398] Basic Law of Saudi Arabia (1992), art. 13.
[399] Constitution of the Maldives (2008), art. 36(c).
[400] Constitution of Iran (1979, amended 1989), arts. 12, 13.

An Islamic foreign policy recognises the universal nature of the *umma*. Islam sees all humans as part of a single community, fundamentally equal to one another, "as 'alike as the teeth of a comb'".[401] Yet universalist aspirations must coexist with the realities of the modern world of states. This makes national foreign policy a potential instrument for the furtherance of the interests and unity of the *umma* as a trans-national community. States are naturally prone to resist encroachment on their prerogatives or dissolution of their powers in the name of an international ideology, even if it is one they themselves subscribe to. Islamic states also have had to come to terms with the post-Ottoman fact that no single state can now reasonably aspire to the sole political leadership of the *umma* that characterised the golden age of political Islam. Nonetheless, some OIC member state constitutions acknowledge the universality of the Muslim community in clauses calling for the state to prioritise cooperation and fraternal relations with other Muslim peoples and states.

The seven modern constitutions that invoke Islam as a principle of foreign policy do so in a spirit of solidarity with other Islamic states, albeit with differing nuances. Iran's constitution enjoins the state to "[frame] the foreign policy of the country on the basis of Islamic criteria, fraternal commitment to all Muslims, and unsparing support to the mustad'afiin [disadvantaged] of the world".[402] The rest are less specific. The constitutions of Bahrain, Pakistan, Saudi Arabia and the UAE instruct the state to promote solidarity among and advance the common interests of Islamic countries (all but Pakistan specifying Arab as well as Islamic states); Pakistan and the UAE place this in the context of a general duty to work for peace and good relations among all nations. The constitutions of Bahrain and Pakistan aim at Islamic unity per se,[403] while Saudi Arabia should "nourish the aspirations of Arab and Muslim nations" and the foreign policy of the UAE should support "Islamic causes".[404] The

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[401] C. G. Weeramantry, Islamic Jurisprudence: An International Perspective (Macmillan, 1988) 133 (citing among other verses Quran 49:13, "O Mankind! We created you from a single pair of a male and a female and made you into nations and tribes, that you may know each other, not that you may despise one another").

[402] Constitution of Iran (1979, amended 1989), art. 3(16). *Mustad'afun* indicates people who are disadvantaged not by a particular trait of their own but by being perceived as of low social standing, and unable to escape that condition through their own efforts. Maysaa S. Bazna and Tarek A. Hatab, *Disability in the Qur'an: The Islamic Alternative to Defining, Viewing, and Relating to Disability*, 9 Journal of Religion, Disability & Health 1 (2005) 5-27 at 18-19.

[403] Constitution of Bahrain (2002), art. 6 ("The State . . . strives to strengthen the bonds between the Islamic countries, and to achieve the aspirations of the Arab nation for unity and progress"); Constitution of Pakistan (1973, amended 2012), art. 40 (duty to promote "fraternal relations among Muslim countries based on Islamic unity" and work for international peace, dispute resolution and good relations).

[404] Basic Law of Saudi Arabia (1992), art. 25 ("The State shall nourish the aspirations of Arab and Muslim nations in solidarity and harmony"); Constitution of the United Arab Emirates (1971, amended 1996), art. 12 (foreign policy should support "Arab and Islamic causes" and aim for "friendship and cooperation with all nations and peoples").

constitutions of Somalia and Iraq merely identify them as members of a broader Arab and Muslim community, Somalia referring as well to its African identity.[405]

Solidarity, at least among Muslim nations and arguably universally, must inform any effort to implement an Islamic foreign policy. Whether or not they constitutionalise it, all modern Islamic states have expressed their commitment to this principle by adhering to the charter of the OIC, which states enhancing Islamic solidarity as its first goal.[406] The member states commit, *inter alia*, to respect each other's territorial integrity and right to national self-determination, to work for sustainable development among the member states and protect human rights and freedoms, and to promote the spread of "Islamic teachings and values based on moderation and tolerance".[407] The Islamic states that constitutionalise solidarity manifest this commitment through their substantial participation in the OIC's Islamic Solidarity Fund for Development. As of the end of 2011, Saudi Arabia and Iran were the two largest donors to the fund in terms of capital actually provided, Bahrain and Iraq had fulfilled their entire commitment, and Pakistan was one of nine states to have contributed at least $5 million.[408] The UAE apparently do not contribute directly to the fund, but participate via their significant investment in the Islamic Development Bank, which alongside Saudi Arabia provides the largest share of the fund's capital.[409]

A foreign policy based on Islamic solidarity facilitates the *da'wah*, as well as the material and spiritual well-being of the *umma*. Arguably, any state that submits itself constitutionally to rule by Sharia has a duty to pursue the ancient injunctions to spread the call, support basic Islamic human rights, and succour any needy members of the trans-national *umma*. All modern Islamic states have made such a commitment through adhering to the OIC Charter, and most have demonstrated their recognition of that commitment through subsequent actions. Whether or not they reinforce international Islamic solidarity by constitutional enactment, modern Islamic states in conducting their affairs cannot disregard the interests of other Islamic states and peoples.

4.4. Conclusion

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[405] Constitution of Iraq (2005), art. 3 (Iraq is "part of the Islamic world" and committed to the covenant of the Arab League); Draft Constitution of Somalia (2012), art. 3(2) (Somalia is "a Muslim country which is a member of the African and Arab Nations").
[406] Charter of the Organisation of the Islamic Conference, art. 1(1).
[407] Charter of the Organisation of the Islamic Conference, art. 1(3), (10), (14), (11).
[408] Islamic Solidarity Fund for Development, 4th Annual Report, Annex II (25 November 2011).
[409] Of the 56 states owning shares in the IDB, the UAE are one of six whose investment amounts to more than $1 billion. The others are Egypt, Iran, Libya, Saudi Arabia and Turkey.

This chapter has shown that Islamic states can remain faithful to Sharia while participating in the systems and institutions that operate under modern international law. Both historically and as a matter of contemporary reality, a state governed in accordance with Islamic law can legitimately engage in interstate relations governed by international law. The doctrines of *siyar* remain relevant today, but Islamic states face the responsibility of re-interpreting and applying them in an international context very different to that in which they developed. Success in this endeavour is a prerequisite to bridging between the Islamic framework of human rights the previous chapter discussed, and the emergent customary international Islamic law of human rights that the final main chapter in this thesis will describe.

Although it is neither obvious nor uncontroversial, a strand of law recognisable to modern international lawyers has run through Islamic law from its beginnings. *Jihad* doctrine displays compatibility with just war theory, a presumption of peace and a respect for human dignity that persists even under the stresses of war. *Siyar*'s treatment of non-Muslims under Islamic jurisdiction shows a tolerance for diversity and a recognition of non-Muslims as possessing human dignity and rights, acknowledging their freedom of choice even while admittedly preferring that they become Muslims. *Siyar* also contains the fundamental building blocks of international law, in the form of reciprocal recognition of sovereign states, recognition of the sanctity of treaties and a clear methodology by which the understanding of law can evolve (although the fact that the methodologies differ places an extra burden on Islamic states to understand how Islamic law and international law are derived, independently of each other). Finally, the aims of Islamic international relations, the call to spread the *da'wah* and solidarity with other Islamic states, as well as establishing peace and social justice, would be easily recognisable to classical Islamic jurists and are at least acceptable to modern international human rights lawyers.

When Islamic states identify zones of compatibility between Sharia and international law they can also hope to influence international law toward greater compatibility with Sharia. Some even argue that Islamic law was the original source of international law.[410] Most obviously, as a major global legal system, Islamic law can and does—indeed, must—influence the development of international law.[411] There is room for accommodation in the

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[410] Labeeb Ahmed Bsoul, *Historical Evolution of Islamic Law of Nations/Siyar: Between Memory and Desire*, 17 Digest of Middle East Studies 1 (Spring 2008) 48-67 at 51 (citing Muhammad Hamidullah, The Emergence of Islam 107-09).

[411] See C.G. Weeramantry, Islamic Jurisprudence: An International Perspective (Macmillan, 1988) 150 ("Having regard to the large number of Islamic nations now members of the United Nations, the international

sense that both traditions continue to evolve, and are flexible enough to allow jurists over time to construct substantive rules that fall within permissible ranges in both traditions. Contemporary Islamic international law builds on classical *siyar*, but also utilises other agreed principles of Islamic jurisprudence to create solidly grounded rules for new contexts.

Participating in international law is anything but repugnant to an Islamic state. It is arguably even beneficial from an Islamic point of view. This extends beyond the permissibility of treaty agreements established as early as the Prophet's time, to include international law-making fora and recognition of customary international law. If Islamic states take part in the evolution of international law, then by definition customary law and especially *jus cogens* norms must gain their approval before becoming binding on the international community. As the final main chapter in this thesis will discuss, modern Islamic states have indeed updated their understanding of Sharia in keeping with international human rights norms in some regards, demonstrating not only that Islamic law and international human rights law are compatible, but that Islamic law can continue to evolve through the unanimous agreement of Islamic states on points of law, arguably a revival of the ancient means of proof, *ijma*.

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law of Islam is a body of knowledge which the [International Court of Justice] cannot afford to ignore. Indeed it must necessarily make an impact upon the content of contemporary international law").

5. Islam, democracy and constitutions

The previous chapter argued that Sharia poses no particular bar to an Islamic state's participation in an international system composed of both Islamic and non-Islamic states, subject to some form of international law. The present chapter serves two purposes. It addresses the question implicit in the thesis, of what is an Islamic state. Specifically, it asks how a government formed according to fundamentalist Islamic principles should be constructed. It also explores the question of whether such a state can realise international standards of government by the people—if an Islamic state is subject to God, how can the people claim to rule themselves? To reconcile these viewpoints, the chapter takes a traditionalist Sunni view of Islamic governance, but examines its modern implementation in terms of western political norms such as checks and balances, separation of powers, representative democracy and constitutionalism. Along with the next chapter, which addresses how Islamic states incorporate Sharia in their municipal legal orders, the result establishes what it means in terms of institutions for a modern state to be resolutely Islamic.

This chapter examines how Islamic states merge traditional principles of Islamic rule with modern tools of participatory government. It does so in nine parts. The first four parts set out the ideological background for an Islamic state. The first part introduces the political aspect of the Prophet's leadership of the *umma* and confronts the difficulty in terming the entity he founded a 'state'. The second part contemplates the caliphate, first in terms of the examples set by the first caliphs and the theories of government subsequently developed by classical jurists, then through the relationship between those jurists and the state, which was crucial in embedding the idea that an Islamic state must operate according to law. Part three discusses the ideas brought forth in the modern era for how to rebuild the Islamic polity in an era of disparate nation-states. The fourth part summarises the principles of government according to Islam demonstrated in the preceding three parts, the most important of which are rule by consent of the governed, justice and consultative government.

The second half of the chapter connects Islamic government to modern state constitutions. The right of citizens to influence and participate in their government is now considered fundamental under international norms. The first half of the chapter having established that this right is compatible with broad principles of Islamic governance, part five demonstrates that, even though representation and elections had no exact precedent in the caliphate, rule according to Sharia is susceptible to the mechanical aspects of modern democracy. Part six

delves into the complex issue of how to reconcile the longstanding Islamic tradition of a monolithic ruling authority with the prevalence of modern constitutional models that incorporate separation between legislative and executive powers, as well as a measure of sharing of the executive power itself, for example in the form of parliamentary oversight of governments. Recognising that monolithic rule was not particularly a feature of Islam, but the worldwide standard for much of human history, the part concludes that while there is room for legitimate doubt as to whether Sharia limits the legitimacy of dividing powers in such ways, modern Islamic states have done so without obviously straying from Islamic principles of governance. The final two main parts of the chapter discuss Islamic states' use of written constitutions as a means to enshrine their promises to their citizens of justice, human rights and rule according to Sharia, and the role they assign to judicial bodies to safeguard those promises. Part nine of the chapter concludes that modern Islamic states have for the most part succeeded in updating their models of governance through the use of institutional arrangements prototyped outside the Muslim world, without compromising their fundamentally Islamic nature.

Any effort to assess how Islamic states subscribe simultaneously to both Sharia and international human rights law needs to consider the nature of an Islamic state. Authoritarian states can and do participate as full members of the international community and, less typically, govern according to law and respect the internationally recognised human rights of their subjects. However according to mainstream international understanding, the starting point for applying human rights as modern civil rights is democracy, or at least rule with the consent and participation of the governed.[412] A state wishing align its legal order fully with UN standards of human rights should institutionalise these values.

It is not universally agreed that democracy and Islamic rule can comfortably coexist. Arguably there is an inherent tension between a vision of rule by Sharia bringing justice to societies whose recent memories consist largely of colonialism and authoritarian rule, and a fundamentalist view that governance according to Sharia requires a state constructed according to the precedents of the Prophet's political leadership and the subsequent caliphate. Reconciling these points of view first with each other, and then with international standards, quickly encounters the conundrum that in the Prophet's time the idea of a state in the

[412] See e.g., Universal Declaration of Human Rights, article 21(1) ("Everyone has the right to take part in the government of his country, directly or through freely chosen representatives"), (3) ("The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections").

Westphalian sense was unknown, much less modern norms such as constitutions, elections, representative government and separation of powers. Yet most of today's avowedly Islamic states were constructed along the latter lines, and their citizens evidence no widespread desire to abandon democratic forms—if anything, they prefer to enhance them.

Traditional Islamic law did not speak to these topics, but through the acts of states a new Islamic ethic of governance is developing. This contemporary Islamic public law accepts the nation-state as its atomic political unit, and proceeds from the proposition that an Islamic state exists to provide its citizens with government according to Sharia. From this starting point, several divergent ideas of an Islamic state have evolved. Serious consideration of the subject began in the late days of the Ottoman Empire and continued to develop through the colonial era and the age of independence that commenced after the second world war. Theoretical ideas of an Islamic state build on principles of Islam, or precedents of rightly guided Islamic governance, often in combination with modern political models. Prior to independence this debate was carried out in the abstract. Today, the constitutions of the 24 modern Islamic states realise these ideas to varying degrees.

5.1. Background: Islamic rule

This part introduces the idea of an Islamic state. This represents one of the main points of discord between western and Islamic ideals of government. The aim of the part is to establish that since the *Hijra* in 622, Islam has incorporated a state-like structure and a geographic reality, the *dar al-Islam* (house of Islam), which are arguably necessary to allow the religion to reach full fruition. In a fundamentalist understanding, an Islamic state therefore must challenge western notions of 'separation of church and state'. A main task of this thesis is to show that a state constructed around Islamic religious principles can, or even must fully respect international human rights norms. This part establishes the unavoidability of merging religious values into a fundamentalist Islamic state.

It is not clear that the Prophet regarded the establishment of a political entity as a priority. The Quran speaks in terms of an unbounded community of believers, the *umma*. The reports of the acts of the Prophet and his Companions do not reveal a desire to establish a state, and the Prophet repeatedly declined offers to assume the leadership of Mecca in return for abandoning his new religion.[413] He accepted the allegiance of Medina in two stages, as a first

[413] Mohammed Abed al-Jabri, Democracy, Human Rights and Law in Islamic Thought (I.B. Tauris, 2009) 34.

delegation recognised the new religion and a second established a political entity, in both cases with the Prophet as the leader.[414] This does not show that the state was a priority per se, rather than a necessary means to organise and protect the *umma* so it could propagate the Islamic call, the *da'wah*. Arguably however, a state-like authority is inherent in certain Islamic prescriptions, such as *hudud* punishments and *zakat* taxation, and in the historical fact that as the *da'wah* progressed, even during the Rashidun caliphate it developed a supporting state structure.[415]

What became the Islamic state had a sovereign from the beginning, as well as a guiding ideology "that the state should establish a properly righteous public order . . . and that expansion of the state into new areas was a legitimate—indeed, an obligatory—endeavour".[416] Although the Muslim empires bore some characteristics of states,[417] an independent nation-state only became the norm in the Muslim world after the second world war. In form, the first government of the Muslims was an alliance of clans under a common leader, which became a city-state, then with stunning speed, a vast empire. This presented the first caliphs with novel "governance problems" as the emerging empire now "included rural folk as well as urbanized non-Arab converts to Islam. Necessities of that time led to several political innovations".[418] With the conquest of large swathes of the multicultural Byzantine and Sasanian empires the caliphate inherited a complex bureaucratic structure,[419] which facilitated these innovations but also irretrievably changed the nature of the original Islamic polity. Throughout the rise and decline of the caliphate, the subsequent interregnum and the history of the Ottoman Empire, Islamic governance remained "at least in aspirational terms,

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[414] Azzam S. Tamimi, Rachid Ghannouchi: A Democrat Within Islamism (Oxford U. Press, 2001) 94-95 (finding Ghannouchi's idea of an Islamic state compatible with international law: a group of persons living in a particular place, "legally organized and personified, and associated for their own government").

[415] Mohammed Abed al-Jabri, Democracy, Human Rights and Law in Islamic Thought (I.B. Tauris, 2009) 34.

[416] Fred M. Donner, *Introduction*, in Fred M. Donner, ed., The Articulation of Early Islamic State Structures (Ashgate Publishing Ltd., 2012) xiii-xxxii at xviii (noting with approval Blankinship's characterisation of the early Islamic state as "the '*jihad* state'", a "state more ideological than any state that had existed before it"; citing Khalid Yahya Blankinship, The End of the Jihad State: The Reign of Hisham ibn 'Abd al'Malik and the Collapse of the Umayyads (SUNY Press, 1994) 11 and *infra*).

[417] Fred M. Donner, *The Formation of the Islamic State*, in Fred M. Donner, ed., The Articulation of Early Islamic State Structures (Ashgate Publishing Ltd., 2012) 1-14 at 2 (proposing to define a state as "having an ideology of Law" alongside institutions consisting of "a governing group"; military and police power; "a judiciary"; "a tax administration" and "institutions to perform other aspects of policy implicit in the legal and ideological foundations of the state"); id. at 11 (concluding that at least as early as the first quarter century of the Umayyad era, the caliphate fit the proposed definition of a state).

[418] Ebrahim Moosa, *The Dilemma of Islamic Rights Schemes*, XV Journal of Law & Religion 1/2 (2001) 185-215 at 188.

[419] Ira M. Lapidus, Islamic Societies to the Nineteenth Century: A Global History (Cambridge U. Press, 2012) 64.

imperial".[420] Traditional Islamic rule centred on the *umma*, the universal community of Muslims. All Muslims, and others willing to subscribe to its basic social bargain, were in principle welcome in the *dar al-Islam*.[421] The early caliphate and the reinvigorated Ottoman Empire engendered a collective myth of expansion ad infinitum that suited an empire based on a universalist religion.[422]

As the end of the Ottoman Empire impended in the late 19th and 20th centuries, efforts ensued to reinvent Islamic governance, as part of a general modernisation effort to compete against European domination. This came too late to save the empire, which was ultimately replaced by colonial control over nearly all Muslim-populated lands. Some Muslim thinkers and political leaders spent these years formulating new ways to restore Muslim self-rule within an international system predicated on states. Independence came rapidly with the exhaustion of the colonial powers after the second world war, triggering a competition of ideas between the Islamist and democratic idealists and an array of despots that has continued to the present.

Most modern advocates of Islamic governance have embraced the nation-state, rather than calling for full political unification of Muslim lands. Both revivalist thinkers and those modernists who accept the idea of a non-secular state advocate that in countries with a majority Muslim population the state should be grounded in principles of Islamic law and faith.[423] Disagreement lingers with respect to Muslims living in countries where they form a minority, with most observers approving of allegiance to any government that allows them to freely practice the private aspects of their faith, some Islamists advocating that Muslims living outside Islamic states migrate to those states to fully live in the faith,[424] and a few calling for violent *jihad* against secular or otherwise non-Islamic governments.

Starting from the idea that in order to fulfil the needs of a Muslim citizenry a state should be "Islamic", the next obvious question is "how Islamic"? Must such a state seek to emulate the

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[420] Anver M. Emon, *Shari'a and the Modern State*, in Anver M. Emon et al., eds., Islamic Law and International Human Rights Law (Oxford U. Press, 2012) 52-81 at 68.

[421] See above, chapter 4, section 4.1.2.

[422] See e.g., Ira M. Lapidus, Islamic Societies to the Nineteenth Century: A Global History (Cambridge U. Press, 2012) 365 ("The Ottoman Empire was legitimized by its reputation as a warrior regime that expanded the frontiers of Islam and defended Muslim peoples against the infidels").

[423] See e.g., Abdolkarim Soroush, Reason, Freedom, and Democracy in Islam: Essential Writings of Abdolkarim Soroush, (Mahmoud Sadri & Ahmad Sadri trs, eds, Oxford U. Press, 2000) 126 (in a religious society, "any purely secular government would be undemocratic").

[424] This reflects the view of the 11th/12th century jurist Ibn Rushd the Elder, who "insisted that it was forbidden for Muslims to take up residence abroad" and that anyone who converted to Islam while living in a non-Muslim country was "religiously obligated to migrate to a Muslim polity". Sherman A. Jackson, *Jihad and the Modern World*, in Gavin N. Picken, ed., Islamic Law: Critical Concepts in Islamic Studies, Volume IV: Islamic Law in the Modern World (Routledge, 2011), 233-54 at 244-45.

all-encompassing fusion of religion and state of the early caliphate? Or might a pseudo-Islamic state suffice, one that violates no core precepts of Islam, but that retains a basically secular or multi-confessional form? The latter must suffice for now, as the alternative would be to exclude the great majority of avowedly Islamic states from the definition of that term. Arguably, the essence of an Islamic state lies in its grounding in core principles of Islam and its provision of rule according to Sharia, not in its particular institutional design. According to this view, the structural shape first of the Medinese state and then of the caliphate represented particular political constructions based on these principles, designed to match a particular society at a particular time. Today it may be possible to detach their core principles from their specific political structures, and incorporate them into a modern state that is no less Islamic.

5.2. The caliphate

The previous part having shown that an Islamic state must account for Islamic law and tradition, this part examines the institution of the caliphate. The starting point for building a state within an Islamic legal framework must be the Quran and the teachings of the Prophet. These do not provide detailed guidance, but pronounce principles of governance which, as discussed later in this chapter, are broadly compatible with modern international standards. Traditionalists often further advocate emulating Islamic political entities of the past, transposing their core characteristics onto the structures of a modern state.

Of the historical examples, only the caliphate under the Rashidun ("pious" or "rightly guided") caliphs who ruled from Medina and Kufa is universally regarded as correctly implementing Islamic rule.[425] Understanding the theory of the caliphate is critical to assessing the correctness of any subsequent Islamic government. The first of two sections in this part briefly introduces this theory, including how a caliph is chosen and the caliph's right to exercise discretion within the zone of *siyasah Sharia*. The second section details the novel institutional arrangement whereby the *ulama*, the Islamic scholar-jurists, reserved the right to declare the content of Sharia and thereby bound the caliph to rule by law. This tradition of

[425] In orthodox Sunni doctrine, by the 10th century it was "indisputable" that the true, perfect caliphate ended after thirty years – the first four caliphs. Ann K. S. Lambton, State and Government in Medieval Islam (Oxford U. Press, 1981) 17 ("Only this caliphate was held to fulfil completely the conditions of the true imamate"). See also Muhammad Khalid Masud, *The changing concepts of caliphate – Social construction of Shari'a and the question of ethics*, in Kari Vogt et al., eds., New Directions in Islamic Thought (I.B. Taurus & Co, 2009) 187-205 at 193-94 (the highly traditionalist Ibn Taymiyyah concurred in this view). There is disagreement on exactly which caliphs were rightly guided. Shia hold that Ali was the sole successor to the Prophet and thus only his line are the true imams. The term "rightly guided" is also applied to Mu'awiya and the 8th Umayyad caliph, Umar II.

rule according to law, with independent oversight, helps to enable an Islamic state to adhere to international human rights law, alongside Sharia.

5.2.1. Caliphate and state in Islamic tradition

In form, the Rashidun caliphate initially resembled its Medinan predecessor, where the "Constitution of Medina" formalised an alliance of clans under the centralised leadership of the Prophet. Vesting plenary power in the Prophet led for the first time in Arabia to a "supra tribal system",[426] rather than each clan supplying its own leadership. The Prophet led in consultation with a group of trusted advisors. After the Prophet passed, these Companions selected one of their number, the Prophet's father-in-law Abu Bakr, as caliph (successor). This was the start of the caliphate as an institution, which provided the political leadership of the *umma* until the disintegration of the first Islamic empire two to three centuries later. The temporal power of the caliph grew to become absolute under the early Umayyads, then waned except for a brief revival under the first Abbasid caliphs, and essentially vanished in the mid-10th century. In principle however, throughout the Rashidun, Umayyad and Abbasid caliphates, whether by designation, birth or both, the caliph inherited the sole right to rule. During the latter part of the unified caliphate and the interregnum that followed, actual political power usually lay with military rulers acting in the name of the caliph, whose remit was restricted *de facto* to ceremonial religious authority. Some modern advocates of an Islamic state call for the restoration of a political order modelled on the caliphate as it existed before the civil wars which ended in rule by the Umayyad clan from 661, and coincided with the separation of the faithful into Shia and Sunni sects.

After the caliphate became established as an institution, the medieval jurists al-Mawardi and Ibn Taymiyyah contributed greatly to the development of theories of governance and the ruler in Islamic law, establishing a firm connection between Sharia and the state. Masud presents al-Mawardi's *al-Ahkam al-Sultaniyya* as an effort "to uphold the caliph's authority in theory, though actual power had been usurped by others" by the time of the later Abbasid period during which he wrote.[427] Al-Mawardi "extend[ed] *shari'a* concepts and vocabulary to cover existing practice" of government.[428] Ibn Taymiyyah argued that the law of the ruler,

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[426] Moshe Sharon, *The Development of the Debate around the Legitimacy of Authority in Early Islam*, in Fred M. Donner, ed., The Articulation of Early Islamic State Structures (Ashgate Publishing Ltd., 2012) 15-35 at 17.
[427] Muhammad Khalid Masud, *The changing concepts of caliphate – Social construction of Shari'a and the question of ethics*, in Kari Vogt et al., eds., New Directions in Islamic Thought (I.B. Taurus & Co, 2009) 187-205 at 190. Al-Mawardi is "regarded as the first Muslim jurist to expound a political theory". Id.
[428] Sami Zubaida, Law and Power in the Islamic World (I.B. Taurus, 2003) 92.

until then treated as independent, was actually subordinate to Sharia and could only operate within its constraints. Ibn Taymiyyah, even while developing theories of why and how government should obey the dictates of revealed Sharia, promoted the doctrines of *siyasah Sharia* (harmonising the application of *fiqh* with the practical needs of governance, *siyasah*) and *ta'zir* (discretionary punishment for acts not addressed by *fiqh*).[429] According to al-Mawardi the caliph's main duties were "to maintain religion according to early precedents, enforce judicial decisions, and protect the people".[430] Since the end of the Rashidun caliphate, according to Masud, the only proper justification of the caliphate has been to uphold Sharia.[431]

A new caliph is nominated, then presented to the *umma* to receive their oath of allegiance (*bay'ah*). Abu Bakr's succession via nomination by leading Companions followed by acclamation by the community in Medina set the pattern. Future caliphs were nominated either by "a college of electors known as the *ahl al-hall wa'l-'aqd*, (those who loose and bind)", or by the prior caliph, then received the *bay'ah*.[432] Even after the caliphate became hereditary, in principle succession remained a matter of the ruling family – usually having been instructed by the late caliph - identifying the next caliph, followed by the *bay'ah* ritual. As during the late Abbasid era the caliphate became effectively a prize claimed or bestowed by military conquerors, 10th and 11th century jurists sought to apply a gloss of legal theory over the realities of power. According to al-Mawardi, the caliph could be either elected "by a group of people who have the political capacity" or designated "by the preceding caliph" (with hereditary rule assimilated to designation).[433] Either means serves to maintain continuity of the divine right to rule that passed from the Prophet to the *umma*, who then delegate it to each caliph – but since the entire power is delegated, this arguably confers on the caliph the prerogative to name a successor. Some advanced the idea that winning power

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[429] Anver M. Emon, *Shari'a and the Modern State*, in Anver M. Emon et al., eds., Islamic Law and International Human Rights Law (Oxford U. Press, 2012) 52-81 at 70-71.
[430] Ira M. Lapidus, Islamic Societies to the Nineteenth Century: A Global History (Cambridge U. Press, 2012) 294.
[431] Muhammad Khalid Masud, *The changing concepts of caliphate – Social construction of Shari'a and the question of ethics*, in Kari Vogt et al., eds., New Directions in Islamic Thought (I.B. Taurus & Co, 2009) 187-205 at 194.
[432] Mohammad Hashim Kamali, Citizenship and Accountability of Government: An Islamic Perspective (Islamic Texts Society, 2011) 151.
[433] Muhammad Khalid Masud, *The changing concepts of caliphate – Social construction of Shari'a and the question of ethics*, in Kari Vogt et al., eds., New Directions in Islamic Thought (I.B. Taurus & Co, 2009) 187-205 at 190-91.

through force conferred the authority to appoint the caliph.[434] The later Ottoman sultans simply proclaimed themselves caliphs. Today, Kamali argues that the will of the people remains the root of the caliph's authority, as the *bay'ah* "completes and brings to fruition the initial nomination".[435] Asad argues that since the actual proofs of law do not set out clear requirements, it is up to the community to decide how to elect the ruler, and for how long.[436]

According to al-Mawardi the caliph must be healthy, wise, brave and just, capable of *ijtihad* and a member of the Quraysh tribe.[437] This did not entirely match historical reality; for example, "[t]he majority of the caliphs were not literate, let alone capable of *ijtihad*".[438] The last criterion, reserving the caliphate to the Quraysh, remained controversial.[439] In the ninth century jurist Ibn Qutayba's narrative, the Quraysh had to assume the leadership simply because they were powerful enough to secure the obedience of the community.[440] They were also related to the clan of the Prophet,[441] which served to heighten their perceived legitimacy. Ibn Khaldun accepts that Qurayshi descent was originally necessary, but applies his theory of *'asabiyya* (social cohesion arising out of clan ties) to argue that this was because the Quraysh "represented at that time the strongest available *'asabiyya*", which dissipated through decadence in later years when "there were others who had superior *'asabiyya*".[442] According

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[434] Muhammad Khalid Masud, *The changing concepts of caliphate – Social construction of Shari'a and the question of ethics*, in Kari Vogt et al., eds., New Directions in Islamic Thought (I.B. Taurus & Co, 2009) 187-205 at 193.

[435] Mohammad Hashim Kamali, Citizenship and Accountability of Government: An Islamic Perspective (Islamic Texts Society, 2011) 151. Kamali rebuts a counter-view that authority vests with the nomination, and the *bay'ah* is merely declaratory of that, citing "prominent *ulama*" from the medieval era, including Ibn Taymiyyah, alongside Sanhuri for authority that this confuses "nomination (*al-tarshih*) with the assignment of authority (*al-wilayah*)". Nomination alone has no value because the *umma* choose "whether or not to grant their bay'ah". Id.

[436] Muhammad Asad, The Principles of State and Government in Islam, 2nd ed. (Islamic Book Trust, 1980) 42.

[437] Muhammad Khalid Masud, *The changing concepts of caliphate – Social construction of Shari'a and the question of ethics*, in Kari Vogt et al., eds., New Directions in Islamic Thought (I.B. Taurus & Co, 2009) 187-205 at 191.

[438] Muhammad Khalid Masud, *The changing concepts of caliphate – Social construction of Shari'a and the question of ethics*, in Kari Vogt et al., eds., New Directions in Islamic Thought (I.B. Taurus & Co, 2009) 187-205 at 191.

[439] Muhammad Khalid Masud, *The changing concepts of caliphate – Social construction of Shari'a and the question of ethics*, in Kari Vogt et al., eds., New Directions in Islamic Thought (I.B. Taurus & Co, 2009) 187-205 at 191-92 (citing Ibn Qutayba to cast doubt on the significance of two *ahadith* with which al-Mawardi supported that assertion. As a leading proponent of *hadith* science, Ibn Qutayba would surely have known of these *ahadith* – "Quraysh are the leaders" and "Let the Quraysh lead, do not lead them" – making the fact that he failed to cite them significant. Masud suggests they were later inventions).

[440] Muhammad Khalid Masud, *The changing concepts of caliphate – Social construction of Shari'a and the question of ethics*, in Kari Vogt et al., eds., New Directions in Islamic Thought (I.B. Taurus & Co, 2009) 187-205 at 192.

[441] Ira M. Lapidus, Islamic Societies to the Nineteenth Century: A Global History (Cambridge U. Press, 2012) 40.

[442] Ann K. S. Lambton, State and Government in Medieval Islam (Oxford U. Press, 1981) 170, citing Ibn Khaldun, The *Muqaddimah*, Vol. I, 396-401. For a discussion of the nature of *'asabiyya* see id., 159.

to Asad, in modern terms the Quran and the Prophetic *Sunna* establish that the ruler must be a Muslim, and "the most righteous" among the *umma*, "which obviously implies that he must be mature, wise, and superior in character", regardless of lineage, race, or social status.[443]

Ever since the *fitnah*, the civil war that ended the Rashidun caliphate and engendered the Sunni-Shia split, debate has periodically arisen over the correct nature of a caliphate, who is the true caliph, or whether a caliph even exists. It is generally agreed that the demise of the Ottoman Empire broke the continuity of the caliphate, but this does not prevent the rise of a new and equally legitimate caliph. It is also an open question whether a caliph must exercise temporal power, or whether it is sufficient to stand as the leader of the faith while various national rulers govern in the caliph's name, or even for the caliph to exercise religious leadership of the *umma* while political leaders stand entirely aside. If however the caliph has any political role, even symbolic, then there are a few clear rules. According to the Islamic proofs, the careful analysis of the greatest classical jurists and the examples of rightly-guided caliphs, a caliph rules by the consent of the people, and must possess specific qualities such as piety, wisdom, fairness and courage that are necessary to enable just rule. Even in the absence of a recognised caliph, any rightly guided Islamic ruler should share these qualities.

5.2.2. The caliph and the *ulama*

As the Prophet, his Companions and Successors passed and the Islamic community continued to thrive, Sharia began to decouple from personal experience of revelation, and also from political authority. As outlined in the previous chapter, communities of pious scholars reacted first by systematically collecting and validating reports of the words and acts of early Islamic leaders, and then by developing the science of *fiqh* to systematically extend human understanding of Sharia. One result of these endeavours was to introduce into the Islamic empires of the time the concept of the rule of law, rather than of an individual. Although arrived at much earlier and through markedly different channels, this is precisely the principle that lies behind modern international notions of democracy, constitutionalism and civil rights.

In later generations, the *ulama* (Islamic scholar-jurists) gradually assumed the Companions' prerogative to elaborate the law, independently of the caliph. As a result, the ruler was to a degree beholden to the legal scholars. Although the caliphs applied Islamic law, and considerably influenced its content through the precedents their actions set, from the time of

[443] Muhammad Asad, The Principles of State and Government in Islam, 2nd ed. (Islamic Book Trust, 1980) 42.

Mu'awiya they began to concede to the *ulama* the right to declare that content. By the ninth century, the scholars had "developed political theories which enjoined obedience to the Muslim ruler" but at the same time "were clear that the law was their province and that it was theoretically binding on the caliphs and their servants".[444] Except for the *mihna*, when the 9th century Abbasid caliph al-Ma'mun attempted to reclaim the caliph's divine authority as espoused by the Umayyads, the Abbasids and subsequent caliphs "accepted the scholars' claim to be the custodians of the law and facilitated their work through patronage and official institutions", although they "felt free to disregard the elements of the law which claimed competence on public affairs, crucially on taxation and the laws of war".[445] At the same time, the jurists necessarily allowed the rulers a certain amount of independent rule-making discretion. State regulations were valid "as long as they did not contravene the divine law – as expounded by the jurists – or constitute an [abuse] of discretion".[446]

There was an inherent tension between the idea of the Prophetic *sunna* as a main source of law, and the caliph's authority.[447] Over the centuries a careful balance developed. By "endeavour[ing] to clothe the prevailing legal practices and the sultan's edicts in terms of concepts and vocabulary of the *shari'a*," the *ulama* buttressed the ruler, but also asserted their own independence and their ability to check the power of the caliph.[448] The *ulama* lent the ruler legitimacy, and institutional recognition of their *fatawa* gave the scholars scope to see that the state respected Islamic norms. Some scholars served the government as judges (*qadis*) and civil administrators, but others held that "to maintain the very independence and legitimacy of the law" they should remain apart.[449] *Qadis* and other state officials made and enforced decisions based both on Sharia and on the ruler's decrees.[450] From the reign of Harun al-Rashid onwards, "the *shari'a* judge derived his authority from the sovereign, while his law was derived from revelation through the *sunna* of the Prophet".[451] A clear boundary both limited the ruler's power to interpret the law and kept the *ulama qua* scholars from

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[444] Sami Zubaida, Law and Power in the Islamic World (I.B. Taurus, 2003) 78.
[445] Sami Zubaida, Law and Power in the Islamic World (I.B. Taurus, 2003) 78.
[446] Khalid Abou El-Fadl, Islam and the Challenge of Democracy (Princeton U. Press, 2004) 14-15.
[447] Sami Zubaida, Law and Power in the Islamic World (I.B. Taurus, 2003) 78.
[448] Sami Zubaida, Law and Power in the Islamic World (I.B. Taurus, 2003) 78.
[449] Anver M. Emon, *Shari'a and the Modern State*, in Anver M. Emon et al., eds., Islamic Law and International Human Rights Law (Oxford U. Press, 2012) 52-81 at 73.
[450] Sami Zubaida, Law and Power in the Islamic World (I.B. Taurus, 2003) 78.
[451] Sami Zubaida, Law and Power in the Islamic World (I.B. Taurus, 2003) 78.

interfering with its execution, thus "serv[ing] to highlight the proper limits of the State's authority and to mark the perimeters of its preserve".[452]

The influence of the *ulama* was pervasive. The accessibility of *muftis* to ordinary people was particularly important to the spread of an understanding of Sharia as something independent of the authority of temporal rulers. *Muftis* gained respect for their learning and piety, and for the quality of their legal reasoning, which emerged into the law through their influence as teachers and the questions they answered for clients and courts. The spread of discussion circles and centres of teaching encouraged the evolution of formally acknowledged legal schools with intricate interpretive methodologies and canons of legal rules, and their propagation into the state structure through the qualifications required of *qadis* and *muftis*. Throughout the classical era, the jurists (at least by their own reckoning) served as the guardians of the law and, when necessary, the arbiters of the rules of the relationship between governing authorities and society. The end result was that the classical caliphate operated (in theory) under a very modern principle that all earthly rulers were subject to the law, which was overseen by a somewhat independent authority.

5.3. Modern conceptions of the Islamic state

This part turns from an examination of the past to an analysis of modern visions for a renewed Islamic state. This serves the thesis by providing a theoretical framework within which to locate the empirical findings of how Islamic states actually structure their governments through their constitutions. Almost no modern Islamic states seek to exactly model themselves on a classical caliphate. Rather, they combine in varying measures the principles of governance found in the Islamic proofs, the examples established by the caliphates and the ideas of modern Muslim scholars. This part is divided into three sections. The first section reviews the ideas of Islamic revivalists who seek to hew as closely as possible to the instructions of the proofs of law in building a modern Islamic state. The second section presents the main opposing view, of Islamic modernists who would eschew strict adherence to proofs and precedents, leaving Muslim citizens to enact Islamic values into society through legislation if they so choose. The final section identifies some key commonalities between these apparently opposite visions, specifically their advocacy of what amounts to a renewal of *ijtihad* in the public sphere to reopen the discussion of what form an

[452] Sherman A. Jackson, *Shari'ah, Democracy and the Modern Nation-State: Some Reflections on Islam, Popular Rule and pluralism*, 27 Fordham Int'l L.J. (2003-04) 88-107 at 101 (footnote omitted).

Islamic state should take, and their willingness to experiment with forms of government prototyped in western secular democracies.

After the discontinuity in Islamic history caused by the decline of the Ottoman Empire, the world wars and colonialism, efforts resumed to modernise political systems in the Muslim world in an era of multiple independent states. Some of these efforts have aimed to remove Islam from the public sphere in favour of a secular nationalist ideology. Turkey is the prototypical example. Those approaches that embrace Islam, or at least the Muslim character of the population, fall broadly into two camps: one emphasises infusing Sharia norms into all aspects of society; the other aims to reform political Islam to adopt characteristics of modern democracy. Despite departing from very different first principles, the approaches are in important ways compatible. Crucially, both espouse rule with the consent and participation of the *umma*, rather than despotism.

5.3.1. Islamic revivalism

Two strands of historical thought disproportionately inform the modern debate on reviving Islamic rule according to fundamentalist principles. One emerged from Arabia in the 18th century, the other from Egypt in the late 19th century. Both are deeply rooted in Islamic tradition, sharing strong similarities in their reverence for the original proofs of law and their professed disdain for much of the juristic work of the classical era. (It is however noteworthy that many of their substantive conclusions of law tend to reflect those of at least some of the early jurists.) Their differences reflect the pluralistic nature of Islamic law, as the Arabian strand emerged from the Hanbali *maddhab* while the Egyptian approach more closely resembles Hanafi or Shafi'ite ideals. A third, newer ideology of an Islamic state emerged in Iran in the 20th century, grounded in Shia theology. Together these three visions of political Islam inform nearly all efforts to construct a new type of state based on a fundamentalist understanding of Islam.

Modern Islamic reformism dates to the 18th century Arabian Wahhabi movement.[453] The Hanbali cleric Muhammad bin 'Abd al-Wahhab rejected all ceremonies and "veneration of saints or any human being", espousing a return to the Quran and the *Sunna* of the Prophet as

[453] Ira M. Lapidus, Islamic Societies to the Nineteenth Century: A Global History (Cambridge U. Press, 2012) 360, 488.

the only sources of authority.[454] The success of the alliance between Ibn 'Abd al-Wahhab and his successors and the family of Ibn Sa'ud ensured that the political expression of Wahhabism would endure, with the added legitimacy of custody of the holy cities of Mecca and Medina. It became the prototype for a series of waves of Islamic revivalism and reformism that have ebbed and flowed, but continue to have strong influence today.

In the late 19th and 20th centuries, variants on the ideal of a reformed Islamic state developed in Egypt, Iran and India. In Egypt, the eminent jurist and *mufti* Muhammad Abduh espoused discarding all past authority except the Quran and *ahadith*, in favour of human reasoning in the form of *ijtihad* to allow each generation to re-apply the fundamental principles of Islam in the area of *mu'amalat* (social relations, as opposed to *'ibadat*, worship).[455] Unlike some who followed Abduh in applying Islamic reform to advocate pseudo-secular modernisation, his pupil Muhammad Rashid Rida developed a fundamentalist model of political Islam based on Abduh's teaching. Rida emphasised *jihad*, in the sense of an inner struggle for purity, and called for "a polity, headed by a Caliph, advised by the ulama, which would revise the law of Islam in accordance with contemporary needs".[456] Rida's idea, however, was not the caliphate of the classical era. He reinterpreted *shura* and the notion of "those who bind and unbind" – the heirs to the close Companions who selected and advised the Rashidun Caliphs – as capable of supporting modern republican governance.[457]

Like Wahhabism, modern political Islamism espouses a return to Islamic observance as described in the Quran, and advocates a state governed in accordance with Islamic values. Proponents such as Mawlana Sayyid Abu'l-A'la Mawdudi in India and, later, Ayatollah Ruhollah Khomeini in Iran and Hasan al-Banna and then Sayyid Qutb in Egypt argued that it is only possible to live as a true Muslim in an Islamic state, and called for the end of secular or foreign rule over Muslims. Mawdudi and Qutb sought to reinvigorate the religion through a renewal of *ijtihad*, relying on rational judgment grounded in the original proofs of law to determine how to apply Islam to a modern state, and discarding what they viewed as centuries'-worth of accretion of juristic dogma that was illegitimate as man-made, and no longer fit the needs of the *umma*. (Theologically, Khomeini was closer to mainstream thought

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[454] Ira M. Lapidus, Islamic Societies to the Nineteenth Century: A Global History (Cambridge U. Press, 2012) 488.
[455] Ira M. Lapidus, A History of Islamic Societies, 2nd ed. (Cambridge U. Press, 2002) 517-18.
[456] Ira M. Lapidus, A History of Islamic Societies, 2nd ed. (Cambridge U. Press, 2002) 581.
[457] Muhammad Khalid Masud, *The changing concepts of caliphate – Social construction of Shari'a and the question of ethics*, in Kari Vogt et al., eds., New Directions in Islamic Thought (I.B. Taurus & Co, 2009) 187-205 at 196.

than the others, as *ijtihad* is uncontroversial in Shia Islam, and he did not advocate permitting laymen to exercise it in public affairs.) Khomeini and Mawdudi foresaw a continuing role for jurists – although with the vast difference that the *ulama* would rule in Khomeini's state, while Mawdudi would side-line them in favour of an enlightened caliph as the civil and religious leader, advised by learned men of religion who might or might not be *ulama*.[458]

These revivalists aimed at the eventual establishment of a universal Islamic polity, but were willing to work for the time being within the confines of a state. In that context, they called for the end of what they viewed as the illegitimate rule of non-Muslims, or of Muslims who failed to rule in accordance with Islamic law.[459] Mawdudi diverged from Qutb and Khomeini in working not toward a political revolution in the near term, but to educate an Islamic society in preparation for an essentially peaceful reshaping of the political order.[460] The political climate Mawdudi faced, the decline of British rule and rise of political Hinduism in India and the establishment of a majority Muslim Pakistan, allowed him to take a longer-term and somewhat more pluralistic view of politics than his contemporaries in Egypt and Iran. Perhaps ironically, many of Mawdudi's ideas came to fruition first.

Many advocates of political Islamism did not seriously grapple with the question of how to construct a legal and institutional order that would realise their visions. Khomeini and Mawdudi were notable exceptions. Khomeini implemented his ideal of an Islamic theocracy in Iran from 1979. Mawdudi considerably influenced the 1956 constitution of Pakistan, immediately by drafting portions of it, but more importantly through decades of writing and organising that "anchored national politics in the concern for the Islamicity of the state and convinced Pakistanis of Mawdudi's view of how to frame key questions about the role of Islam in the state".[461] Mawdudi and Qutb envisioned a state led by an enlightened caliph elected or at least acclaimed by the people, alongside an elected assembly. Mawdudi promoted the "democratic caliphate", in which the chief executive would act as God's delegate, implementing the commands of Sharia.[462] The assembly would be advisory rather than legislative, as the state would reach correct conclusions of law through *ijtihad*, acting simultaneously as chief judge and law-giver, in the mould of the original Medinan

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[458] Seyyed Vali Reza Nasr, Mawdudi and the Making of Islamic Revivalism (Oxford U. Press, 1996) 97.
[459] Hamid M. Khan, *Nothing is Written: Fundamentalism, Revivalism, Reformism and the Fate of Islamic Law*, 24 Michigan J. Int'l L. (Fall 2002) (student Note) 273-345 at 308.
[460] Seyyed Vali Reza Nasr, Mawdudi and the Making of Islamic Revivalism (Oxford U. Press, 1996) 78.
[461] Seyyed Vali Reza Nasr, Mawdudi and the Making of Islamic Revivalism (Oxford U. Press, 1996) 44.
[462] Seyyed Vali Reza Nasr, Mawdudi and the Making of Islamic Revivalism (Oxford U. Press, 1996) 89.

governance.[463] Both Mawdudi and Qutb held that God's word could have only one correct meaning, and as any good Muslim could find that meaning in the Quran and *ahadith*, the *ulama* had no special status as interpreters of the law.

None of the state models proposed by modern Islamists closely matches the classical caliphate,[464] and it is difficult to see how they cohere with any modern political system except one-party autocracy. The Medinan state rested on the authority of the Prophet as the Messenger of God. If, in the Prophet's absence, even the Companions did not always agree on a point of law, it is unclear how the Prophet's infallibility would devolve on any modern person or group. Both Qutb and Mawdudi proposed in effect that the leaders of the Islamic party would choose the ruler-designate to present to the people. However, the possibility for dissent among "those who bind and unbind" had been revealed in the first moment of the original caliphate, in the debate that led to Abu Bakr's selection as caliph. Even if as in Mawdudi's model the community legitimises the caliph by acclamation, thus fulfilling the widely reported *hadith* that the *umma* will not agree in error, the error might already have occurred in the nomination.

5.3.2. The modernist view

Modernist Muslim thinkers share with the fundamentalist revivalists a desire to re-think how Islam should operate in the public space. They also agree that the time has come to discard many of the analyses and conclusions reached by the *ulama*, particularly in the classical era. These modernists are however much more willing than the fundamentalists to depart from the literal words of the proofs of law. One important implication of this difference is that the modernists can more easily than the traditionalists reconcile a Muslim society with the idea of a state that does not necessarily seek to apply Sharia as a matter of public policy. A firm grounding in Islamic principles can suffice, or possibly even a trust that if supplied with democratic institutions and political freedom a Muslim populace will opt for policies that reasonably reflect Islamic norms.

Ever since the technological and political eclipse of the Ottoman Empire became obvious, a second strand of reformism has competed with the Islamic revivalists. Modernisers since at least the time of the first Ottoman constitution have sought to adopt some of the political,

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[463] Seyyed Vali Reza Nasr, Mawdudi and the Making of Islamic Revivalism (Oxford U. Press, 1996) 90.
[464] See e.g., Noah Feldman, The Fall and Rise of the Islamic State (Princeton U. Press, 2008) 111 (the Islamists' "shari'a-oriented constitutional proposal represents not the classical Islamic constitution but something very different: a novel set of Islamized constitutional arrangements").

educational and technological ideas of secular European states, while still maintaining a close connection to Islam.[465] For example, Khan proposes a 'fusion state', a constitutional state that "aligns itself with a designated religion or denomination" but protects the rights of religious minorities, a duty incumbent upon a state that "enforce[s] the laws and morality of Islam".[466]

In this view, an 'Islamic state' need not enforce strict adherence to the divine proofs, nor be governed by a monolithic executive. A Muslim society can adopt the forms and even the laws of Western democracies, trusting the community to use them in keeping with their faith. Even if the revivalist approach to *ijtihad* could consistently arrive at the same substantive conclusions of law as would have emerged in Medina under the Prophet, the application of those conclusions might not be feasible today. Emon, for example, argues that the pre-modern rules of *fiqh* "were the product of juristic deliberation at a particular time and space", and their mechanical application in an institutionally, politically and socially very different modern state risks "logical or social dissonance".[467] This indicates a need to re-think these rules. Failure to consider the historical context in which a rule developed can result in the application of a particular set of values that neither have a strong foundation in Islamic law, nor reflect modern priorities of governance.[468] In al-Jabri's view, "[t]he results of *ijtihad* concerning any matter left for Muslims to decide will certainly vary with times and circumstances".[469]

An-Naim goes further, arguing that only where the state remains neutral with regard to religion can Muslims fulfil their religious obligations entirely of their own volition, which he sees as a fundamental tenet of Islam.[470] In a state that adhered to the principle of 'civic

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[465] Ira M. Lapidus, A History of Islamic Societies, 2nd ed. (Cambridge U. Press, 2002) 496-97 (the effort to modernise began some decades earlier in the Tanzimat reforms, but only with the 1876 uprising of the "Young Ottomans" that led to the constitution did it explicitly seek to incorporate Islamic values).

[466] L. Ali Khan and Hisham M. Ramadan, Contemporary *Ijtihad* (Edinburgh U. Press, 2011) 122-23 (citing L. Ali Khan, A Theory of Universal Democracy (Kluwer International, 2006)).

[467] Anver M. Emon, *The Limits of Constitutionalism in the Muslim World: History and Identity in Islamic Law*, in Sujit Choudhry, ed., Constitutional Design for Divided Societies: Integration or Accommodation? 258-86 at 285.

[468] Anver M. Emon, *The Limits of Constitutionalism in the Muslim World: History and Identity in Islamic Law*, in Sujit Choudhry, ed., Constitutional Design for Divided Societies: Integration or Accommodation? 258-86 at 279-80 (relating the 12th century jurist Ibn Rushd's description of how wrongful death compensation for non-Muslims shifted from equality in the early caliphate, to equality but with the state paying half the amount under Mu'awiya, to half compensation under Umar II about 40 years later, apparently simply to save money, rather than a deliberate recasting of a legal norm).

[469] Mohammed Abed al-Jabri, Democracy, Human Rights and Law in Islamic Thought (I.B. Tauris, 2009) 36-37.

[470] Abdullahi Ahmen An-Na'im, Islam and the Secular State (Harvard U. Press, 2008) 4-5. In An-Naim's view, a government's assertion of its Islamic character may be misleading. Id., 52 ("Such claims did not make past rulers superior Muslims or the state they controlled Islamic").

reason', citizens could advocate that the state act pursuant to Islamic norms such as *riba* (the prohibition on interest) or *zakat* (collection of funds to provide for social welfare), but should use arguments grounded beyond their personal religious beliefs, in the greater good of society.[471] Such an approach would rely on the broad Islamic consciousness and shared values of a Muslim society to develop a state infused by Islamic values.

While the modernists do not agree among themselves, much less with the revivalists, on the degree to which an Islamic state should seek to enforce Islamic norms, they share a consensus on the ideas of *ijtihad* and representative democracy. As with the shift from the *ulama* to the *umma* of the responsibility to declare the content of the law, this transfers from the ruler to the people "the responsibility for implementing what God has commanded".[472]

5.3.3. Islamism

Contemporary visions of an Islamic state draw heavily on history. In the context of a religion that for nearly all of its formative centuries provided not only the ideology of public administration in the lands where it prevailed, but a detailed body of law as well, it is difficult to imagine its adherents arriving at a secularist consensus in the near future. As this chapter will proceed to discuss, however, Islamic rule does not require—and arguably cannot tolerate—repression, autocracy or failure to uphold and defend human rights. The opposite case is far more likely.

Islamic revivalists and Muslim modernists have each developed their ideas atop a foundation of Islamic tradition. Notwithstanding real differences and vehement ideological competition, there is also a wide area of agreement between these two approaches. Like Mawdudi and Qutb, modernists propose renewed *ijtihad* as a means to continue to develop new substantive rules of Islamic law to fit a modern society. Even if there was once sufficient consensus to establish that *ijtihad* is no longer permitted, it is arguably not open to human authority to forbid it, and there is nothing "to prevent the emergence of a new consensus that *ijtihad* should be freely exercised to meet the new needs and aspirations of Islamic societies".[473]

On this point the dissent comes not from the revivalists but from the traditionalists. Jackson, for example, argues that renewed *ijtihad* is unnecessary to reformulate Islamic law to fit

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[471] Abdullahi Ahmen An-Na'im, Islam and the Secular State (Harvard U. Press, 2008) 93.
[472] See e.g., Noah Feldman, The Fall and Rise of the Islamic State (Princeton U. Press, 2008) 119-20.
[473] Abdullahi Ahmen An-Na'im, Islam and the Secular State (Harvard U. Press, 2008) 15. This view would appear to be open to criticism from the classical point of view that once consensus is achieved, it binds future generations. However An-Na'im's thesis does not necessarily require the absence of consensus.

modern society, and possibly even counter-productive. In Jackson's view, pure *ijtihad* "lacks the power of self-authentication"; reformulated Islamic governance will more readily acquire long-term legitimacy if it proceeds from a robust foundation in traditional Islamic law.[474] Far from having ossified to the point where only a fundamental revision of its basic principles can maintain its relevance, *fiqh* can and does evolve through the processes of interpretation and use of precedent that comprise *taqlid*.[475]

Modernists and revivalists alike would open *ijtihad* to the community at large. In a republican government, this would replace the role of the *ulama* advising the ruler how to interpret Sharia with the legislature, in effect the *umma*, passing laws to implement Islamic norms.[476] This does not fit the classical model of Islamic governance, and engenders strong objection from traditionalists concerned about the integrity of *fiqh*, but nonetheless represents a point of congruence among most modern commentators on political Islam, and one the revivalists could agree with. It also does not represent a radical departure from the diminution of the role of the *ulama* in modern times, of advising the ruler but exercising actual oversight only in certain fields such as family and personal status law.

Routing part of the ruler's power to an elected assembly, however, is without precedent in pre-modern Islamic governance. Here, the open-endedness with regard to means of the Quranic and Prophetic commands to practice *shura*, and the existence of a view that having solicited consultation the ruler is bound to accept its conclusions,[477] may create sufficient space to enable the people to exert their will on the ruler. Alternatively, there may at least be a consensus of modernists, revivalists and traditionalists on the validity of an elected assembly, which would narrow the disagreement to whether that assembly may enact legislation, or must merely advise. The issue is not whether the ruler or the assembly may create law—human-created legislation is defensible as an exercise of *siyasah* which has always been a prerogative of the caliph or the emir—but rather, whether within the zone of *siyasah* the power of the ruler may be other than monolithic. On this point the revivalists seem unwilling to concede in principle: although in practice they have been willing to

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[474] Sherman A. Jackson, *Shari'ah, Democracy and the Modern Nation-State: Some Reflections on Islam, Popular Rule and pluralism*, 27 Fordham Int'l L.J. (2003-04) 88-107 at 93.
[475] Sherman A. Jackson, *Shari'ah, Democracy and the Modern Nation-State: Some Reflections on Islam, Popular Rule and pluralism*, 27 Fordham Int'l L.J. (2003-04) 88-107 at 91-92.
[476] See e.g., Noah Feldman, The Fall and Rise of the Islamic State (Princeton U. Press, 2008) 119-20.
[477] It is also sometimes argued that the outcome of *shura* can bind the ruler's decisions. See e.g. Yusuf al-Qaradawi, *Islam and Democracy*, in Roxanne L. Euben and Muhammad Qasim Zaman, eds., Princeton Readings in Islamist Thought (Princeton U. Press, 2009) 230-45 at 244-45. Although this is likely a minority view, in the absence of consensus to the contrary, it may still fall within the range of acceptable interpretations.

compete in electoral politics, it remains to be seen whether once having achieved power through election an Islamist party in the revivalist mould as presented here could countenance surrendering it at a subsequent election.

5.4. Principles of Islamic rule

This part completes the analysis of the ideals of Islamic government. Drawing on the examples of the caliphate and the efforts of revivalist and modernist thinkers discussed in the chapter thus far, it lays out three of the core principles that the government of any Islamic state must implement. The first section delves into the nature of what might be called the divine right to rule. In an Islamic state, this raises a question crucial to enabling participatory governance: is power bestowed on the ruler directly by God, or on the people who then delegate it to the ruler? The other two sections deal with concepts more familiar to western ideals, rule by justice and rule through consultation. Rule by justice encapsulates a large proportion of the Islamic human rights paradigm, while consultation is key to enabling citizens to participate in their government.

Islamic law requires ruling authorities to follow certain basic principles. These political ideals resemble those that underpin post-Enlightenment western democracy.[478] The institution of the *bay'ah* demonstrates that Islamic rule rests on the consent of the governed. Drawing on Quranic verses and *ahadith*, especially the practices of the early caliphs, Kamali outlines further rules of Islamic governance.[479] The first duty of the ruler is to command good and forbid evil. All are subject to the rule of law, including the ruler. Leadership is a public trust. The community has the right to remove an unjust ruler. Crucially for a democratic implementation of an Islamic state, the ruler must consult with the community, according to the principle of *shura*. Notwithstanding the precedent of the caliphate, Islam contains no intrinsic preference for a particular political system, but concepts such as *bay'ah*, *shura*, *ijtihad* and *ijma* "have political connotations conducive to the social construction of democracy".[480]

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[478] Azzam S. Tamimi, Rachid Ghannouchi: A Democrat Within Islamism (Oxford U. Press, 2001) 80 (analysing Ghannouchi's political theory presented in *Al-Hurriyat al-'Ammah Fid-Dawlah al-Islamiyyah* (Public liberties in the Islamic state), Beirut, 1993, as "compatible with democracy and pluralism", and specifying *ijtihad*, *ijma* and *shura*).

[479] Mohammad Hashim Kamali, Citizenship and Accountability of Government: An Islamic Perspective (Islamic Texts Society, 2011) 195-96.

[480] Nader Hashemi, *Islam and Democracy*, in John L. Esposito and Emad El-Din Shahin, eds., The Oxford Handbook of Islam and Politics (Oxford U. Press, 2013) 68-88 at 72.

This part presents some of the foundational principles that guide an Islamic ruler. It begins with the threshold issue of why exactly an Islamic ruler is entitled to rule, a question that has exercised Islamic theorists from classical times to the present, and that triggered the civil wars that ended the era of the rightly-guided caliphs. After identifying the basis for Islamic rule and locating it within a modern understanding of government by consent, the section discusses two of the most fundamental principles: an Islamic ruler must rule justly, and in consultation with the community. The first of these incorporates the concept of the rule of law. The second provides the basis for introducing modern forms of democratic government into a polity grounded in a fundamentalist understanding of Islam.

5.4.1. Source of the right to rule

A basic assumption underlying international human rights law is that the power to govern rises from the consent of the people. In the European tradition, this represents a relatively recent development, prototyped by the American independence and the French revolution, developing through the 19th century, and taking purportedly universal form in the 20th century international human rights instruments. Even today, states are the atomic units underlying much of mainstream international law, wielding sovereignty *qua* states. By contrast, from the caliphate onwards, an "Islamic state [views] itself as being only a trustee of power and not a central consolidated repository of sovereign and absolute power".[481] The right to rule an Islamic state, if it does not arise from the people themselves as secularists argue, springs from God. This mandate is seen as passing from God to the ruler directly, or as flowing from God through the community to the ruler. An Islamic state's view as to which of these is correct can reflect into its choice between monarchical and republican forms of government.

The Prophet, as the founder of the community, was both chosen by God to pronounce and guide the new religion, and freely acclaimed by the people as they severally decided to adhere to his community. Left to decide how to govern a growing state, his successors drew on the Prophet's teaching, but also on Arab traditions of decentralised rule by tribal leaders, and later, on Persian mysticism. The law lagged the politics, as scholars sought to fit Umayyad and Abbasid claims into a legal framework that would allow both the ruler and the *ulama* to maintain that the caliphate operated under the rule of law. This resulted in a close

[481] C.G. Weeramantry, Islamic Jurisprudence: An International Perspective (Macmillan, 1988) 131.

similarity "between the theories of *fuqaha'* on the caliphate and the actual forms of rule in Islam".[482]

Once the succession became contested, theories of legitimation developed. Most of them arose out of the disagreements between the partisans of Ali and the prominent clans who held the caliphate. Sharon traces the debate as evolving from arguments claiming consensus, to seniority in Islam, then kinship to the Prophet and finally designation by the Prophet, the ultimate claim of Ali's followers.[483] Abu Bakr and Umar became caliphs based on general consensus and seniority (and Abu Bakr's designation of Umar).[484] Umar tried to institute consensus, but schism made that inoperable after its one use, the *shura* that chose Uthman.[485] The resurgence during Uthman's caliphate of the old Meccan nobility, willing to share social status but not political power with the other senior Muslims, disabled consensus, and "challenged the ideas of tribal freedom and Islamic seniority".[486] Ali grounded his argument against Mu'awiya in consensus, but in fact became caliph based on his seniority in Islam.[487] Mu'awiya inaugurated hereditary rule based on divine predestination demonstrated by military power, bluntly acknowledging he had become caliph "with my sword".[488]

Mu'awiya's successors claimed the caliphate descended from the last caliph designated through *shura*, Uthman, but also that the ruling charisma attached to the descendants of Abu

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[482] Mohammed Abed al-Jabri, Democracy, Human Rights and Law in Islamic Thought (I.B. Tauris, 2009) 36 ("the Sunni theory of the caliphate is generally an attempt to legalize an accomplished fact").

[483] Moshe Sharon, *The Development of the Debate around the Legitimacy of Authority in Early Islam*, in Fred M. Donner, ed., The Articulation of Early Islamic State Structures (Ashgate Publishing Ltd., 2012) 15-35 at 25 ("*rida wa-jama'ah, sabiqah, qarabah, wasiyyah* [and] *nass*").

[484] Moshe Sharon, *The Development of the Debate around the Legitimacy of Authority in Early Islam*, in Fred M. Donner, ed., The Articulation of Early Islamic State Structures (Ashgate Publishing Ltd., 2012) 15-35 at 21. "The principle of seniority achieved some legal standing with the establishment of the *diwan* of 'Umar (634-644) in which the *ata*, the pension, was paid according to the *sabiqah* or *qidam*, the priority and precedence in the service for Islam". Id. at 17.

[485] Moshe Sharon, *The Development of the Debate around the Legitimacy of Authority in Early Islam*, in Fred M. Donner, ed., The Articulation of Early Islamic State Structures (Ashgate Publishing Ltd., 2012) 15-35 at 21-22.

[486] Moshe Sharon, *The Development of the Debate around the Legitimacy of Authority in Early Islam*, in Fred M. Donner, ed., The Articulation of Early Islamic State Structures (Ashgate Publishing Ltd., 2012) 15-35 at 22-23.

[487] Moshe Sharon, *The Development of the Debate around the Legitimacy of Authority in Early Islam*, in Fred M. Donner, ed., The Articulation of Early Islamic State Structures (Ashgate Publishing Ltd., 2012) 15-35 at 24, 26. Sharon argues that the fact that in order to secure the caliphate Ali had to fight the Battle of the Camel against forces led by some of the most senior companions casts doubt on his assertion of consensus. Id. at 26. The same events rendered Mu'awiya's claim to consensus equally unlikely.

[488] Mohammed Abed al-Jabri, Democracy, Human Rights and Law in Islamic Thought (I.B. Tauris, 2009) 42. Mu'awiya resorted to predestination as the basis of his claim because he "knew only too well that he had usurped rule by the sword; therefore he lacked the legitimacy on which rule in Islam had been built since Abu Bakr, namely the Islamic legitimacy of [*shura*]". Id. 41-42.

Manaf, "the common ancestor of Muhammad, Ali, al-Abbas and Mu'awiya".[489] The latter claim was of limited avail, in view of the closer kinship between the Prophet and his first cousin Ali,[490] or for that matter with the family of Abdallah ibn Abbas, their paternal uncle and the Prophet's heir.[491] Once the Prophet's legacy had grown to that of the unquestionable founder of the faith, the Umayyad claim based on inheritance from Uthman began to look unconvincing.[492] The Abbasids succeeded the Umayyads on grounds that the latter had deviated from Islamic rule, and that the imamate descended in the Prophet's family, the Banu Hashim.[493] In principle and in fact, they reinstated the priority of *qarabah*, kinship to the Prophet.[494] To the assertion of predestination they answered (besides the obvious fact that they, not the Umayyads held power) with the "slogan of *al-qadr*, meaning the freedom of the human and being able to choose, and, consequently, his bearing responsibility for his actions. Thus, the 'Abbasids attempted to find legitimacy for their rule . . . in the 'divine will'".[495] Ali's partisans posthumously attached *qarabah*, then "introduced *wasiyyah*", designation, which "changed the picture completely", attaching to the caliphate "a divine aura" which "transformed [the caliph] in Shi'ite thinking to a God-guided imam" rather than simply a secular leader.[496] This established an unassailable ideology,[497] but also rendered the schism with the followers of the Sunni caliphs extremely difficult to resolve. Sharon presents the

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[489] Ann K. S. Lambton, State and Government in Medieval Islam (Oxford U. Press, 1981) 46 and footnote 6. Uthman and Mu'awiya's Umayyad clan "claim[ed] to be the *ahl al-bayt* in the original sense of . . . the leading family in the tribe". Moshe Sharon, *The Development of the Debate around the Legitimacy of Authority in Early Islam*, in Fred M. Donner, ed., The Articulation of Early Islamic State Structures (Ashgate Publishing Ltd., 2012) 15-35 at 30.

[490] Moshe Sharon, *The Development of the Debate around the Legitimacy of Authority in Early Islam*, in Fred M. Donner, ed., The Articulation of Early Islamic State Structures (Ashgate Publishing Ltd., 2012) 15-35 at 31.

[491] Moshe Sharon, *The Development of the Debate around the Legitimacy of Authority in Early Islam*, in Fred M. Donner, ed., The Articulation of Early Islamic State Structures (Ashgate Publishing Ltd., 2012) 15-35 at 29. The Umayyads countered that "[k]inship with the Prophet . . . was an overwhelmingly important personal merit but not a basis on which to rest any claim to the legitimate leadership of the *ummah*". Id. at 29-30.

[492] Patricia Crone and Martin Hinds, God's Caliph: Religious Authority in the First Centuries of Islam (Cambridge U. Press, 1986) 32-33.

[493] Ann K. S. Lambton, State and Government in Medieval Islam (Oxford U. Press, 1981) 47 (the faction that took power had split from the Hashimiyya after the death of Abu Hashim, whom they held had inherited the imamate from his father, "the 'Alid [Shia], Muhammad b. al-Hanafiyya". The third Abbasid caliph, al-Mahdi, re-based the family's claim "on descent from al-'Abbas b. 'Abd al-Muttalib as the kinsman and rightful successor of the prophet").

[494] Moshe Sharon, *The Development of the Debate around the Legitimacy of Authority in Early Islam*, in Fred M. Donner, ed., The Articulation of Early Islamic State Structures (Ashgate Publishing Ltd., 2012) 15-35 at 31.

[495] Mohammed Abed al-Jabri, Democracy, Human Rights and Law in Islamic Thought (I.B. Tauris, 2009) 42. The Divine will "was established through what Ibn al-Muqaffa' and others of the 'Sultanate authors' copied from the Persian Sultanate ideologies and similar sources, which compare the despotic ruler to a god". Id. 43.

[496] Moshe Sharon, *The Development of the Debate around the Legitimacy of Authority in Early Islam*, in Fred M. Donner, ed., The Articulation of Early Islamic State Structures (Ashgate Publishing Ltd., 2012) 15-35 at 31. *Wasiyyah* "meant that the Prophet in an explicit ordinance, *nass*, nominated 'Ali as his heir". Id. at 25.

[497] Sami Zubaida, Law and Power in the Islamic World (I.B. Taurus, 2003) 90 (the Shi'ite theory of the *imamiya* rested on "continuity with the prophetic period in the imamate of the descendants of the Prophet", and the infallible imam.).

terms of the debate over the source of the caliphs' right to rule as essentially set by the end of the first Islamic century.[498]

'*Khalifa*' can be translated as either deputy or successor. To whom? There is an extensive literature on whether a duly recognised caliph is *khalifat allah* or *khalifat rasul allah* – God's deputy, or the Prophet's successor. The former implies a divine right to rule, inviting autocracy and hereditary succession, while the latter indicates merely that the caliph assumed the political mandate the Prophet exercised on behalf of the *umma*. In the conventional Sunni understanding, the earliest caliphs did not claim to rule by divine right or with divinely-inspired authority. Rather, the caliphs had assumed the Prophet's temporal leadership, by agreement of the community. Al-Jabri argues that the first caliphs were primarily military commanders, as the proofs of law lacked a clear prescription for government, and Arab tradition did not include state structures.[499] After the first *fitnah*, the civil war that ended in Hasan's abdication of the caliphate to Mu'awiya, "the Umayyads appear to have used the title *khalifat allah*, and to have claimed to reign by the *qadar* and will of God as his [vicegerents]".[500] The Abbasid dynasty reintroduced the idea and terminology of succession to the Prophet, but "did not thereby stop regarding themselves as deputies of God".[501]

Today, in the absence of a universally acclaimed caliph, temporal leadership of the *umma* is fragmented. This alone does not mean that Islamic states lack a legitimate sovereign. Even the classical caliphate occasionally recognised more than one caliph, such as when the Umayyad dynasty in Spain coexisted with the Abbasid caliphs in Baghdad, an arrangement some jurists rationalised by postulating that caliphs could coexist if separated by an ocean. For most of its history, the Abbasid caliphate itself encompassed multiple effectively independent emirs or commanders, ruling their separate fiefs in the name of the distant caliph. Thus it would not be a major innovation to say that today a multiplicity of Islamic rulers could coexist and rule under the same umbrella of sovereignty that a caliph once personified, but that today may be found in a direct relationship between God and the *umma*, or even in the collective Islamic legitimacy of an international organisation such as the OIC.

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[498] Moshe Sharon, *The Development of the Debate around the Legitimacy of Authority in Early Islam*, in Fred M. Donner, ed., The Articulation of Early Islamic State Structures (Ashgate Publishing Ltd., 2012) 15-35 at 35.
[499] Mohammed Abed al-Jabri, Democracy, Human Rights and Law in Islamic Thought (I.B. Tauris, 2009) 39-40 (After Umar's accession, he was called "'Caliph, or Caliph of the Messenger of Allah'. 'Umar did not savour that title and preferred 'commander of the faithful' . . . because he felt it expressed the essence of his duties, which were to command the Muslim armies in the wars they were fighting against the apostates").
[500] Ann K. S. Lambton, State and Government in Medieval Islam (Oxford U. Press, 1981) 46, see footnote 6.
[501] Patricia Crone and Martin Hinds, God's Caliph: Religious Authority in the First Centuries of Islam (Cambridge U. Press, 1986) 16.

The caliph was not the source of the right to rule, but merely the one who held it in trust for the people. Modern Islamic rulers can in principle draw from the same well of legitimacy that sustained the caliphs in their role as God's deputy or the prophet's successor.

In this sense, regardless of how it is transmitted, power in any Islamic state can be seen as divinely grounded. The foundation of governance, according to al-Mawardi, is a religious faith which "espouses the virtue of knowing God, thus inculcating a sense of duty in the individual to adhere to God's will. By extension, this duty can be directed toward the ruling authority".[502] The ruler stands on both sides of the duty, as the recipient of individual loyalty but at the same time owing loyalty to God. Monarchy and republicanism reflect the respective views that legitimacy is divinely assigned, or that the people hold God's trust, of which the ruler is but the custodian. Among modern Islamic states there are six monarchies in the Arabian Peninsula,[503] and one republic, Yemen. Elsewhere republics predominate, except for Brunei, Jordan and Morocco. Several of the monarchies claim descent from the Banu Hashim, the Prophet's clan.

Ultimately an Islamic state is merely a means to achieve the end of correct leadership of the *umma*. This implies safeguarding their safety and basic livelihood, duties any state owes its people, but also ensuring that the government retains its legitimacy under Sharia. As the next chapter discusses in more detail, an Islamic state should strive to implement Sharia in the public space. But this is best achievable politically if the state can draw its right to rule back to the principles that supported the classical caliphs in office and guided their rule. Whence the right to rule an Islamic society originates affects whether and how the people may share in the ruling power. The Prophet's silence as to his succession could signal that the responsibility for government devolves on the people generally: he demonstrated the principles of an Islamic society, then trusted those who best understood the message to carry it forward. A caliph is however the original model of a legitimate Islamic ruler; in a sense all temporal rulers exercise the same ruling power the classical caliphs held in trust. Whichever path a state takes to establish its Islamic legitimacy, under international norms it must enable the people to participate in self-governance.

5.4.2. Just rule

[502] Anver M. Emon, *Shari'a and the Modern State*, in Anver M. Emon et al., eds., Islamic Law and International Human Rights Law (Oxford U. Press, 2012) 52-81 at 69.
[503] Bahrain, Kuwait, Oman, Qatar, Saudi Arabia and the United Arab Emirates.

The Quranic idea of just rule, as developed by Abu Bakr and the other early caliphs, resembles the modern norm of the rule of law. Abu Bakr acknowledged his rule was not absolute, but subject to Sharia. Ibn Taymiyyah based his theory of *siyasah*—subordinating the ruler's discretion to the strictures of Sharia—on the Quran and the Prophet's teaching, but also on the acts of Abu Bakr as the first Islamic ruler who lacked the advantage of direct instruction from God. The Quran contains the idea of rule as a public trust, forbidding arbitrariness. The ruler must act to advance the public good—understandable in terms of *maslahah*, pursuing the five aims of Sharia, protection of life, property, intellect, religion and family—and must treat all citizens, including the ruler, as equal under the law. Stripped of their religious grounding, these priorities would fit exactly into the international framework.

The caliph held only a conditional claim on the people's allegiance. In his inaugural speech, Abu Bakr asked the people to "[a]ssist me when I am right but [] stop me when I am wrong", and admonished them to obey him only so long as he obeyed God.[504] Conditioning allegiance on adherence to the Quran and *sunna* reflected the view that those proofs "stood for whatever was perceived to be right and proper in any given case",[505] a proxy for the concept of just rule. An Islamic ruler also bears a duty to command (promote) good and forbid evil. This is grounded in *hisbah*, the duty of all Muslims to prevent or stop acts that harm the *umma*. A third main component of just rule is equality before the law, an inevitable implication of the Prophetic *hadith* that all Muslims are equal, like teeth in a comb. A just ruler accepts this sacred trust, using it to command good and forbid evil, treating all believers as equal before God's law. The community may withdraw its allegiance and dismiss a ruler who fails to uphold these basic principles – indeed, the duty of *hisbah* implies it must do so. Some modern Islamic constitutions implement this right or duty in the form of impeachment.

Rulership is a public trust. Rule by consent implies the ruler is a trustee of the people. Honouring this trust is a key principle of justice. Kamali explains this by analogy to the divine trust the Quran recognised in King David to implement the prime goal of government, justice, which he held so long as his "exercise of power . . . conformed to correct guidance

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[504] Mohammad Hashim Kamali, Citizenship and Accountability of Government: An Islamic Perspective (Islamic Texts Society, 2011) 199. The Quran places rulers and government officials under a duty "to faithfully discharge their trust" on behalf of God and the community. Id., 211 (citing Quran 4:58 and 38:26).

[505] Patricia Crone and Martin Hinds, God's Caliph: Religious Authority in the First Centuries of Islam (Cambridge U. Press, 1986) 67.

and avoided arbitrariness and indulgence in" his own desires.[506] Because each Muslim is individually responsible to God, including the ruler, Islamic rule can never be "capricious or arbitrary".[507] Corruption was not to be tolerated, and already by the time Ali became caliph, "the precedent of periodical inspection into the conduct of officials was well recognised and became an established practice".[508] *Hisbah* is a duty of all Muslims, which the ruler is expected to exercise on behalf of the *umma*. This does not relieve individuals of their duties (a Muslim who becomes aware of errant behaviour must personally seek to correct it if possible),[509] but it is especially incumbent on the ruler, who has the authority to command observance of Sharia norms and the power to carry out the necessary acts of oversight and enforcement.

Islamic law is fundamentally egalitarian. Kamali relates that the second caliph, Umar, awarded the right of retaliation to a man whom a senior companion, 'Amr bin al-'As, allegedly insulted in the mosque.[510] During their caliphates, Umar and Ali were each involved in private lawsuits; in both cases the court applied the principle of equal treatment between litigants even to the head of state, in keeping with a letter of instruction from Umar to the judges he appointed.[511] The ethic of the *ulama* that required *muftis* to give legal advice whenever asked enabled people to understand their legal rights and how to present their cases, and *qadi* courts gave them a venue to do so. The court of the caliph, or of his delegates or provincial authorities, was open to the people to register complaints against official acts.

Hisbah implies a community right to remove an unjust ruler. According to Kamali, this is seen as grounded in the Quranic commands to "enjoin good [and] forbid evil" and to "fear tumult" or oppression,[512] although the community must determine its exact mechanisms and

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[506] Mohammad Hashim Kamali, Citizenship and Accountability of Government: An Islamic Perspective (Islamic Texts Society, 2011) 211. As with King David, this places a duty on government officials "to faithfully discharge their trust" on behalf of God and the community. Id.

[507] C. G. Weeramantry, Islamic Jurisprudence: An International Perspective (Macmillan, 1988) 117 (citing Quran 4:58, "Allah commands you to render back your trusts to those to whom they are due and when you judge between men and men that you judge with justice").

[508] Mohammad Hashim Kamali, Citizenship and Accountability of Government: An Islamic Perspective (Islamic Texts Society, 2011) 203.

[509] Azzam S. Tamimi, Rachid Ghannouchi: A Democrat Within Islamism (Oxford U. Press, 2001) 98 (quoting Ghannouchi as stating that this "is what prompted . . . Ibn Taymiyah to conclude that God may support a just state even if it were non-Muslim and may bring defeat unto the unjust state even if it were Muslim").

[510] Mohammad Hashim Kamali, Citizenship and Accountability of Government: An Islamic Perspective (Islamic Texts Society, 2011) 202 ('Amr submitted himself, and the man forgave him).

[511] Mohammad Hashim Kamali, Citizenship and Accountability of Government: An Islamic Perspective (Islamic Texts Society, 2011) 263-64.

[512] Mohammad Hashim Kamali, Citizenship and Accountability of Government: An Islamic Perspective (Islamic Texts Society, 2011) 280-81 (citing Quran 9:71 and 8:25).

the conditions under which to exercise it. In al-Qaradawi's view, an Islamic ruler is a (fallible) "employee" representing the community, which may "hold its representative accountable or [divest] him of this position whenever it wishes and especially if the representative fails in his obligations".[513] Accordingly, several modern Islamic constitutions provide for impeachment. In Afghanistan, Egypt and Mauritania the people's representatives can vote (by two-thirds) to remove the president from office to trial by a special court.[514] Grounds specified in Afghanistan include "crimes against humanity, national treason or other crimes".[515] This is not exactly the rule announced by Abu Bakr, that the people should cease to obey him if he failed to govern in accordance with Sharia, but there is certainly room to interpret failings leading to impeachment as violations of Islamic duties such as to rule justly ("crimes against humanity" would constitute injustice), or to protect the community (which treason would violate). Conversely, independent heads of states can dissolve parliaments in Algeria, Mauritania, Morocco and Syria,[516] and in Egypt and Yemen can do so with the approval of a public referendum.[517]

5.4.3. *Shura*

An enigmatic yet core injunction for Islamic governance is the requirement of consultation, *shura*. The Quran commands the Prophet to "consult [the community] in their affairs", and praises the fact of consultation.[518] As with rule by consent, just rule and rule according to law, this norm of *siyasah Sharia* resembles international standards as it empowers citizens to participate in their own governance. Kamali links Islam and democracy via *shura*: Sharia requires "that government should consult the community, especially the learned among them,

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[513] Yusuf al-Qaradawi, *Islam and Democracy*, in Roxanne L. Euben and Muhammad Qasim Zaman, eds., Princeton Readings in Islamist Thought (Princeton U. Press, 2009) 230-45 at 235.

[514] Constitution of Afghanistan (2003), art. 69 (at least one third of the *Wolesi Jirga* must sponsor the motion to charge, which must pass by two thirds. A *Loya Jirga* convenes, and by two thirds vote can remove the president to trial by a court "composed of three members of the Wolesi Jirga and three members of the Supreme Court appointed by the Loya Jirga and the Chair of the Meshrano Jirga"); Constitution of Egypt (2014), art. 159 (two thirds of the House of Representatives can vote to impeach the president, who is then tried before the top judges of the state); Constitution of Mauritania (1991, amended 2006), arts. 92 (majority of the combined legislature charges, absolute majority votes for a trial), 93 (trial before a court elected from the two chambers).

[515] Constitution of Afghanistan (2003), art. 69.

[516] The president of Syria need only proffer a reasoned decision, while the other constitutions require consultation with legislative or judicial leaders. Constitution of Algeria (1996, amended 2002), art. 129 ("the President of the National People's Assembly, the President of the Council of the Nation and the Head of the Government"); Constitution of Mauritania (1991, amended 2006), art. 31 ("the Prime Minister and the Presidents of the Assemblies"); Constitution of Morocco (2011), art. 96 (Constitutional Court); Constitution of Syria (2012), art. 111(1).

[517] Constitution of Egypt (2014), art. 137; Constitution of Yemen (1991, amended 2001), art. 101(a).

[518] Mohammad Hashim Kamali, Principles of Islamic Jurisprudence (Islamic Texts Society, 1991) 39 (citing Al-Imran, 3:159 and Al-Shura, 42:38).

in public affairs".[519] The means of consultation can be designed to accommodate the views of both experts and the public, though they should not displace general elections that enable the public to demonstrate (or not) its allegiance to the ruler.[520] Al-Jabri characterises *shura* as "a right of the ruled" even more than as "a duty on the ruler", because in the Rashidun caliphate the caliph "was not installed until after *al-shura* was conducted".[521]

Yet the Quran did not specify the manner, subject matter or interlocutors for consultation. Kamali argues that these are "left to the discretion of the community. In its capacity as the vicegerent of God and the locus of political authority, the community is at liberty to determine the manner in which the principle of *shura* should be interpreted and enforced".[522] Since citizens of modern Islamic states simultaneously share their national citizenship with each other, and a broader Muslim citizenship with the global *umma*, this raises the possibility that *shura* might operate on multiple levels. The rulers of modern Islamic states govern in consultation with their citizens, but also engage in regional or global fora such as the OIC. The prevailing view is that some form of substantial consultation is obligatory, although al-Jabri argues that under a 'fundamentalist' understanding of Islamic jurisprudence *shura* "falls under 'good morals' and 'commendable behaviour', but not under 'obligations and duties'", and thus arguably is not a duty of the ruler or a source of binding public decision making.[523]

In the early caliphate *shura* became "a symbol signifying participatory politics and legitimacy".[524] The Prophet consulted his Companions regarding affairs of state. Even when one of them was universally acknowledged as caliph, the Companions routinely consulted one another in matters of Islam and Sharia. Consultation lent pluralism to governance, as the Companions represented different Arab clans and, as the Muslim people and territory expanded, spread to various regions and could serve as liaison to the caliph in Medina. There is no clear consensus among classical jurists about whether the ruler need only consult close advisors, or should take into account the views at least of the *ulama*, if not the wider society.

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[519] Mohammad Hashim Kamali, Citizenship and Accountability of Government: An Islamic Perspective (Islamic Texts Society, 2011) 204 (*shura* "is a right of the community, a vehicle for the exercise of its authority, and a means therefore by which to fight despotism" (citation omitted)).
[520] Mohammad Hashim Kamali, Citizenship and Accountability of Government: An Islamic Perspective (Islamic Texts Society, 2011) 206.
[521] Mohammed Abed al-Jabri, Democracy, Human Rights and Law in Islamic Thought (I.B. Tauris, 2009) 227.
[522] Mohammad Hashim Kamali, Principles of Islamic Jurisprudence (Islamic Texts Society, 1991) 39.
[523] Mohammed Abed al-Jabri, Democracy, Human Rights and Law in Islamic Thought (I.B. Tauris, 2009) 125.
[524] Khalid Abou El-Fadl, Islam and the Challenge of Democracy (Princeton U. Press, 2004) 16.

Most fundamentally, there is no consensus regarding the degree to which the ruler is bound to follow the results of the consultation.[525]

In modern times, *shura* is often invoked as the core principle of Islamic democracy. Ghannouchi interprets it to mean "that the power of interpreting the text is not to be monopolized by any one particular person or institution", but accrues to "the entire *Ummah*, the vicegerent of God".[526] In this view, some of the *umma*'s right to self-rule is delegated conditionally to an acknowledged ruler. The *umma* must however continue to exercise its residual share in the ruling power through *shura*, for example through legislation and guardianship of the constitution.

Every modern Islamic state institutionalises *shura* in the form of a legislature sharing in the ruling power, or an advisory council. Many states supplement this with a body of senior scholars, jurists or other eminent persons whose duty it is to monitor (and sometimes enforce) compliance of legislative or administrative acts with Islamic law. Through *ijtihad* based on the principles of Sharia and the public interest, a legislative *shura* creates laws for "the many problems of administration" Sharia does not reach, and where Sharia "has provided general principles but no detailed laws".[527] Monitoring institutions with members "elected from among senior judges and scholars" also apply a form of *shura* when they "act as a constitutional control over parliament in order to guarantee" fidelity to the constitution and Sharia.[528] These and other technical innovations of governance, such as parliamentary rule and formal legislation,[529] have rendered the tool of *shura* both far more complex and potentially more powerful than it was in the classical caliphate.

It is not clear whom exactly the ruler should consult: for example the *umma* or their representatives, the *ulama*, or a select group of prominent, pious citizens? An elected assembly represents the citizens but might or might not exercise part of the legislative or executive power.[530] In that sense, it may in part play the role of the ruler, and in part defer to the executive while still providing non-binding advice. Five modern constitutions establish an unelected, purely consultative council. In all five states, the ruling power is monolithic, or

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[525] Khalid Abou El-Fadl, Islam and the Challenge of Democracy (Princeton U. Press, 2004) 17 (the majority of jurists concluded that the opinions of this group were advisory, but the ruler had a duty after consultation "to follow the opinion that is most consistent with the Qur'an, the Sunna, and the consensus of jurists").
[526] Azzam S. Tamimi, Rachid Ghannouchi: A Democrat Within Islamism (Oxford U. Press, 2001) 100.
[527] Azzam S. Tamimi, Rachid Ghannouchi: A Democrat Within Islamism (Oxford U. Press, 2001) 101.
[528] Azzam S. Tamimi, Rachid Ghannouchi: A Democrat Within Islamism (Oxford U. Press, 2001) 101.
[529] See respectively sections 5.6.2.2. and 5.6.3., below.
[530] This division of the ruling power is discussed further in sections 5.6.2. and 5.6.3., below.

nearly so: Brunei is an absolute monarchy; in the Comoros the president governs without a legislature; Algeria and Mauritania are strongly presidential republics; and Pakistan is an almost purely parliamentary republic i.e. the lower parliamentary chamber wields almost all of the non-judicial governing powers. The president may decide whether to establish a council in the Comoros. In the other states its creation is mandatory. Members should be *ulama* or otherwise expert in Islam,[531] and are appointed by the ruler. Except in Pakistan, the main duty of the councils is to advise the ruler in decisions regarding religion,[532] or to respond to questions posed by the ruler.[533]

Pakistan's Council of Islamic Ideology fulfils a broader and more immediate role in the country's government, providing advice regarding whether proposed national or provincial laws would be "repugnant to the Injunctions of Islam" (and thus liable to invalidation by the Federal Shariat Court).[534] The council was also tasked with recommending legislative means to "encourage and enable" a more Islamic society and to bring laws into conformity with Islamic norms, and to compile a list of Islamic injunctions that "can be given legislative effect".[535] Thus Pakistan has gone furthest of any modern state in adapting *shura*, in its original sense of consultation regarding Sharia, to Islamic governance in a legislative age.[536]

5.5. Sharia and democracy

This part of the chapter begins the analysis of how Islamic states transpose traditional Islamic standards of governance on to modern institutions. Its specific task is to reconcile the rules of government gleaned from the sources of law and the examples of the caliphate with the modern norms of democracy. The part addresses five distinct issues: whether rule by the people usurps God's authority; whether Islam can permit hereditary rule, representation or

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[531] Constitution of the Comoros (2001), art. 36 (*ulama*); Constitution of Algeria (1996, amended 2002), art. 172 (members are appointed "from among religious personalities in the different sciences"); Constitution of Pakistan (1973, amended 2012), art. 228(2) (members should have "knowledge of the principles and philosophy of Islam as enunciated in the Holy Quran and Sunnah, or understanding of the economic, political, legal or administrative problems of Pakistan"). The membership should include at least two current or former senior judges and at least one woman. At least one third of the members must have at least 15 years' experience of "Islamic research or instruction". Id., art. 228(3). Members should represent "various schools of thought". Id., art. 228(3)(a).

[532] Constitution of the Comoros (2001), art. 36; Constitution of Brunei-Darussalam (1959, amended 2011), art. 3(3), (4) (The sultan must consult the Religious Council before making "laws in respect of matters relating to the Islamic religion", but need not follow its advice). The Sultan also appoints an Adat Istiadat Council to advise him regarding traditional national customs and social mores. Id., art. 3A.

[533] Constitution of Mauritania (1991, amended 2006), art. 94; Constitution of Algeria (1996, amended 2002), art. 171 (the council should promote *ijtihad* and should render opinions on religious rules when asked).

[534] Constitution of Pakistan (1973, amended 2012), art. 229.

[535] Constitution of Pakistan (1973, amended 2012), art. 230(1)(a), (c), (d).

[536] For a fuller description of the role of the council under Pakistan's constitution, see Jeffrey A. Redding, *Constitutionalizing Islam: Theory and Pakistan*, 44 Virginia J. Int'l L. 3, 759-827 at 768-69.

election, none of which formally existed in the Rashidun caliphate; and whether Islam allows campaigning for office. While all of these are controversial in some degree among modern Islamic theorists, the part concludes that only the final one, campaigning for office, is ultimately likely to be problematic.

While Sharia itself is immutable, human understanding of it evolves. Classical Islamic governance did not utilise elections or representation, but this does not mean that their use in the modern age would constitute *bid'ah* (unwarranted innovation).[537] It may simply be that the Prophet and the Rashidun caliphs implemented Islamic rule through the institutions that were known to the age. Sharia might well permit Muslims to make use of the types of political tools that are now available, or even require them to do so, if those tools are the best means to realise the main principles of *siyasah*: consent, just rule and consultation.

By contrast, some modern Islamists hold that rule by western style democracy is tantamount to usurping God's supremacy,[538] equivalent to *tawhid*, denying the oneness of God. Al-Qaradawi replies that the Quranic verses raised to support this argument addressed the Muslims as a particular group within a wider world of unbelievers, whereas a discussion of modern Islamic "democracy assumes a *Muslim* society".[539] This can be seen as a refinement rather than a rejection of the views of those such as Qutb who held that no system whereby people are governed by man-made laws is acceptable. If a society's members "first established [Islam] in their hearts and lives",[540] they could reasonably use tools developed in foreign political systems to implement Islamic ideals of governance. If one accepts that after the Prophet the people, not hereditary rulers, became God's vicegerents, then their use of those tools represents a mere technical adjustment, not a fundamental change to the Islamic nature of a society or state.

Elections and representation can serve as means to realise core principles of Islamic governance such as rule by consent, the rule of law and consultation. Election enables the

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[537] See e.g. *Sahih* Muslim, Vol. 4, book 30, chapter 8, *hadith* 4492, according to which the Prophet said, "Whoever introduces something into this matter of ours that is not part of it will have it rejected".

[538] For example, Qutb argues based on the verses enjoining worship and obedience to God alone that human beings should not exercise sovereignty "in any shape or form". Sayyid Qutb, *In the Shade of the Qur'an*, in Roxanne L. Euben and Muhammad Qasim Zaman, eds., Princeton Readings in Islamist Thought (Princeton U. Press, 2009) 145-52 at 147 (referencing Quran 43:84, 12:40, 3:64).

[539] Yusuf al-Qaradawi, *Islam and Democracy*, in Roxanne L. Euben and Muhammad Qasim Zaman, eds., Princeton Readings in Islamist Thought (Princeton U. Press, 2009) 230-45 at 240-41 (original emphasis) (referencing Quran 6:116, 12:103, 7:187, 29:63, 11:17, 2:243, 34:13, 38:24).

[540] Sayyid Qutb, n.d. *Ma'alim fi al-Tariq* (Dar al-Shar ruq) 34, quoted in John O. Voll, *Political Islam and the State*, in John L. Esposito and Emad El-Din Shahin, eds., The Oxford Handbook of Islam and Politics (Oxford U. Press, 2013) 56-67 at 61.

people to select their leaders. Representation can operate in support of election, or as a way for the people to participate in political leadership on an ongoing basis. While the caliphate did not formally institute these practices until very late in the Ottoman era, they have sufficient support in the proofs of law and enough antecedents in early practice to argue that they are at least not incongruous with Islamic governance. Al-Qaradawi sees "no Islamic legal impediment to acquiring an idea or a practical solution from non-Muslims".[541] Kamali argues against "confin[ing] the Islamic system of rule to only the historical caliphate", arguing that periodic election of the ruler by universal suffrage "is also a modern equivalent of the caliphate".[542]

Electing the ruler through universal suffrage is without classical precedent, but defensible as permitted or even required by basic principles of Islamic rule as applied to modern society. The example of the Rashidun caliphs as leaders chosen (or at least freely accepted) by the community demonstrates that the people collectively may choose their rulers. Al-Qaradawi argues that election of the leadership is not merely permitted, but required, as the principles of just rule, *shura* and a ruler beholden to the people oblige Muslims to bear witness as to the suitability of the ruler.[543] Democracy and its tools are the best available means to these ends, and therefore it is incumbent on Muslims to use them.[544] In essence, "from an Islamic point of view, voting is [the equivalent of] legal testimony for a candidate's abilities".[545] Islam appears to strongly discourage campaigning for office,[546] which presents a challenge for a polity large enough to require elections in order to express the people's choice of a ruler. Al-Turabi proposes to address this through replacing campaigns with "a neutral institution that

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[541] Yusuf al-Qaradawi, *Islam and Democracy*, in Roxanne L. Euben and Muhammad Qasim Zaman, eds., Princeton Readings in Islamist Thought (Princeton U. Press, 2009) 230-45 at 237 (for example, the Prophet adopted Persian military tactics, and had polytheist prisoners of war teach Muslim children to write).

[542] Mohammad Hashim Kamali, Citizenship and Accountability of Government: An Islamic Perspective (Islamic Texts Society, 2011) 131 (citation omitted).

[543] Yusuf al-Qaradawi, *Islam and Democracy*, in Roxanne L. Euben and Muhammad Qasim Zaman, eds., Princeton Readings in Islamist Thought (Princeton U. Press, 2009) 230-45 at 237-38 (citing Quran 65:2 and 22:30 as creating a duty to bear true witness, in the best interest of God; and 2:283 and 28:26 as creating a duty to vote when asked).

[544] Yusuf al-Qaradawi, *Islam and Democracy*, in Roxanne L. Euben and Muhammad Qasim Zaman, eds., Princeton Readings in Islamist Thought (Princeton U. Press, 2009) 230-45 at 236 (while there is no reason not to seek them, until better means are found, it is incumbent on Muslim societies "to adopt those of democracy, for they are indispensable to the application of justice, for consultation, respect for human rights, and resistance against exalted rulers on earth").

[545] Yusuf al-Qaradawi, *Islam and Democracy*, in Roxanne L. Euben and Muhammad Qasim Zaman, eds., Princeton Readings in Islamist Thought (Princeton U. Press, 2009) 230-45 at 237 (brackets in original).

[546] This is supported by numerous Prophetic *ahadith*. For example, one *hadith* relates how two men approached the Prophet and requested appointment to positions of authority. The Prophet replied, "By Allah, we will not appoint to such positions anyone who asks for it, or anyone who is eager for it". *Sahih* Muslim, Vol. 5, book 33, chapter 3, *hadith* 4492.

would explain to the people the options offered in policies and personalities".[547] It is however also possible that modern Islamic societies are simply too large and complex for the people to gather enough information to exercise their modern duties of *bay'ah* through voting without the candidates themselves presenting their best arguments for election.

Neither the Rashidun nor the later classical caliphate provides a precedent for representative government. Asad does not see this lack as problematic, as for example the Prophet and the Rashidun caliphs routinely consulted with tribal leaders whose people surely would have elected them if asked.[548] Kamali argues that when they pledged the *bay'ah* to Abu Bakr on behalf of the entire *umma*, the people of Medina showed that some members of the community may speak for the rest in matters of governance, and that through *shura* this applies "*mutatis mutandis*, to the election of other officers and representative organs of government".[549] This form of *bay'ah* may well have set a precedent for representation in choosing the ruler. But for it to support representatives exercising ruling or law-making power on an on-going basis requires a further logical step. Al-Banna, for example, argued that modern *shura* requires a community to remain involved in its governance on an on-going basis, and that "the ruler, regardless of his social or religious position, must not single-handedly regulate state affairs: in the final analysis, he must resort and yield to people's choices".[550] In Asad's view, consultation in the sense of Quran 42:38 involves the entire community, which in a modern, complex society requires an elected assembly as a practical matter, in order to "be truly representative of the entire community".[551]

Where practiced, election is for a limited term, which has no precedent in pre-modern Islamic governance. According to al-Jabri, the original definition of the caliph as essentially a 'commander', coupled with the impossibility of predicting the duration of the wars against apostasy, would have rendered it nonsensical to appoint the caliph for a fixed time in office; his term lasted until the wars ended, "then he would lose the title of 'commander' and resume his former place".[552] Uthman's precedent showed that a caliph's term could end when

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[547] Hasan al-Turabi, *The Islamic State*, in Roxanne L. Euben and Muhammad Qasim Zaman, eds., Princeton Readings in Islamist Thought (Princeton U. Press, 2009) 213-23 at 220.
[548] Muhammad Asad, The Principles of State and Government in Islam, 2nd ed. (Islamic Book Trust, 1980) 53.
[549] Mohammad Hashim Kamali, Citizenship and Accountability of Government: An Islamic Perspective (Islamic Texts Society, 2011) 152.
[550] Ahmad Moussalli, *Hassan al-Banna*, in John L. Esposito and Emad El-Din Shahin, eds., The Oxford Handbook of Islam and Politics (Oxford U. Press, 2013) 129-43 at 136 (citing Hasan al-Banna, *Al-Imam al-Shahid Yatahaddath*, Dar al-Qalam, Beirut, 1974, 99-100).
[551] Muhammad Asad, The Principles of State and Government in Islam, 2nd ed. (Islamic Book Trust, 1980) 45.
[552] Mohammed Abed al-Jabri, Democracy, Human Rights and Law in Islamic Thought (I.B. Tauris, 2009) 39.

"people were bored with him", but also demonstrated the danger of failure to define the caliph's duties beyond the military, or to provide a constitutional means of removal.[553] All eleven modern Islamic states with elected presidencies except Afghanistan and the Comoros limit the president to two terms in office, or two consecutive terms, with terms ranging from four to seven years.[554] Iran and Yemen further emulate the caliphate insofar as nomination by an elite group precedes acclamation. In Yemen the legislature nominates two candidates for the people to choose from, which resembles the approach advocated by al-Turabi to avoid the conundrum of having elections without campaigns.[555] Iran's Supreme Council of religious scholars pre-approves candidates (but does not nominate per se).[556]

Modern tools such as elections and legislative representation are justifiable as means to realise *bay'ah*, *shura*, and *ijtihad*, as well as in terms of *maslahah*, if they increase the well-being of the Muslim community. The dilemma faced after Umar that "[t]he absence of a caliph who enjoyed general recognition prevented the establishment of the *shura*, and the absence of a *shura* prevented the election of a legitimate caliph",[557] can be resolved in modern times by recalling that upon the Prophet's passing the right to rule essentially devolved on the *umma* as a whole. If the *umma* can come to a consensus as to how to assemble a *majlis al-shura*, such as to enact a constitution, then a legitimate ruler may once again be elected.

Hereditary rule persists in ten modern Islamic states. In Kuwait, Oman and Saudi Arabia the ruling family selects the successor, subject to the *bay'ah*, except that in Kuwait the National Assembly represents the people, approving the choice of Heir Apparent.[558] The constitutions

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[553] Mohammed Abed al-Jabri, Democracy, Human Rights and Law in Islamic Thought (I.B. Tauris, 2009) 40.
[554] Constitution of Afghanistan (2003), art. 61 (five year term); Constitution of Algeria (1996, amended 2002), art. 74 (five year term, renewable once); Constitution of the Comoros (2001), art. 13 (the president is elected to a four year term by all citizens, from three candidates elected by the people of the island that holds the rotating presidency); Constitution of Egypt (2014), art. 140 (four year term, renewable once); Constitution of Iran (1979, amended 1989), art. 114 (four year term, at most two consecutive terms); Constitution of the Maldives (2008), art. 107(a) (five year term, renewable once); Constitution of Mauritania (1991, amended 2006), arts. 26, 28 (five year term, renewable once); Basic Law of Palestine (2005), art. 36 (as amended 2005) (four year term, at most two consecutive terms); Constitution of Syria (2012), art. 88 (seven year term, at most two consecutive terms); Constitution of Tunisia (2014), art. 75 (five year term, renewable once); Constitution of Yemen (1991, amended 2001), art. 112 (seven year term, renewable once).
[555] Constitution of Yemen (1991, amended 2001), art. 108.
[556] Constitution of Iran (1979, amended 1989), arts. 107, 108. The president is only the second most powerful executive after the Leader. Id., art. 113.
[557] Moshe Sharon, *The Development of the Debate around the Legitimacy of Authority in Early Islam*, in Fred M. Donner, ed., The Articulation of Early Islamic State Structures (Ashgate Publishing Ltd., 2012) 15-35 at 22.
[558] Constitution of Kuwait (1962), arts. 4(1) (hereditary succession), 4(3) (vote to approve the Heir Apparent); Basic Statute of Oman (1996, amended 2011), art. 6 (a royal family council determines the succession); Basic Law of Saudi Arabia (1992), art. 5 ("The most upright among" the house of Al-Saud "shall receive allegiance

of Bahrain, Brunei, Jordan, Morocco and Qatar specify hereditary rule, but without explicit instructions as to the succession.[559] In the United Arab Emirates, a union of seven monarchies led by a Supreme Council, the hereditary emirs select the president from among themselves, for a renewable five year term.[560] Likewise, the hereditary Rulers of Malaysia's states elect from themselves the head of state, the Yang di-Pertuan Agong, whose political power is however largely illusory. Actual power resides with the government, which is responsible to the House of Representatives and headed by one of its members.[561] This transfer of temporal power to a government ruling in the name of the religious leader has Islamic antecedents in the emirs and sultans who ruled in the name of and sanctioned by the caliph beginning in the later Abbasid era.

Nearly all modern Islamic states follow one or the other of the means of selecting the ruler that al-Mawardi recognised. Most Islamic constitutions provide for election as in the Rashidun caliphate, or heredity as prevailed from Umayyad to Ottoman times. The exceptions are Iran, Malaysia and the UAE. Iran's assignment of the choice of the Leader to a council of *ulama* who also supervise the election of the nominal head of state is a unique approach. Nominal rule by councils of traditional leaders as in Malaysia and the UAE resembles the leadership structure of the Medinan state, with the crucial difference that in Malaysia the ruler has only ceremonial authority. Modern commentary has settled on an elected ruler wielding unitary executive power, aided by a legislature, as the most appropriate structure for an Islamic state. Asad considers presidential democracy best because it subjects the ruler to election, but does not dilute the executive power.[562]

More Islamic constitutions have indeed opted for a presidential system of government than have adopted hereditary rule or parliamentary democracy. The model of an elected president heading the government is also widely accepted internationally. While parliamentary democracy is questionable from an Islamic point of view, it is also widely accepted as a

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according to Almighty God's Book and His Messenger's Sunna". This phrasing seems not to admit the possibility that the people might withhold the *bay'ah*).

[559] Constitution of Bahrain (2002), art. 1(b).

[560] Constitution of the United Arab Emirates (1971, amended 1996), arts. 1, 51.

[561] Constitution of Malaysia (1957, amended 2010), arts. 32(1) ("Supreme Head of the Federation"), (3) (elected by and from the Conference of Rulers), 40(1) (acts "in accordance with the advice of the Cabinet"), 43(2) (the head of state appoints as prime minister "a member of the House of Representatives who in his judgment is likely to command the confidence of the majority of [its] members"), (3) (the cabinet is "collectively responsible to Parliament").

[562] Muhammad Asad, The Principles of State and Government in Islam, 2nd ed. (Islamic Book Trust, 1980) 61. Unified ruling power conforms to classical precedent and the apparent view of the Prophet, as well as providing clarity of direction in a morally and ideologically grounded state. Id. 58-60.

means to enact internationally recognised political rights. Hereditary rule falls squarely within at least the tradition of the post-Rashidun caliphate, but raises more concerns from the standpoint of international human rights norms. However, most Islamic constitutions that implement hereditary rule also constrain the monarch's power through granting an elected assembly either some degree of oversight of the government, or power to enact legislation that the government must enforce, or both. As the next section demonstrates, Islamic states have applied the classical models of *siyasah Sharia* while employing a range of modern structures of government. The end result is that nearly all Islamic constitutions now distribute executive and legislative powers of government in ways that fall within the range of what both international human rights law and fundamentalist Islamic law find acceptable.

5.6. The distribution of powers in Islamic states

This part advances the thesis by examining how Islamic states have redistributed the power once held solely by the caliph. This analysis serves two purposes. First, it establishes that the practice of most Islamic states of dividing the power that once accrued to the caliph into executive and legislative components, and further dividing the executive portion by imposing a measure of oversight, is a permissible application of newly available instruments of governance rather than *bid'ah*. Second, it demonstrates that in the structural sense most Islamic states (albeit with some notable exceptions) apply models of government that follow the principles of consent and participation envisioned by the UDHR. It is difficult to claim that the states that apply these modern models are less Islamic than those that reserve the bulk of power to a single ruler because, as the next part in the chapter will show, some of the states that have gone furthest in dividing powers have also made the most stringent efforts to integrate the substance of Sharia into their national legal orders. The part proceeds in three sections. The first considers the separation of religious leadership from temporal power. The second evaluates models of dividing the executive power. The third section assesses the substitution of formal legislation in place of a caliph's edicts, which is almost universal among modern Islamic states.

Since the caliphs demonstrated enlightened Islamic rule and the classical jurists developed their theories of *siyasah*, the needs and expectations of societies and the known tools of government have grown considerably in complexity. Prior to European colonisation, all Islamic states had a single ruler, although often local and traditional leaders could act somewhat independently of the nominal central authority. The Ottoman Empire was the first

avowedly Islamic state to experiment with modernising the tools of government to incorporate limited sharing of executive authority and a formal process for modifying law through a legislative process rather than by edict. Since the mid-20th century, states in predominantly Muslim regions have adopted forms of government derived from European models, usually even before seeking to adapt them to implement Islamic rule. This part explores two of these developments: dividing the executive power between different institutions, and separating the legislative from the executive branch of government.

Dividing powers facilitates oversight of the executive while legislation gives the people ongoing input into law-making and also adds some durability to law. An unfettered executive can potentially come unmoored from its responsibilities to uphold individual rights, and rule by edict rather than legislation edicts risks instability and capriciousness of law. Dividing or balancing executive power and adopting a formal legislative process can advance both internationally acknowledged human and political rights, and the longstanding aims of governance according to Sharia. For example, Ali implemented regular oversight of the work of government to ensure justice and inhibit corruption, but in the absence of an institutional basis this laudable priority faded under less enlightened caliphs. Permanent oversight of the executive by an elected assembly, realised at its highest level in the power to vote or remove confidence, provides some safeguard against such backsliding. Legislation can institutionalise *shura* with the population at large, channelling the views of the *umma* rather than (or in addition to) those of chosen counsellors and experts in Sharia. This enables the realisation of the broader understanding of *shura* espoused by al-Shafi'i as well as the more mainstream view that *shura* requires only the advice of *ulama*, as the heirs to the Companions who counselled the Prophet and the Rashidun caliphs.

Modern Islamic states apply the principles of governance derived from the proofs of law in a more complex political structure than that of the classical caliphate. A caliph could designate an emir, or delegate non-discretionary executive power to governors and other representatives, but fundamentally the power to govern remained monolithic and indivisible. By contrast, modern Islamic states separate powers along at least three lines. First, as in the caliphate, political leaders are not necessarily the national leaders of the religion. Second, most Islamic states no longer permanently cede the entire executive power to the head of state. Finally, the caliph's traditional powers to create and to apply law are now typically divided between a legislature and a government. This part examines how modern Islamic constitutions separate the powers of government along these axes, and the implications for

whether the people's representatives can constrain the ruler not just in making law (legislation) but also in its application (executive power).

5.6.1. Separating civil from religious authority

One facet of most modern states is a detachment of the state authorities from religious leadership. For example, the French state rests on a strong principle of *laïcité* and the first amendment to the American constitution is understood to require a separation of church and state. It is thus understandable that some western observers might look askance at an Islamic state's declaration of a state religion, or of some role of religious leadership on the part of state figures. Yet this phenomenon is hardly limited to Islamic states—the British monarch heads the Church of England, the German government collects taxes to support the Catholic and Evangelical churches, the Lutheran church enjoys constitutional status in Finland. Similarly, many modern Islamic states establish the head of state as simultaneously the ceremonial leader of the national religion. Neither Islamic tradition nor modern international law would preclude a caliph, or head of state, from serving as the unifying point or centre of the religion, while formally delegating the actual duties of government. Those Islamic states where the government wields real ecclesiastical power depart from the practices of most modern states, but also arguably from those of the classical caliphate. The only practical way in which the consensus of Islamic states in this area conflicts with modern international norms appears to be in a widespread requirement that the head of state be a Muslim.

Any claim that the caliphs succeeded the Prophet in his religious leadership remains controversial. As "simultaneously a representative of God, a legislator, a judge and a military leader," the Prophet was irreplaceable.[563] Although some early jurists held that the caliph's authority was divine, derived as "vicegerent of God on earth",[564] unlike the Prophet the caliph could potentially err in interpreting the word of God.[565] Many caliphs nonetheless combined leadership of the state and of the religion, even though arguably the Rashidun, and thus succeeding caliphs, held only first-among-equals religious authority.[566] Abu Bakr, Umar,

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[563] Moshe Sharon, *The Development of the Debate around the Legitimacy of Authority in Early Islam*, in Fred M. Donner, ed., The Articulation of Early Islamic State Structures (Ashgate Publishing Ltd., 2012) 15-35 at 16.
[564] See e.g., Muhammad Khalid Masud, *The changing concepts of caliphate – Social construction of Shari'a and the question of ethics*, in Kari Vogt et al., eds., New Directions in Islamic Thought (I.B. Taurus & Co, 2009) 187-205 at 190 (citing the 8th century jurist Abu Yusuf).
[565] Sherman A. Jackson, Islamic Law and the State: The Constitutional Jurisprudence of Shihab al-Din al-Qarafi (E.J. Brill, 1996) 215.
[566] The Prophet's role as spiritual leader "did not, according to the jurists, pass to his successor but was inherited by the community as a whole". Ann K. S. Lambton, State and Government in Medieval Islam (Oxford U. Press, 1981) 19.

Uthman, Ali and for that matter Mu'awiya, the first Umayyad caliph, had standing as close Companions of the Prophet who had known him well, but insofar as they could claim religious primacy it was as the delegate of the Companions collectively, not in their own right. Thus even while caliphs ruled the Muslims, their religious authority could not be absolute.[567] An-Naim cites objections raised by two leading Companions (and future caliphs), Umar and Ali, to a decision of Abu Bakr: their "demands would have been inconceivable if Abu Bakr had been exercising the religious authority of the Prophet".[568] Nonetheless, all of the early caliphs were, independently of their office, respected and influential senior members of the religious community.[569] Only after hereditary rule had become entrenched did the idea of a divinely ordained caliph emerge into legal theory.

During the Abbasid caliphate, a separation between the caliph's spiritual status and temporal power took place. "A succession of Persian and Turkish military dynasties" took control over the Muslim lands in the third Islamic century and rendered the caliph a "puppet", establishing an alternate model of Islamic rule where the caliph retained nominal religious supremacy, while the sultan handled the temporal side.[570] The Sunni jurists, most prominently al-Ghazali and al-Mawardi, justified this by developing a principle of quietude under which "obedience was due to a Muslim ruler who protected and expanded the Muslim domains, fought heresy and error and fostered the conditions for Muslims to worship and apply the holy law in peace . . . even if such a ruler was impious in his personal and courtly conduct and oppressive in his rule".[571] Al-Shafi'i went so far as to permit "the imamate of the less excellent", the choice of other than the best available candidate as caliph, if it would keep peace in the community.[572]

Several Islamic constitutions recognise religious authority in the ruler. In all modern Islamic monarchies except Jordan and the United Arab Emirates, the ruler holds a title or responsibilities that indicate leadership of the religion. The Saudi approach resembles the

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[567] Muhammad Khalid Masud, *The changing concepts of caliphate – Social construction of Shari'a and the question of ethics*, in Kari Vogt et al., eds., New Directions in Islamic Thought (I.B. Taurus & Co, 2009) 187-205 at 191-92 (in the detailed narrative of the origins of the caliphate of the ninth century jurist Ibn Qutayba, "the caliphate is broadly formulated in a non-religious framework of succession").

[568] Abdullahi Ahmen An-Na'im, Islam and the Secular State (Harvard U. Press, 2008) 59.

[569] See e.g., John Kelsay, Arguing the Just War in Islam (Harvard U. Press, 2007) 85 ("the religious authority of [the first four caliphs] stemmed from their recognized status as significant companions of the Prophet, and thus from their familiarity with his *sunna*").

[570] Sami Zubaida, Law and Power in the Islamic World (I.B. Taurus, 2003) 91 ("starting with the Shi'i Buwayhids in 946 . . . the [military] rulers upheld Sunni Islam and fostered its institutions of education, the law and the awqaf. They built mosques and madrasas, appointed qadis and patronized jurists. Most affairs of state administration and security, however, largely bypassed these institutions, including taxation, which went far beyond what is prescribed by the shari'a").

[571] Sami Zubaida, Law and Power in the Islamic World (I.B. Taurus, 2003) 91.

[572] Ann K. S. Lambton, State and Government in Medieval Islam (Oxford U. Press, 1981) 17.

later caliphate, with the King bearing the duty to "rule the nation according to" and "supervise the implementation of" Sharia,[573] but deferring to the *ulama* the power to interpret Sharia. Brunei, Morocco and Malaysia follow the Ottoman model of unifying civil and religious leadership in a hereditary monarchy, albeit wielding respectively absolute, constitutionally constrained, and effectively no temporal powers.[574] Finally, Shia Iran follows a model without an exact pre-modern precedent. Both religious and secular supremacy rests with a council of senior *ulama*, the Guardian Council. The Leader, who holds final executive and legislative authority, must be in the view of the Assembly of Experts the country's most learned Islamic scholar.[575] Where not also the head of the religion, the temporal ruler usually has no specific religious role under the constitution.[576]

It is widely agreed that the head of an Islamic state should be an observant Muslim. From the time of the Prophet onwards, whether styled caliph or not, the ruler was always a Muslim, but non-Muslims served in administrative roles, even senior ones, for most of the classical and Ottoman periods. According to Asad, as any ideologically based polity needs a true believer at its head, only a Muslim could be certain to be fully committed to the aims of Islam.[577] There is additional support in the Quranic command to "[o]bey God and obey the Apostle and those in authority *from among you*".[578] In addition to the states where a hereditary ruler is also the head of religion, eleven modern Islamic constitutions implement Asad's dictum that those who lead an Islamic state should be Muslims "not merely *de facto*, by virtue of their majority in the country, but also *de jure*, by virtue of a constitutional enactment".[579] All of

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[573] Basic Law of Saudi Arabia (1992), art. 55. Citizens should "pay allegiance to the King in accordance with the holy Koran and the tradition of the Prophet". Id., art. 6.

[574] Constitution of Brunei-Darussalam (1959, amended 2011), art. 3(2) (the Sultan is head of both the state and the official religion of Islam); Constitution of Morocco (2011), art. 41 (the King in consultation with the Superior Council of the Ulama (over which he presides and whose terms and membership he regulates) may issue *fatawa* by royal decree to "exercise . . . the religious prerogatives inherent in the institution of the Emirate of the Faithful [Imarat Al Mouminine]"); Constitution of Malaysia (1957, amended 2010), art. 3(2), (3), (5) (the Yang di-Pertuan Agong or another member of the Conference of Rulers is the "Head of the religion of Islam" in each state or federal territory).

[575] Constitution of Iran (1979, amended 1989), art. 107. For the extensive powers of the Leader, see article 110.

[576] The King of Bahrain is designated "loyal protector of the religion and the homeland", but without specific powers. Constitution of Bahrain (2002), art. 33(a). Tunisia empowers its president to appoint the Grand Mufti. Constitution of Tunisia (2014), art. 78. Otherwise, modern Islamic constitutions do not recognise any religious authority in the political leadership.

[577] Muhammad Asad, The Principles of State and Government in Islam, 2nd ed. (Islamic Book Trust, 1980) 40 (A main purpose of an Islamic state is to establish Islamic law, and only a Muslim "can be supposed to submit willingly to the Divine Law of Islam").

[578] Muhammad Asad, The Principles of State and Government in Islam, 2nd ed. (Islamic Book Trust, 1980) 41 (emphasis added).

[579] Muhammad Asad, The Principles of State and Government in Islam, 2nd ed. (Islamic Book Trust, 1980) 41. See Constitution of Afghanistan (2003), art. 62(1), Constitution of Algeria (1996, amended 2002), (art 73); Constitution of Kuwait (1962), art. 4(5) (the heir apparent must be "a legitimate son of Muslim parents");

these bar Somalia have a strong, independent executive. Pakistan and Yemen, where parliaments share in executive power, require members of parliament who are Muslim to be observant.[580] Only Bahrain, the Comoros, the UAE and a cluster of formerly British-ruled states around the Middle East (Egypt, Iraq, Jordan and Palestine) neither constitutionally require that the chief executive or head of state be a Muslim nor recognise the ruler as the leader of the religion.

5.6.2. Dividing the executive power

Since the classical Islamic era, models of government have proliferated. Some aspects of these models may be more conducive to institutionalising the ideals of participatory government found in both international instruments and Islamic tradition, than even the caliphate was. The original, perfect government of Medina depended on the daily presence of the Prophet. The Arab tradition of tribal leaders governing in council was best suited for a small polity. In the classical era, the only known approach to governing a larger society was the imperial model, with its incumbent flaws that tend to lead toward tyranny or disintegration. One way modern democratic states try to maintain cohesion while also protecting the rights of the people to participate in their government is through diverting at least part of the executive power to a separate, representative assembly. This approach might even better achieve the aims of an Islamic society than did the classical models, but it requires some analysis to determine whether division of the ruling power that the caliph used to hold in trust comports with *siyasah Sharia*.

Whether and how it is appropriate to divide the power to rule an Islamic state depends in part on one's view of where that power flows from. God is the wellspring of governing power, but it is conceptually much simpler to redirect part of it to a people's assembly if it flows to the institutions of the state through the people, and to the ruler as one of those institutions, than if

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Constitution of the Maldives (2008), art. 109(b) (Sunni); Constitution of Mauritania (1991, amended 2006), art. 23; Basic Statute of Oman (1996, amended 2011), art. 5 (the sultan must be "a Muslim, mature, rational and the legitimate son of Omani Muslim parents"); Constitution of Qatar (2004), art. 9 ("The Heir Apparent must be a Muslim of a Qatari Muslim Mother"); Draft Constitution of Somalia (2012), art. 88(a); Constitution of Syria (2012), art. 3(1); Constitution of Tunisia (2014), art. 74 (candidates for president must be Muslims); Constitution of Yemen (1991, amended 2001), art. 107(d) (a candidate for president must "practice[] his Islamic duties"). The president of Afghanistan "cannot act based on", *inter alia*, "religious . . . considerations during his term in office". Constitution of Afghanistan (2003), art. 66.

[580] Constitution of Yemen (1991, amended 2001), art. 65(2). Constitution of Pakistan (1973, amended 2012), arts. 62(d) ("not commonly known as one who violates Islamic Injunctions"), (e) (members must have "adequate knowledge of Islamic teachings and [practice] obligatory duties prescribed by Islam [and abstain] from major sins"), 113(d), (e) (article 62 applies *mutatis mutandis* to provincial assemblies). These requirements do not apply to non-Muslims, "but such a person shall have good moral reputation." Id., art. 62(2).

it passes from God through the ruler to the people. Assigning part of the executive power away from the nominal ruler arguably usurps the ruler's prerogative to govern unfettered except by Sharia.[581] Even if the people's representatives do not themselves govern, they exercise more than a consultative or legislative power when for example an elected assembly can constrain the ruler's discretion to designate or remove a government. Nevertheless, the constitutions of all Islamic states except Brunei, Oman and Saudi Arabia provide for at least one elected chamber,[582] most of which exercise such powers. Parliamentary rule implies a qualitatively different division, a collective exercise by the people's representatives of the executive power. Here al-Jabri argues that because the Quran speaks in the plural when it enjoins the believers to "obey . . . those given authority among you", "it is not necessary according to *al-shari'ah* to have only one person in charge".[583]

Either a presidential or a parliamentary system could satisfy those modernists who would countenance a re-thinking of the nature of an Islamic state based on reasoning from the broad principles of Islam. Those who ground their views textually, according to the Quran and the Prophetic *ahadith*, or in classical precedent or the writings of the medieval jurists, tend instead to favour a system of government where a single chief executive governs with wide discretion. The latter group can accommodate monarchists as well as those who advocate electing the ruler. It is less clear that Islam can accommodate models of government in which executive power is shared. In a purely parliamentary democracy, representatives of the people exercise the powers both of legislation and government. Even if the role of a member of parliament is only to choose the government, then to recede to a legislative or consultative role, the possibility to remove the government for merely political reasons had no analogue in the caliphate. This dilemma can also arise in presidential states, as for example when

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[581] According to al-Jabri, Uthman insisted the caliph's power was absolute and indivisible, but others including Ali disagreed vehemently, contributing in the end to civil war. Mohammed Abed al-Jabri, Democracy, Human Rights and Law in Islamic Thought (I.B. Tauris, 2009) 41.

[582] Constitution of Afghanistan (2003), art. 83 (*Wolesi Jirga*, five year term); Constitution of Algeria (1996, amended 2002), arts. 101, 102 (National People's Assembly, five year term); Constitution of the Comoros (2001), arts. 19, 20 (Assembly of the Union, 5-year term; 18 of 33 members are directly elected, the rest selected by the assemblies of the three islands); Constitution of Egypt (2014), arts. 101, 102, 106 (House of Representatives, 5-year term); Constitution of Iran (1979, amended 1989), arts. 62, 63 (Islamic Consultative Assembly, 4-year term); Constitution of the Maldives (2008), arts. 5, 71(a), 79(a) (People's Majlis, 5-year term); Constitution of Mauritania (1991, amended 2006), art. 47 (National Assembly, 5-year term); Basic Law of Palestine (2005), arts. 48(1) (as amended 2005), 47(3) (Legislative Council, 4-year term); Constitution of Syria (2012), arts. 55-57 (People's Assembly, 4-year term); Constitution of Tunisia (2014), arts. 50, 56 (Assembly of the Representatives of the People, 5-year term); Constitution of Yemen (1991, amended 2001), arts. 62, 63, 65 (House of Representatives, 6 years).

[583] Mohammed Abed al-Jabri, Democracy, Human Rights and Law in Islamic Thought (I.B. Tauris, 2009) 36.

parliaments enjoy the power to vote or withdraw confidence in the government installed by the president.

5.6.2.1. Limiting the ruler's power

According to the classical theories of al-Mawardi and others the caliph enjoyed absolute political authority, subject only to the constraints of Sharia. Most scholars of Islamic governance and certainly the revivalists hold that, as with pre-modern leaders of the *umma*, an Islamic ruler should enjoy complete discretion to act within the boundaries of Sharia. Indeed, the caliph's authority went even further. If the caliph, despite remonstration, persisted in impious behaviour or unjust rule, he nonetheless retained the right to rule, if to depose the caliph would risk *fitnah*—strife, chaos or even civil war. Up to a point, orderly injustice was the lesser evil. In more recent centuries it has become common for elected assemblies to exercise some measure of oversight and even control of governments. Early Islamic constitutions undertook limited experiments in this regard, including the Ottoman Empire which established that a caliphate could submit to some degree of ongoing oversight. Institutionally restraining the executive power can provide a further institutional check, in addition to courts and constitutions, by which representatives of the people might hope to prevent violations of civil rights committed as a matter of state policy.

Traditionally in an Islamic state, the ruling power is monolithic. Among modern Islamic states, only Brunei, Oman and Saudi Arabia go this far.[584] The UAE also reserves the entire federal governing power to the 'ruler', the Supreme Council of hereditary rulers of the Emirates. In Qatar the al-Shoura Council has no power over the government or prime minister, but can require the removal of an individual minister.[585] In the rest of the modern Islamic constitutions although executive leadership vests in an individual, that individual in some degree either shares power with, or is subject to oversight by, an elected body. This reaches its greatest extent in Iraq and Somalia, which assign most of, and Malaysia and Pakistan essentially all of, the right to rule to parliament, where the representatives then choose one of their number for a revocable right to exercise it.

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[584] Constitution of Brunei-Darussalam (1959, amended 2011), art. 4 (1) (the Sultan wields "supreme executive authority"), (1A) (the Sultan is also the prime minister); Basic Statute of Oman (1996, amended 2011), art. 42 (powers of the Sultan as head of state and chief executive); Basic Law of Saudi Arabia (1992), art. 5 ("The most upright among" the descendants of the house of Al-Saud "shall receive allegiance according to Almighty God's Book and His Messenger's Sunna"). In Oman, one of the legislative houses is elected, but the Sultan retains final discretion whether or not to promulgate laws. Basic Statute of Oman (1996, amended 2011), art. 58.

[585] Constitution of Qatar (2004), art. 111 (by 2/3 vote).

Sharing the ruler's prerogative to establish the government or set policy is controversial in Islamic law. If the authority to rule comes from God directly, then it may not lie within the ruler's discretion to share the executive portion of it with an assembly, even where the assembly may enact binding legislation for the ruler to enforce. Asad presents the Quranic verse, "Take counsel with them in all communal business [*amr*]; and when you have decided on a course of action, place your trust in God", as generally understood to indicate that after taking counsel, the leader may execute whatever decision he sees fit.[586] Asad notes however that this verse was revealed just before the battle of Uhud, where "the Prophet felt constrained, against his own better judgment, to defer to the advice of the majority of his Companions", and cites two further *ahadith* as demonstrating that the Prophet himself perceived an obligation to allow the opinions of his counsellors to sway his actions as the leader of the *umma*.[587] The analogy to an elected parliament is imperfect, as the Prophet rather than the community chose his advisors. But if the principle of representation is accepted, and if the Prophet could acquiesce in his advisors' views of the best course to take, even when it ran counter to his own opinion, then arguably the people's representatives can constrain the decision space available to the chief executive of an Islamic state. Under the Ottoman constitution, the General Assembly could discuss and vote on legislation and interpolate members of the government, but had no influence over the selection of the Grand Vizier or the composition of the government.[588] Arguably, this first breach of the principle of a single unfettered ruler was not an unwarranted innovation, but a permissible agreement between the ruler and the *umma* to alter the conditions of their contract.

Most modern Islamic states divide the executive power via parliamentary oversight. In the Arabian Peninsula states and the Comoros, executive power is nearly undiluted, with only Yemen establishing parliamentary control, via the power to nominate presidential candidates. The King of Jordan must also reckon with a strong parliament, unlike the president of Syria whose executive authority is nearly total. The president appoints the government or the prime minister in all of the presidential republics.[589] Afghanistan, the Comoros, Iran and the

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[586] Muhammad Asad, The Principles of State and Government in Islam, 2nd ed. (Islamic Book Trust, 1980) 55 (quoting Al-Imran 3:159).

[587] Muhammad Asad, The Principles of State and Government in Islam, 2nd ed. (Islamic Book Trust, 1980) 55 (the Prophet once explained that deciding on a course of action entails following the counsel of knowledgeable people; on another occasion he told Abu Bakr and Umar that if they "agree on a counsel, I shall not dissent").

[588] Ottoman Constitution (1876), art. 27.

[589] The appointed head of the government selects the ministers in Algeria, Egypt, Iraq, Palestine, Tunisia and Yemen. Constitution of Algeria (1996, amended 2002), arts. 77(5), 79; Constitution of Egypt (2014), art. 146; Basic Law of Palestine (2005), art. 45; Constitution of Tunisia (2014), art. 89; Constitution of Yemen (1991, amended 2001), art. 119(4).

Maldives present a nearly unified governing power, as the president leads the government personally,[590] as does the King of Morocco.[591] In Algeria, Mauritania and Syria the president shares this role, appointing and dismissing ministers as well as the prime minister,[592] or leading the government alongside the prime minister.[593] In Bahrain, Jordan and Kuwait, the monarch chooses the prime minister, then the government in consultation with the prime minister.[594] Since the head of state retains the right either to determine policy or to install or remove the government, these remain within the law of the vizierate as stated by al-Mawardi.[595]

Other Islamic constitutions enable the elected assembly to restrict the discretion of the head of state to designate the government. Rulers in North Africa face constraints in this regard. The constitutions of Egypt, Morocco and Tunisia require the head of state to offer the largest party or bloc in parliament the opportunity to form a government.[596] Even where it plays no role in the selection, the parliament must vote confidence to seat a government in all the presidential republics except Syria, and in Jordan if the House of Representatives so requests.[597] In all modern Islamic states except absolute monarchies, the legislature can

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[590] Constitution of Afghanistan (2003), art. 71; Constitution of the Comoros (2001), art. 12 (the president "is the head of government"); Constitution of Iran (1979, amended 1989), art. 134; Constitution of the Maldives (2008), arts. 106(b), 115(g).

[591] Constitution of Morocco (2011), art. 48 (the King may delegate this role to the Head of Government for a specified agenda).

[592] Constitution of Mauritania (1991, amended 2006), art. 30 (however, the president appoints ministers only on the prime minister's recommendation, and must consult the prime minister before dismissing them); Constitution of Syria (2012), art. 97. The prime minister and members of the government are responsible to both the president and the People's Assembly. Id., art. 121.

[593] Constitution of Algeria (1996, amended 2002), art. 77(4), Constitution of Mauritania (1991, amended 2006), art. 25.

[594] Constitution of Bahrain (2002), art. 33(d); Constitution of Jordan (1952, amended 2011), art. 35; Constitution of Kuwait (1962), art. 56(1) (the prime minister is selected "after the traditional consultations"). Ministers should be selected from National Assembly members "and from others". Id., art. 56(2).

[595] Ann K. S. Lambton, State and Government in Medieval Islam (Oxford U. Press, 1981) 96 (a "wazir of delegation" exercised powers within limits set by the caliph, which could include any of the caliph's tasks except selecting the heir apparent or dismissing the caliph's appointees).

[596] Constitution of Egypt (2014), art. 146 (if the president's first choice of government fails to win parliamentary confidence then the leader of the largest bloc must be nominated. If this government also fails to win confidence, then new elections take place); Constitution of Morocco (2011), art. 47 (the King must appoint the Head of Government from the largest party in the elected Chamber of Representatives); Constitution of Tunisia (2014), art. 89 (the president must offer the first chance to form a government to the leader of the largest party in parliament). In the previous Egyptian constitution parliament would be invited to nominate a new prime minister before new elections are required. Constitution of Egypt (2012), art. 139.

[597] Constitution of Afghanistan (2003), art. 71 (ministers "shall be introduced to the National Assembly [the combined houses of parliament] for approval"; but see art. 64(11), empowering the president to appoint ministers "with the approval of the Wolesi Jirga", the lower house); Constitution of Algeria (1996, amended 2002), art. 80; Constitution of the Comoros (2001), art. 16 (the president, "assisted by two Vice Presidents, appoints the ministers of the Union and determines their functions"; no other provision refers to this process); Constitution of Egypt (2014), art. 146; Constitution of Iran (1979, amended 1989), arts. 87 (Council of Ministers), 133 (merely 'Ministers'); Constitution of Jordan (1952, amended 2011), arts. 53(3), (6) (by "absolute

compel a change of government. In Bahrain and Kuwait, the assembly can vote no confidence in a minister or the prime minister; in the latter case the monarch must then either appoint a new government or dissolve the assembly.[598] The elected assemblies of Jordan and Morocco can compel the government to resign.[599] In all the presidential republics except the Comoros the legislature can require the removal of the government or ministers, in most cases by vote of a majority of all members.[600] All of these examples demonstrate how Islamic states have adopted the widespread democratic practice of parliamentary oversight of the executive as a tool to help ensure that there is a peaceful means to call an errant ruler to account. This can be seen as another manifestation of al-Qaradawi's principles that the ruler is beholden to the people and that Islam permits the adoption of new tools to achieve just rule.

Some states offset this assignment to the people of part of the ruling power through powers of monarchs and presidents to appoint legislators. In Qatar, the Emir appoints one third of the Al-Shoura Council.[601] Otherwise lower (or sole) houses are elected.[602] Afghanistan, Algeria,

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majority of the members"); (Constitution of the Maldives (2008), art. 129(c) (the People's Majlis must approve all of the president's cabinet appointments except for the vice president); Constitution of Mauritania (1991, amended 2006), art. 74 ("After deliberation in the Council of Ministers, the Prime Minister shall put the question of responsibility of the Government before the National Assembly with regard to its program"); Basic Law of Palestine (2003), art. 66 (majority of all members); Constitution of Syria (2012), art. 76 (once appointed, the prime minister need only "present the cabinet's statement . . . to the People's Assembly for discussion"); Constitution of Tunisia (2014), art. 89; Constitution of Yemen (1991, amended 2001), arts. 86 (majority of all members), 133.

[598] Constitution of Bahrain (2002), arts. 66(c) (minister), 67(d) (prime minister) (in both cases requiring 2/3 of the members of the Chamber of Deputies); Constitution of Kuwait (1962), arts. 101(2) (ministers), 102(2) (prime minister) (in both cases requiring a majority of the members of the National Assembly, excluding ministers).

[599] Constitution of Jordan (1952, amended 2011), art. 54(2) (government must resign following a no confidence vote); Constitution of Morocco (2011), arts. 103 (by refusing Head of Government's request to vote confidence), 105 (by a motion of censure).

[600] Constitution of Afghanistan (2003), art. 92 (any minister); Constitution of Algeria (1996, amended 2002), arts. 84 (if the National People's Assembly declines, presumably by a simple majority, a request by the head of government for a vote of confidence), 136, 137 (motion of censure by 2/3 vote); Constitution of Egypt (2014), art. 131 (House of Representatives can withdraw confidence "from the Prime Minister or a minister" or their deputies; if the Cabinet "announce[s] its solidarity with him before the vote, then" it must offer to resign); Constitution of Iran (1979, amended 1989), art. 135 (assembly can withdraw confidence in ministers, presumably by simple majority); Constitution of the Maldives (2008), art. 101(3) (any minister); Constitution of Mauritania (1991, amended 2006), arts. 74, 75 (government); Basic Law of Palestine, arts. 57(1) (minister), 78(1) (prime minister or government); Constitution of Tunisia (2014), art. 97 (government), Constitution of Syria (2012), arts. 75(3), 77(1); Constitution of Yemen (1991, amended 2001), arts. 93 (1/4 of the House of Representatives may table a motion of no confidence, which passes by absolute majority), 98 (1/3 of the House may table such a motion, requiring a simple majority to pass).

[601] Constitution of Qatar (2004), art. 77 (15 of 45 members).

[602] Constitution of Iraq (2005), arts. 47, 54 ("limited to four calendar years"); Constitution of Jordan (1952, amended 2011), art. 68(1) (4-year term, extensible a further 1 to 2 years by royal decree); Constitution of Malaysia (1957, amended 2010), art. 55(3) (5-year term, unless dissolved first); Constitution of Pakistan (1973, amended 2012), arts. 51 (ten of 342 seats reserved for non-Muslims, the rest allocated among the provinces and

Bahrain, Jordan, Mauritania, Morocco and the four parliamentary republics have bicameral legislatures (although in Iraq the establishment of an upper house remains pending).[603] In Bahrain and Jordan the King appoints all members of the upper house.[604] The presidents of Afghanistan and Algeria appoint one third of the respective upper houses.[605] In Malaysia the ruler appoints the majority of senators,[606] but on the government's advice, which leaves the ruling power entirely with the House of Representatives. Elected members of upper houses represent regional interests.[607] These help to institutionalise dialogue between the ruler and the people's assembly, by decreasing the risk that the debates of the assembly could come to entirely disregard the views of the executive.

5.6.2.2. Can the people rule themselves?

Westminster style parliamentary rule is unremarkable in modern democracies, but incongruous with classical *siyasah* or the theories of modern political Islamists such as Asad

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federally administered areas), 52 (5-year term, unless dissolved first); Draft Constitution of Somalia (2012), arts. 60, 72 (four year term, re-electable).

[603] Constitution of Afghanistan (2003), art. 82; Constitution of Algeria (1996, amended 2002), art. 98; Constitution of Mauritania (1991, amended 2006), art. 46; Constitution of Iraq (2005), arts. 46 (Council of Representatives and Federation Council, the latter to be established by a law), 62 (the law must pass by a two-thirds majority of all members); Constitution of Malaysia (1957, amended 2010), art. 44 (House of Representatives (*Dewan Rakyat*) and Senate (*Dewan Negara*), plus the Yang di Pertuan Agong); Constitution of Pakistan (1973, amended 2012), art. 50 (National Assembly and Senate, plus the national president); Draft Constitution of Somalia (2012), art. 55(1) (House of the People and Upper House). Yemen has a Consultative Council appointed by the president, which the president may call into joint session with the House of Representatives. It does not, however, normally function as a legislative body. Constitution of Yemen (1991, amended 2001), arts. 126, 127. Egypt's 2014 constitutional revisions dissolved the upper house, the Shura Council, merging its employees into the House of Representatives. Constitution of Egypt (2014), art. 245. See Constitution of Egypt (2012), arts. 82 (establishing the Shura Council), 128 (president appoints 10% of members), 130 (six year term).

[604] Constitution of Bahrain (2002), art. 52; Constitution of Jordan (1952, amended 2011), art. 36.

[605] Constitution of Afghanistan (2003), art. 84 (the president appoints to a 5-year term "from among experts and experienced personalities", half of whom must be women); Constitution of Algeria (1996, amended 2002), art. 101 (appointed from among leaders "in the scientific, cultural, professional, economic and social fields"). Six year term. Id., art. 102.

[606] Constitution of Malaysia (1957, amended 2010), arts. 45(1), (2) (the Yang di-Pertuan Agong appoints 40 senators from among distinguished personages or representatives of indigenous peoples and ethnic minorities); id., Schedule 7 (each of the thirteen states elects two senators).

[607] Constitution of Afghanistan (2003), art. 84 (one third of the *Meshrano Jirga* elected by provincial and one third by local councils, respectively to four and three year terms); Constitution of Algeria (1996, amended 2002), arts. 101 (two thirds of the Council of the Nation elected "among and by the members of" local assemblies), 102 (six year term). Constitution of Malaysia (1957, amended 2010), art. 45(1), (3), (3A) (each of the thirteen states elects two senators, and four represent the capital and other federal territories; they serve a maximum of two consecutive three-year terms); Constitution of Mauritania (1991, amended 2006), art. 47 (senators are elected by "indirect suffrage" from the regions to a six year term); Constitution of Pakistan (1973, amended 2012), art. 59 (the Senate serves a six-year term, with each provincial assembly electing 23 members (of whom at least four are women, four "technocrats including ulema", and one non-Muslim) and twelve elected from federal territories, including one woman and one technocrat from the capital); Draft Constitution of Somalia (2012), arts 60 (the people of each state elect the same number of representatives to the Upper House, for a four-year term, re-electable), 72.

or Mawdudi. Despite apparently providing a particularly powerful means to apply the principle of *shura* to governance, enabling an assembly to not only counsel the government but to replace the chief executive at any time for any reason differs significantly from the model of selecting the ruler prototyped by the selection of Abu Bakr as caliph, nomination by *ahl al-hall wa'l-'aqd* followed by the *bay'ah*. Nevertheless, modern Islamic states have implemented the Westminster model. In particular, Pakistan's constitution places all executive power with the parliament yet at the same time goes to considerable lengths to institutionalise Sharia,[608] an effort in which Mawdudi himself was deeply involved. Therefore it may well be that in this regard states have developed the mechanisms of *siyasah*, and thereby actually enhanced the range of means available to create state structures conducive to rule according to Sharia.

The titular rulers of Iraq, Malaysia, Pakistan and Somalia wield so little actual authority that the governing power effectively resides with the parliament, which establishes and sustains the government. The lower house elects the president in Iraq and Somalia.[609] In Pakistan, the members of the Senate and the provincial assemblies also vote for the president, with the National Assembly members holding nearly half of the votes, the senators about one seventh, and the remaining votes split equally among the four provinces.[610] In Malaysia and Pakistan, the nominal chief executive in all main aspects of governing must follow the advice of the cabinet of ministers.[611] The same is true of the president of Somalia, with the important exceptions of leading the armed forces and declaring an emergency or war "in accordance with the law", and appointing the prime minister subject to a vote of confidence.[612] In Iraq the president may issue decrees, but the prime minister exercises the main executive authority, and the president's appointment or dismissal of ministers requires parliamentary assent.[613] In all four states, the lower house of parliament holds the power to vote or withdraw confidence in the government.

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[608] For further discussion of how Pakistan's constitution institutionalises Sharia, see the next chapter.
[609] Constitution of Iraq (2005), arts. 58(3) (election requires a two-thirds majority (art. 67(1)), with the nominees selected by a process determined by a law (art. 66)); Draft Constitution of Somalia (2012), art. 89.
[610] Constitution of Pakistan (1973, amended 2012), art. 41(3). Members of the national parliament cast about 63% of the votes. There are 104 senators and 342 members of the National Assembly. Id., arts. 59(1), 51(1A). In effect each member of the smallest provincial assembly, that of Baluchistan, has one vote while the members of the larger assemblies hold fractional votes, such that each of the four assemblies collectively has the same number of votes as Baluchistan. Id., Second Schedule, art. 18(1). As Baluchistan's assembly has 65 seats, the provincial assemblies together cast 260 votes to elect the president. Id., art. 106.
[611] Constitution of Malaysia (1957, amended 2010), art. 40(1); Constitution of Pakistan (1973, amended 2012), art. 48(1).
[612] Draft Constitution of Somalia (2012), art. 90.
[613] Constitution of Iraq (2005), arts. 70(G), 75, 73.

Despite the dearth of precedent, basic principles of Islam provide at least a starting point to reason toward rule by an assembly. The Quran praises the *umma* because "they conduct their affairs by consultation among them".[614] In isolation, this might be read as sanctioning collective rule due to its use of the plural form. Such a conclusion would, however, be a minority view. While admitting there is no explicit command on the point, Asad concludes based on several *ahadith* that "the Prophet envisaged the concentration of all executive responsibilities in the hands of one person . . . as being the most suitable for the purposes of an Islamic polity".[615] Asad further argues that the ruler should hold authority by popular election in his own right, and that the possible necessity of compromise among several parties to arrive at government policy would work against the "single-mindedness and inner continuity so essential for an Islamic state".[616] Nevertheless, Asad's view is not universally shared. For example Zubaida argues that "[a]fter the Prophet ... [a] leader was no more than a practical necessity", which leaves the citizenry of an Islamic state free to select and remove its leaders as it chooses.[617] Iraq, Malaysia, Pakistan and Somalia aim to implement Islamic rule in a system that assigns most or all executive power to a parliament. This approach does not comport with the example of the classical caliphate, but this may show only that it did not suit the political structures familiar to that society at that time. It appears as well suited as any other approach to establish state structures capable of meeting both Islamic and international standards of just, participatory governance.

5.6.3. Legislation

A further innovation since classical Islamic times is the advent of legislation, rather than relying on edicts of the ruler. Legislation, and separating law-making from daily government and law-enforcement, can be powerful tools of democracy. Legislation is both more durable and more efficient than making public decisions ad hoc in council, as for example was the ancient Athenian tradition. Al-Mawardi and Ibn Taymiyyah readily conceded the right of the ruler to create law within the areas governed by *siyasah*. As with the question of sharing the executive power that once accrued entirely to the caliph, most Islamic states have had to innovate in order to separate legislative from executive powers—the exceptions being those states that are absolute monarchies or parliamentary republics. The Ottoman caliphate set the

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[614] Quran 42:38, quoted in Mohammad Hashim Kamali, Principles of Islamic Jurisprudence (Islamic Texts Society, 1991) 39.
[615] Muhammad Asad, The Principles of State and Government in Islam, 2nd ed. (Islamic Book Trust, 1980) 59.
[616] Muhammad Asad, The Principles of State and Government in Islam, 2nd ed. (Islamic Book Trust, 1980) 60.
[617] Sami Zubaida, Law and Power in the Islamic World (I.B. Taurus, 2003) 90.

first tentative precedents in this regard. The essential question in terms of Islamic law is whether the principle of *shura* can extend to enacting legislation and thus altering the legal framework within which the ruler operates, or whether this would impermissibly usurp the ruler's *siyasah* prerogatives. Through their constitutions, Islamic states have undertaken to update *siyasah Sharia* in this way. If the Prophet's ruling power, the divine trust, devolved on the *umma* as a whole rather than being bequeathed by God to the caliph personally as the Umayyads and Abbasids periodically argued, then reassigning the caliph's right to issue edicts to an assembly to exercise as legislative power is merely a technical modification.

Most of the basic principles are relatively uncontroversial. The ruler must apply Sharia but may enact new laws as necessary to govern. This entails consultation with the people, which may occur through representation. The example of the Prophet following the counsel of his companions even when he disagreed arguably indicates that a legislative assembly could have the power to amend or reject the ruler's proposed law. But this does not necessarily establish that the people can, through legislation, make lasting changes to the legal framework of the state. For this, recall that when the early jurists were elaborating the law, the edicts and political or administrative decisions of past rulers formed part of the legal environment of the Muslim society. Although they could not openly admit it, the *ulama*'s exposition of Sharia owed a significant part of its substance to existing *de facto* sources of law, such as tradition, custom and the ruler's edicts.

The lack of theoretical clarity around the role of a legislative assembly in an Islamic state is highlighted by the variety of approaches modern constitutions take. All of these both recognise the duty of *shura*, and permit legislation. Distinguishing consultation from legislation is not always straightforward, but even where a body apparently tasked with *shura* holds law-making power, there is a separate provision for consultation. The latter may take the form of an advisory relationship with a body of Islamic jurists or leaders such as former officials or teachers. Only in Saudi Arabia does the ruler's power reach the absolute level of the Rashidun caliphs advocated by Mawdudi, with the assembly exercising purely consultative powers. Brunei and Oman, even while reserving to the Sultan the sole right to approve laws, allow members of the assembly to propose laws, which fits neither Mawdudi's model nor even Asad's idea of an assembly empowered to reject proposed legislation.

The remaining Islamic states have adopted law-making by legislation. Under most Islamic constitutions, the head of state plays a powerful role in the legislative process. Without an

elected assembly there might be little restraint on a ruler who failed to rule in accordance with Islam. This necessitates legislation or at least consultation, as a matter of public interest (*maslahah*). Arguably, this might outweigh any hesitations about unwarranted innovation. In any case the legislative model of government has won almost universal acceptance. The assembly's role in law-making can be as little as the right to propose legislation for the ruler's consideration, and at the other extreme can encompass the entire law-making power. The most common approach is to require that both the ruler and the assembly assent to legislation. All Islamic states except for Bahrain, Kuwait and Saudi Arabia allow the legislature or council to propose laws. Only in Brunei, Oman, Saudi Arabia and the UAE does the ruler wield plenary authority over the final text of laws.[618] All other Islamic constitutions at least allow the legislature to decline legislation proposed by the ruler, usually by an enhanced-majority vote.

The caliphal model of a complete combination of executive and legislative authority, leavened only by the duty to consult, is rare in modern Islamic states. Only Saudi Arabia takes this approach, though Brunei and Oman nearly do. Otherwise, a shared law-making power has become the norm. Only a few hereditary monarchs reserve to themselves the right of legislative initiative. The parliamentary states and Iran and Morocco go to the opposite extreme of providing the chief executive with no legislative role (although in Iran the Guardian Council supervises both branches). The bulk of Islamic states apply typical presidential governance, whereby the president, government or legislators may propose laws, both the legislature and the executive must agree to pass them, and a supermajority can overcome the executive's refusal to assent.

5.6.3.1. Initiating legislation

One point of difficulty is whether an assembly may initiate legislation. There is no specific Quranic or sunnaic injunction on this. Islamist writers who have addressed it agree that in principle legislation should begin with the executive. Yet citizens in an Islamic polity have the right to express an unsolicited opinion on governance (part of the duty of *hisbah*), and are

[618] The Basic Law of Saudi Arabia requires the establishment of a consultative council, to be dissolved or re-created at the discretion of the King. Basic Law of Saudi Arabia (1992), art. 68 (deferring details of the council to a law). The Union National Assembly of the UAE serves as a consultative legislature with the right to propose amendments to bills submitted by the Council of Ministers. Constitution of the United Arab Emirates (1971, amended 1996), arts. 110(2), (3). Final authority over whether to enact legislation lies with the president and the Supreme Council. Id.

free to criticise the government.[619] If citizens may participate in legislating, and may also offer unsolicited criticism, that criticism might take the form of proposing a specific change to the *siyasah* law. The early written Islamic constitutions diverged on this point: the 1876 Ottoman constitution permitted only the government to initiate legislation,[620] while the 1906 Iranian constitution allowed the National Consultative Assembly to "to propose any measure which it regards as conducive to well-being of the Government and the People".[621] A precedent-based reading might well conclude that legislation should begin with the government, but a rationalist application of Islamic principles could also conclude that it is within the prerogative of a Muslim community to permit the assembly to take the initiative.

The most common approach to legislation among modern Islamic states echoes that of the Ottoman constitutional monarchy, except that legislators as well as the executive may propose laws. Providing this power to an assembly is controversial in theory, but with the possible exception of the Maldives all non-monarchical Islamic states have done so.[622] The elected consultation chambers of Brunei and Oman may propose legislation, although only the monarch has the power to enact it. Otherwise among monarchies, the right to initiate legislation rests solely with the monarch.[623] In republics, the president or government and the legislature share this right.[624] In Egypt, Malaysia, Palestine and Yemen it belongs to each member of parliament,[625] and in Algeria, Iran, Iraq, Somalia and Tunisia to groups of members.[626] The constitutions of Afghanistan, the Comoros, Mauritania and Syria specify

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[619] Mohammad Hashim Kamali, Citizenship and Accountability of Government: An Islamic Perspective (Islamic Texts Society, 2011) 159 (referencing the *hadith*, "the best form of *jihad* is to speak a word of truth to a tyrannical ruler").

[620] Ottoman Constitution (1876), art. 53.

[621] Constitution of Iran (1906), art. 15.

[622] While the constitution of the Maldives contains no language to prevent legislators from proposing laws, it only explicitly mentions this as a government competence, although empowering the People's Majlis to enact legislation. Constitution of the Maldives (2008), arts. 70(b)(2), 132(b).

[623] Constitution of Bahrain (2002), art. 35(a); Constitution of Kuwait (1962), arts. 65(1).

[624] In the six presidential republics where the president cannot initiate legislation (Afghanistan, Algeria, Iran, Mauritania, Palestine and Yemen), the government can do so, and the president appoints the government.

[625] Constitution of Egypt (2014), art. 122; Constitution of Malaysia (1957, amended 2010), arts. 66(2) (members of either house may introduce ordinary legislation), 67(1) (only a minister may introduce 'money bills' involving significant taxation or expenditure); Basic Law of Palestine (2003), art. 56(2); Constitution of Yemen (1991, amended 2001), art. 85 (but proposals that change tax rates or "aim at allocating part of the state funds for a certain project" require backing by the government or 20% of the House of Representatives).

[626] Constitution of Algeria (1996, amended 2002), art. 119 (20 deputies of the National People's Assembly); Constitution of Iran (1979, amended 1989), art. 74 (15 members of the Islamic Consultative Assembly); Constitution of Iraq (2005), art. 57(2)(B) ("ten members of the Council of Representatives [or] one of its specialized committees"); Draft Constitution of Somalia (2012), art. 80 (10 members of the House of the People; committees or representatives of the federal states in the Upper House); Constitution of Tunisia (2014), art. 62 (ten members).

only "members" or "the members".[627] The executive's right to propose laws rests with the president personally in the Comoros, the Maldives and Syria,[628] with the government in Afghanistan, Algeria, Iran, Mauritania, Palestine, Somalia and Yemen,[629] and with both in Egypt, Iraq and Tunisia.[630]

5.6.3.2. Enacting laws

Most Islamic states balance the traditional power of the ruler to declare law within the sphere of *siyasah* with the modern democratic norm of legislation enacted by an elected assembly. The exceptions are absolute monarchies, where the ruler may consult with an assembly or other advisors, but retains the sole right to issue edicts, as in the classical caliphates, and parliamentary republics where the nominal head of state wields effectively no authority over the legislation that the government enforces. The majority of modern Islamic states compromise by empowering the head of state to either approve or block legislation, varying the weight of this power by the standard modern means of allowing a supermajority to enact legislation even over the objections of the head of state.

Legislation in constitutional monarchies and presidential republics, except for the Comoros, Morocco and Iran, requires the consent of the head of state to become law.[631] In Afghanistan, Algeria, Bahrain, Egypt, Jordan, Kuwait, Palestine, Qatar and Syria a 2/3 vote of the legislature (or its lower house) overrides the ruler's refusal,[632] the same formula as in the

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[627] Constitution of Afghanistan (2003), art. 95; Constitution of the Comoros (2001), art. 25, Constitution of Mauritania (1991, amended 2006), art. 61; Constitution of Syria (2012), art. 74.

[628] Constitution of the Comoros (2001), art. 25, Constitution of the Maldives (2008), art. 132(b) (the cabinet should "advise and recommend draft bills and proposals to the President, to be prepared for submission to the People's Majlis"); Constitution of Syria (2012), art. 112.

[629] Constitution of Afghanistan (2003), art. 95; Constitution of Algeria (1996, amended 2002), art. 119; Constitution of Iran (1979, amended 1989), art. 74; Constitution of Mauritania (1991, amended 2006), art. 61; Basic Law of Palestine (2003), art. 70 (the Council of Ministers); Draft Constitution of Somalia (2012), art. 80(1)(a); Constitution of Yemen (1991, amended 2001), art. 85.

[630] Constitution of Egypt (2014), art. 122; Constitution of Iraq (2005), art. 57(2)(A); Constitution of Tunisia (2014), art. 62.

[631] Constitution of the Comoros (2001), art. 17(the president may merely request that the Assembly of the Union reconsider); Constitution of Iraq (2005), art. art. 70(C) (the president has the power to ratify laws, but after 15 days they are considered ratified regardless); Constitution of Morocco (2011), arts. 84-85 (bills approved by legislative votes). The Draft Constitution of Somalia does not state whether the president may refrain from signing legislation, but several provisions appear to treat signature as a formality. See e.g., Draft Constitution of Somalia (2012), arts. 81(4), 82(3) (referring to sending legislation to the president "for his signature, and its publication in the Official Gazette"). The list of presidential powers includes signing laws. Id., art. 90(f).

[632] Constitution of Afghanistan (2003), art. 94, Constitution of Algeria (1996, amended 2002), art. 127; Constitution of Bahrain (2002), art. 35(a), (d) (applying to amendments made by the Chamber of Deputies, which cannot initiate legislation); Constitution of Egypt (2014), art. 123; Constitution of Jordan (1952, amended 2011), art. 93(4); Constitution of Kuwait (1962), art. 66; Basic Law of Palestine (2003), art. 41(2); Constitution of Qatar (2004), art. 106(3); Constitution of Syria (2012), art. 100. In Kuwait a simple majority can enact a bill unable to command a 2/3 majority in a previous legislative session. Constitution of Kuwait (1962), art. 66.

1909 amendments to the Ottoman constitution.[633] This already significant power of the ruler is even stronger than it at first appears in Afghanistan, Algeria, Bahrain, Jordan and Qatar because the respective heads of state appoint enough legislators to form a blocking minority. The legislature has greater power in the Maldives, Mauritania, Tunisia and Yemen, where the president may require a second reading, but must promulgate a measure if it passes again by a majority of all members.[634] Where there are bicameral legislatures, both houses must consent, but in Mauritania and Somalia if they fail to agree then the lower house may approve a text with an enhanced majority.[635] The presidents of Algeria, Mauritania and Tunisia may under certain circumstances submit questions to public referendum.[636] In Iran, Iraq, Malaysia, Morocco, Pakistan and Somalia the nominal head of state essentially cannot prevent the enactment of laws.

5.7. Constitutionalism

In nearly every modern state, the constitution is the first locus of human rights guarantees. This part poses the question of whether an Islamic state can operate under a written constitution, and concludes that Sharia presents no bar to the practice. The Prophet himself assumed temporal powers in Medina through a written agreement. Abu Bakr established in the first moments of the caliphate that the caliph rules based on a compact made with the *umma*. Uthman, by accepting the caliphate under the condition that he follow the examples

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[633] The amendments enabled Parliament to overrule the Sultan's refusal with a 2/3 majority of each house—unlikely considering the Sultan's power to appoint all senators. Ottoman Constitution (1909), art. 54; Ottoman Constitution (1876), art. 60.

[634] Constitution of the Maldives (2008), art. 91(b); Constitution of Mauritania (1991, amended 2006), art. 70; Constitution of Tunisia (2014), art. 81 (except organic laws, which require a 3/5 majority); Constitution of Yemen (1991, amended 2001), art. 102.

[635] Constitution of Afghanistan (2003), art. 94; Constitution of Algeria (1996, amended 2002), art. 120 (after passage by the National Assembly the Council of the Nation approves laws by a 3/4 vote. If the chambers cannot agree, the text is withdrawn); Constitution of Malaysia (1957, amended 2010), art. 66(1) (except money bills, which the lower house alone passes); Constitution of Mauritania (1991, amended 2006), art. 66 (but article 67 requires a majority of all members to pass an organic law); Constitution of Pakistan (1973, amended 2012), arts. 70, 73(1) (except money bills, where the Senate may only make recommendations); Draft Constitution of Somalia (2012), arts. 81-83 (2/3 of all members). In Malaysia, only a minister may propose to amend a money bill. Constitution of Malaysia (1957, amended 2010), art. 67(1). Bills become law with the assent of the Yang di-Pertuan Agong, or after thirty days. Id., art. 66(4), (4A). In Pakistan, if the houses disagree then they sit jointly to reconsider the bill, which passes with a majority of the members present. Constitution of Pakistan (1973, amended 2012), art. 73(3). The president may ask the parliament to reconsider a measure, but ultimately cannot stop its enactment. Id., art. 75.

[636] Constitution of Algeria (1996, amended 2002), arts. 7, 77(8) ("any question of national importance"); Constitution of Mauritania (1991, amended 2006), art. 38 ("any question of national importance"); Constitution of Tunisia (2014), art. 82 ("draft laws related to the ratification of treaties, to freedoms and human rights, or personal status").

set by Abu Bakr and Umar, showed that the compact can outlive the caliph.[637] After disposing of the threshold question of how to reconcile the potentially competing claims of a constitution and Sharia to supremacy, the part proceeds in two sections. The first section establishes that Islamic states can and do implement constitutions without compromising their fidelity to Sharia. The second section examines how Islamic states amend constitutions by peaceful means. The latter issue is particularly important to an Islamic state, in light of the disputes over the nature of the compact of governance that contributed in large measure to the outbreak of the first *fitnah*, the civil war that ended the Rashidun caliphate and fostered the Sunni-Shia split.

With a few exceptions, states now operate under written constitutions. A constitution is the locus of lasting human rights guarantees, in the form of civil rights, and often also describes the degree to which the government is beholden to international law and agreements. It also poses potentially difficult issues for an Islamic state. A constitution documents the compact between a government and the people who agree to be governed. Traditionally, the operation of *shura* reflects this covenant into Islamic society.[638] A constitution raises the question of whether Sharia can accept a permanent realignment of the terms under which the ruler holds in trust the power to govern the *umma*, whether delegated by the citizens or granted directly by God. Modern Islamic constitutions implement Islamic governance based on a mix of principles gleaned from the sources of law, examples from the first caliphate, and precedents such as the 1876 Ottoman constitution.

A preliminary difficulty in contemplating an 'Islamic constitution' is its standing relative to Sharia. A constitution is the supreme law of the land, but Sharia, as God's law, is supreme. The first Islamic constitution to assert supremacy was the Ottoman constitution, amended in 1909 to require the Sultan to swear before Parliament to respect Sharia and itself.[639] This does not address which of those two sources of law takes precedence if they conflict. Brown sees no inherent dilemma, as "any constitution that provides possibilities for amendment acknowledges the existence of authority higher than itself", but does perceive a potential

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[637] Ali's refusal of this condition and later assumption of the caliphate without it (see below, section 5.7.2.) arguably did not negate this possibility, but rather showed that it could be negotiated one way or the other prior to the ruler's assumption of power.

[638] Mohammed Abed al-Jabri, Democracy, Human Rights and Law in Islamic Thought (I.B. Tauris, 2009) 189-90.

[639] Ottoman Constitution (1909), art. 3. Brown considers this "symbolically critical" because it "formaliz[ed] the idea that the sultan himself was subject to the will of God and the people". Nathan J. Brown, *Constitutionalizing Islam in the Arab World*, in Robert Fatton, Jr. and R.K. Ramazani, eds., Religion, State and Society: Jefferson's Wall of Separation in Comparative Perspective (Palgrave Macmillan, 2009) 195-214 at 199-200.

conflict in the fact that Sharia is itself in part a "specific code of law".[640] Four modern constitutions explicitly address the question. Saudi Arabia's Basic Law states that not itself, but the Quran with the Sunna is the constitution and the root of state power.[641] Somalia subordinates its constitution to Sharia.[642] The constitutions of Iraq and Malaysia assert their own supremacy.[643] The practical scope for constitution and Sharia to collide is limited, however. The laws of an Islamic state operate against a background of what amounts to a supranational common law. When multiple plausible interpretations exist, constitutional provisions would where possible be read compatibly with the prevailing understanding of Islamic law. Only if a provision were written or applied so as to unambiguously collide with a clear norm of *fiqh* would the supremacy question arise in practice.

5.7.1. Constitutional legitimacy

A greater conundrum is whether the *umma* can give allegiance to an abstract entity such as a state. Through the *bay'ah* the people pledge their loyalty not to a state structure, but to the ruler, as the leader of the *umma*. The narrowest model of an Islamic state is therefore to acknowledge the proofs of Sharia as the constitution, and recognise in the ruler plenary powers during good behaviour, as in Saudi Arabia.[644] But restricting the definition of an 'Islamic constitution' to this minimal model would exclude all other modern constitutions (except possibly the Basic Statute of Oman), as well as the Ottoman constitution, and would disregard the work of most thinkers who have considered the question of an Islamic state since the 19th century. Khan and Ramadan propose a definition that would include any constitution containing a 'supremacy clause', requiring that all laws be compatible with it, and a 'submission clause' subordinating itself to Sharia.[645]

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[640] Nathan J. Brown, *Constitutionalizing Islam in the Arab World*, in Robert Fatton, Jr. and R. K. Ramazani, eds., Religion, State and Society: Jefferson's Wall of Separation in Comparative Perspective (Palgrave Macmillan, 2009) 195-214 at 196.

[641] Basic Law of Saudi Arabia (1992), arts. 1, 7. Subordination to Shari'a might also be inferred in Oman's Basic Statute, which gives considerable deference to Shari'a in its substantive provisions.

[642] Draft Constitution of Somalia (2012), art. 4(1) ("After the Shari'ah, the Constitution . . . is the supreme law"). The draft constitution acknowledges Sharia as a paramount source of rights, recognising rights conferred via other law "to the extent that they are consistent with the Shari'ah and the Constitution", id., art. 40(4), and proclaims itself "based on the foundations of" the Quran and Sunna, and protecting "the higher objectives of Shari'ah and social justice". Id., art. 3(1).

[643] Constitution of Malaysia (1957, amended 2010), art. 4(1); Constitution of Iraq (2005), art. 13 ("This constitution is the sublime and supreme law in Iraq"). See also id., art. 5 ("The law is sovereign" and the people, through their votes and their constitutional institutions are the source of authority).

[644] Basic Law of Saudi Arabia (1992), arts. 1 (the Quran and the Prophetic *sunna* are the constitution), 6 (the people pay allegiance to the King).

[645] L. Ali Khan and Hisham M. Ramadan, Contemporary *Ijtihad* (Edinburgh U. Press, 2011) 116 (the submission clause should specify at least the 'Basic Code', that is, the Quran and the Prophetic sunna).

Pre-modern Islamic history offers limited guidance to inform the permissible contours of an Islamic constitution. The Constitution of Medina comprised only a small portion of the basic law governing Medinan society. Far the greater part was Sharia and, where Sharia was silent, Arab custom. The Medina constitution did however show that the Prophet was willing to abide by a written document. Throughout the subsequent caliphate, Sharia alongside custom as the common law served as an unwritten constitution governing relations between the *umma* and the ruler. This established an Islamic precedent for the mixing of a written constitution with an unwritten common law. The difference with Islamic states today is more one of degree than of kind: formal constitutions have become more detailed, as is arguably necessary in a more complex society and without a divinely guided leader like the Prophet or his Companions who had been able to observe his *sunna* first hand.

The Prophet's authority was absolute, but beginning with Abu Bakr, the caliph exercised power conditionally. This rested on the basic exchange of protection for obedience, and the ruler's pledge to implement Sharia. The caliph had a duty "to apply God's law and to protect Muslims in the territory of Islam; in return, the ruler was promised the people's support and obedience", although the classical sources do not lay out the terms of this 'contract' in detail.[646] The ruler should ensure that society operates within Sharia's bounds, while protecting the freedoms necessary for people to fulfil their development as Muslims and to exercise their collective right to participate in their own governance. Abu Bakr simply promised to rule according to the Quran and the Prophet's words and example.[647]

The 1876 Ottoman constitution presents a somewhat controversial example. The sultanate and caliphate had Islamic legitimacy, but the constitutional changes since the mid-19th century stemmed first from relatively recent European ideas and examples, with Islamic considerations secondary at best. The constitution remained in force for only about fifteen years, during most of which the empire's demise was clearly imminent (1876-78 and 1909-1922). Though it remains the first example of a widely-recognised caliphate acceding to a formal constitution, it is not surprising that some commentators would prefer to more closely emulate the earlier caliphates.

A written constitution for an Islamic state is uncontroversial among modern thinkers. Khomeini and Mawdudi each helped to create such constitutions. The proponents of the

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[646] Khalid Abou El-Fadl, Islam and the Challenge of Democracy (Princeton U. Press, 2004) 11.
[647] Ira M. Lapidus, Islamic Societies to the Nineteenth Century: A Global History (Cambridge U. Press, 2012) 80.

original Ottoman constitution sought its legitimacy in principles such as *shura* and *bay'ah*, but their efforts attracted criticism from the *Shaykh-ul-Islam* and other *ulama* concerned that it would allow non-Muslims to participate in law-making.[648] This was not the same as objecting to the idea of a constitution. The most fundamental objection to constitutionalism stems from the risk that professing loyalty to a state would diminish citizens' membership of the universal *umma*. As Kamali relates, the idea of the nation state as it developed in the post-colonial era engendered hostility from defenders of the universalism of Islam such as Mawdudi and Qaradawi, but is ultimately reconcilable with a natural love of a people for their heritage, through al-Sa'idi's thesis that Muslims share a type of citizenship across national borders, but also national citizenship, the latter shared with non-Muslim citizens.[649]

Rule by written constitution has become the norm among avowedly Islamic states.[650] Even traditionalist readings of Islamic governance would appear to permit it, because the Prophet ruled by written agreement; Abu Bakr disclaimed divine right to rule, in favour of an exchange of promises with the *umma*; and the proofs of Sharia contain no clear prohibition of the practice. So long as it remains subordinate to Sharia, and does not infringe on the prerogatives of the supreme religious authority, the state can enter into the Islamic social contract as a conduit for the orderly succession of temporal leadership under agreed conditions, and as the guarantor of the limits of the temporal ruler's authority.

5.7.2. Constitutional amendment

While the Prophet lived, the revelation of the Sharia was on-going. In effect the constitution evolved in response to the needs of the *umma*, as verses were revealed to guide their actions. The first question that required a constitutional amendment, in the sense of a debated change in the basic rules governing society, was whether and how to designate a successor to the Prophet. Subsequently, during the rapid development of the caliphate, the Rashidun caliphs "varied their system of administration—or, as we would say today, the constitution of the state".[651] Umar, for example, incorporated the Persian institution of the *diwan*, a civil service

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[648] Sami Zubaida, Law and Power in the Islamic World (I.B. Taurus, 2003) 136-37. "One *'alim*, however, the Qadiaskar Seyfeddin, consistently supported the constitution, citing verses from the Quran and prophetic *hadith* in favour". Id. 137 (citing Niyazi Berkes, The Development of Secularism in Turkey (Hurst, 1964) 228).

[649] Mohammad Hashim Kamali, Citizenship and Accountability of Government: An Islamic Perspective (Islamic Texts Society, 2011) 129-31.

[650] See e.g., L. Ali Khan and Hisham M. Ramadan, Contemporary *Ijtihad* (Edinburgh U. Press, 2011) 115 ("constitutionalism has emerged, though not without question, as part of contemporary Islamic law").

[651] Muhammad Asad, The Principles of State and Government in Islam, 2nd ed. (Islamic Book Trust, 1980) 27 (citing the example of the variations in ways to select the caliph exercised during the Rashidun caliphate).

bureau, and brought the armies under state control, paid from public funds.[652] The Rashidun caliphs did not, however, innovate as readily in matters that concerned the rights of citizens or the relationship between the *umma* and the caliph. A ruler who changed the basic contract against the will of the *umma* risked giving rebels a principle to rally around, as when the Kharijites rebelled against Ali, citing what they considered to be an unacceptable innovation (submitting the caliph's continuance in office to arbitration). This left *ijma*, consensus of at least all the Companions or, later, the *ulama*, if not the entire *umma*, as the only real means to amend the unwritten constitution of the caliphate. The first formal provision for amendment came in the 1876 Ottoman constitution, amendable by 2/3 supermajorities of the elected Chamber of Deputies and the appointed Senate, with the Sultan's assent.[653]

Had there been any notion in the classical era of a written constitution, it appears from the principles of Islamic governance that it could have envisaged amendment. Islamic rule rests on the consent of the governed. The ruler governs, the people accept the ruler, and Sharia demarcates the boundaries. In order to govern, the ruler may alter the institutions of the state, particularly the executive administration. Thus the ruler may change the constitution, within the boundaries of Sharia. The question is more complex if the state power is divided, as for example when an elected parliament shares in the governing power. Some constitutional changes might affect the balance of power between 'ruler' and 'people'. Under a power-sharing model, a new ruler could not undo an amendment made by mutual consent, if the people did not consent—but a new ruler could simply decline to assume power in the first place, as Ali declined the caliphate rather than pledge to adhere to the precedents set by Abu Bakr and Umar.[654] Therefore amendment by mutual consent of ruler and people is permissible even when it affects the distribution of governing powers, so long as the amendment does not transgress Sharia.

All modern Islamic constitutions provide for amendment, by rules that roughly mirror the distribution of legislative and governing powers between the head of state, an assembly, and the general populace. As with legislative procedures, the most common approach is that of

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[652] Ira M. Lapidus, Islamic Societies to the Nineteenth Century: A Global History (Cambridge U. Press, 2012) 63-64.

[653] Ottoman Constitution (1876), art. 116.

[654] Ali was invited to succeed Umar as caliph, on condition that he govern in accordance with the Quran and the examples set by the Prophet and the first two caliphs. He declined, as he was an *imam* in his own right with a duty to exercise his own judgment in applying the rules of the Quran and the Prophet. Uthman agreed to the condition, and became caliph. Yusuf al-Qaradawi, *Islam and Democracy*, in Roxanne L. Euben and Muhammad Qasim Zaman, eds., Princeton Readings in Islamist Thought (Princeton U. Press, 2009) 230-45 at 245.

the Ottoman constitution: in Bahrain, Jordan, Kuwait, the Maldives, Qatar and the UAE, the ruler may amend the constitution with the agreement of a supermajority of the elected assembly, usually two thirds.[655] The same is true of the Comoros, but a referendum may substitute for a legislative vote.[656] In Brunei, Oman and Saudi Arabia, the monarch wholly controls the constitutional text.[657] The parliaments of Iraq, Malaysia, Pakistan, Palestine, Somalia and Yemen, which wield most or all of the executive power, can enact amendments without the chief executive's assent (Iraq and Somalia require a referendum as well).[658] A referendum is common practice in the Middle East, and the norm in North Africa. Somewhat incongruously, the constitutions of North Africa that establish otherwise strong, independent chief executives provide for amendment without the executive's formal approval.[659] This may reflect a legacy of the French legal tradition. Afghanistan presents a variant on this concept, as notwithstanding a powerful president a *Loya Jirga* representing the whole people adopts amendments by a two thirds vote.[660] Iran's constitution provides for amendment by

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[655] Constitution of Bahrain (2002), art. 120(a); Constitution of Jordan (1952, amended 2011), art. 126; Constitution of Kuwait (1962), art. 174; Constitution of the Maldives (2008), arts. 261 (3/4 majority), 262(a) (presidential assent); Constitution of Qatar (2004), art. 144; Constitution of Syria (2012), art. 150(4) (3/4 majority); Constitution of the United Arab Emirates (1971, amended 1996), art. 144(2)(c) (presidential assent is not strictly required, but amendments must originate with the Supreme Council which the president chairs).

[656] Constitution of the Comoros (2001), art. 37 (the president and 1/3 of the legislature "jointly" propose amendments; approval is by 2/3 of each legislative house "or by referendum").

[657] Constitution of Brunei-Darussalam (1959, amended 2011), art. 85 (1); Basic Statute of Oman (1996, amended 2011), art. 81; Basic Law of Saudi Arabia (1992), art. 83.

[658] Constitution of Iraq (2005), art. 122 (presidential ratification is required, however if the president does not ratify then the amendment is nonetheless enacted after seven days); Constitution of Malaysia (1957, amended 2010), art. 159(3) (2/3 majority); Constitution of Pakistan (1973, amended 2012), art. 239 (2/3 of the National Assembly only); Basic Law of Palestine (2003, amended 2005), art. 120 (2/3); Draft Constitution of Somalia (2012), arts. 132(4)-(8) (2/3 of each house), 132(10) (referendum); Constitution of Yemen (1991, amended 2001), art. 158 (3/4). In some matters, such as the means of selecting senators and the head of state, the legislature in Malaysia may amend the constitution via the ordinary legislative process. Constitution of Malaysia (1957, amended 2010), art. 159(4)(a). Other amendments require the assent of the Conference of Rulers, the assembly of traditional leaders of the states. These relate mainly to citizenship and the ceremonial prerogatives of the Conference. Id., art. 159(5). In Pakistan, the provincial legislatures must assent to amendments that would affect provincial boundaries. Constitution of Pakistan (1973, amended 2012), art. 239 (4).

[659] Constitution of Algeria (1996, amended 2002), art. 174; Constitution of Egypt (2014), art. 226 (2/3 legislative majority, referendum); Constitution of Mauritania (1991, amended 2006), arts. 99 (2/3 legislative majority), 100 (referendum); Constitution of Morocco (2011), arts. 172-74 (the King, or Parliament by a two-thirds majority of each chamber, may propose amendments for adoption by referendum); Constitution of Tunisia (2014), art. 144 (2/3 legislative majority, after which the president may call a referendum). No referendum is required in Algeria if the legislature approves or proposes an amendment by 3/4 majority, although in the latter case the president may call for one nonetheless. Constitution of Algeria (1996, amended 2002), arts. 176, 177. In Mauritania the president can in effect approve the amendment without a referendum. Constitution of Mauritania (1991, amended 2006), art. 101 (the president may submit a proposed amendment "to Parliament convened as a Congress", where a 3/5 majority suffices; 2/3 of Parliament having previously voted to propose the amendment). Any member of parliament, a federal or state government, or 40,000 citizens by petition may propose an amendment to the draft constitution of Somalia. Draft Constitution of Somalia (2012), art. 132(3).

[660] Constitution of Afghanistan (2003), art. 150. The *Loya Jirga* is a national congress of all members of the National Assembly and the chairs of the provincial and district councils. Id., art. 110. The president participates, but as an ordinary member.

agreement of the highest executive (the Leader), who proposes amendments, with the people by referendum, leaving no role for the legislature.[661] In the Maldives and Yemen a referendum is required to amend certain provisions.[662]

Pre-modern precedent for the people's participation in constitutional amendment is limited to the short-lived Ottoman constitution, exercised only once. Popular participation is not, however, difficult to justify under basic principles of Islam, if one accepts the idea of renewed *ijtihad*.[663] Most present day Islamists and Islamic modernists advocate such a course, arguing that developing the understanding of Sharia through *ijtihad* is a right and duty of the entire *umma*, not only the *ulama*. The *bay'ah* and *shura* show respectively that the people must consent to and be consulted during rule over them. Ongoing consultation is the means by which the social contract is maintained. If it becomes clear that the contract needs adjustment and both parties are amenable, then it is difficult to find a specific rule of Sharia that would forbid it. Finally, under the principle of representation, it is acceptable for an assembly to commit the people to a change. If constitutionalism is permitted at all, then no strong principle of Islam would stand obviously in the way of allowing the people and the ruler to alter their contract by mutual agreement.

The absence of an emir who is accountable to the people directly rather than through a legislature makes it difficult to assess parliamentary democracy as a context for Islamic constitutionalism. A parliament may be more closely analogous to a group of ruling elders, as in the traditional model of rule that pre-dated the Prophet's political entity. If Islam can still accommodate such a model, as well as constitutionalism, then empowering a supreme council of the people to amend the constitution would be a logical extension of the approach. The Afghan *Loya Jirga* is defensible as an instance of continuing an ancient tradition that, while without obvious precedent in the sources or the Rashidun caliphate, does not transgress any core principles of Islam.

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[661] Constitution of Iran (1979, amended 1989), art. 177 (excluding constitutional amendments from the normal rule of article 59 which requires legislative concurrence by 2/3 majority to enact the results of a referendum).
[662] Constitution of the Maldives (2008), art. 262(b) (referendum if the amendments affect basic rights or freedoms or presidential or legislative terms of office); Constitution of Yemen (1991, amended 2001), art. 158 (a referendum is required for amendments that affect the distribution of powers between the president and the legislature, i.e. articles 62, 63, 81, 82, 92, 93, 98, 101, 105, 108, 110, 111, 112, 116, 119, 121, 128, 139, 146, 158 or 159). The People's Majlis in the Maldives may also call a referendum to overcome the president's refusal to assent to an amendment. Constitution of the Maldives (2008), art. 264.
[663] See above, chapter 5, section 5.3.3., and chapter 2, section 2.4.2.

Most of these approaches comport with Islamic principles and precedents. Even in the case of a ruler whose control extends to modifying the basic agreement in ways that affect the rights of individual citizens, the core of individual rights that emanate from Sharia limits the scope for innovation. Even the most minimal and traditional (unwritten) Islamic constitutions were logically divided between specifying the structures and powers of the state (almost entirely at the caliph's discretion) and individual rights and liberties (stemming from Sharia).

5.8. Courts and constitutional interpretation

Judicial review is one of the most powerful modern safeguards against human rights violations at the hands of state authorities. This part establishes that while formal independent oversight of legislation, executive action or constitutional provisions did not exist in Islamic states prior to the demise of the Ottoman Empire, a judicial role is a natural counterpart of the advent of written constitutions and separation of powers in modern Islamic states. Subordination of even the caliph to the law has always been a grounding principle of Islamic rule, and as this part demonstrates, ever since the early caliphate citizens have enjoyed some form of at least quasi-judicial recourse against unlawful acts of the ruler.

An independent judicial authority is seen as necessary to ensure justice and safeguard civil rights. A highest court is usually empowered to interpret the constitution, declare the compatibility of laws with it, and adjudicate disputes between government bodies over how they may exercise their powers *vis-à-vis* one another. Nearly all Islamic states whose constitutions aim to realise individual rights, checks and balances and separation of powers have instituted similar authorities. These serve to guarantee the citizens the rule of law and participation in government, as promised both by international human rights standards and a traditionalist understanding of Sharia. As discussed in the next chapter, the judicial systems of Islamic states face a further level of complexity in that they may face questions implicating any or all of legislative enactments, constitutional law, international law and Sharia, which depending on the state may hold a specific role in the municipal legal order, or remain as a backdrop of common law. Rights guarantees may reside in any of these sources.

Constitutional interpretation has long existed in Islamic societies, although an independent authority to perform this task is a recent development. Under the Constitution of Medina, the tribes agreed to submit disputes to the Prophet's arbitration, and that God and the Prophet would settle any disagreement over the meaning of the document. The Prophet was also the final authority on matters relating to Islam, therefore on the unwritten constitution. The

Rashidun caliphs combined executive and judicial functions, hearing petitions from citizens, until Mu'awiya relinquished his judicial role in favour of appointed judges, although it is not clear whether this extended beyond civil cases to "issues pertaining to constitutional law and politics".[664] The 8th/9th century caliph Harun al-Rashid instituted a chief judge, who wielded great influence through the authority to appoint and supervise judges,[665] but did not act as a tribunal of last resort for interpretation. Only with the 16th century Ottoman institution of the Grand Mufti as the *Shaykh al-Islam* was a highest authority recognised in the area of declaring the substantive content of law.

An institutional referee is uncontroversial among modern Islamic thinkers who admit the possibility of a legislature. Asad acknowledges the potential for deadlock between legislature and ruler, and offers as a way out the Quranic instruction to obey those in authority "then, if you disagree in anything, refer it to God and the Apostle".[666] This indicates a role for an independent tribunal of highly qualified jurists, learned in Islamic law and "fully informed on the affairs of the world", to declare whether an act of the parliament or the ruler complies with Islamic law and the constitution.[667] Kamali finds this capability already present in the judiciary: unless limited by the government that appoints them, the jurisdiction of Islamic judges is general, encompassing "all decisions that are not based on a clear text and consensus" and therefore review of statutes and decrees.[668] The ruler also may establish a separate institution to supervise statutory instruments.[669] Mawdudi saw no need for an interpretive institution, preferring to rely on the perfection of the caliphal judgment and limiting judicial interpretation to secular matters (a narrow jurisdiction, given the primacy of Sharia in Mawdudi's vision of the state).[670]

Outside the Arabian Peninsula, a constitutional review authority, appointed with both the executive and the legislature participating, is the norm. All modern Islamic constitutions

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[664] Mohammad Hashim Kamali, Citizenship and Accountability of Government: An Islamic Perspective (Islamic Texts Society, 2011) 265.
[665] Mohammad Hashim Kamali, Citizenship and Accountability of Government: An Islamic Perspective (Islamic Texts Society, 2011) 266 (footnote omitted).
[666] Muhammad Asad, The Principles of State and Government in Islam, 2nd ed. (Islamic Book Trust, 1980) 66 (quoting Quran 4:59).
[667] Muhammad Asad, The Principles of State and Government in Islam, 2nd ed. (Islamic Book Trust, 1980) 66-67. Members should enjoy secure tenure and be barred from other public office. The ruler and the legislature should collaborate in choosing members, e.g. one proposing a list, and the other selecting from it. Id. 67.
[668] Mohammad Hashim Kamali, Citizenship and Accountability of Government: An Islamic Perspective (Islamic Texts Society, 2011) 266.
[669] Mohammad Hashim Kamali, Citizenship and Accountability of Government: An Islamic Perspective (Islamic Texts Society, 2011) 266.
[670] Seyyed Vali Reza Nasr, Mawdudi and the Making of Islamic Revivalism (Oxford U. Press, 1996) 90.

except Saudi Arabia's acknowledge an interpretive institution.[671] Sixteen empower a court of last resort or constitutional review.[672] A further three assign interpretive authority to a non-judicial body.[673] In Brunei the Interpretation Tribunal may consider any question regarding the constitution that the sultan refers, including those referred upon request of a court.[674] The constitutions of Egypt, Iraq and Palestine simply assert that the court's jurisdiction includes "the constitutionality of laws and regulations" and constitutional interpretation.[675] The remaining constitutions that establish interpretive bodies assign those bodies competence to review legislation for constitutional compatibility, or to hear constitutional complaints that arise during court cases. The means of interpretation often reflect hierarchical court systems similar to European models, but with a tendency to prefer review by referral of questions rather than by appeal of finalised decisions, perhaps reflecting the former method's greater familiarity in Islamic jurisprudence.

Judicial review of legislation is a recent development in Islamic governance. It finds support in the principle that the ruler's right to make law is not unfettered—in an era of legislation, assigning powers of review to judges is akin to the role *muftis* played (at least in theory) in restraining the ruler through *fatawa*. The 1876 Ottoman constitution instituted a legislature and formalised the role of the courts, but did not provide for review of legislation. Sixteen modern Islamic constitutions, predominantly those of the parliamentary republics and the North African states, provide for review of legislation against the constitution. Standing is limited. Only in the Comoros and Somalia may private citizens challenge a law.[676] The governments of Afghanistan, Kuwait, Malaysia and Pakistan can refer laws for review.[677] In

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[671] In Iran, the Guardian Council interprets the constitution. Constitution of Iran (1979, amended 1989), art. 98. Kuwait, Oman and Qatar defer the creation of a "judicial body" tasked with constitutional interpretation to a law. Constitution of Kuwait (1962), art 173; Basic Statute of Oman (1996, amended 2011), art.70; Constitution of Qatar (2004), art. 140. In Saudi Arabia since Sharia itself is the constitution, its interpretation falls to the *ulama*.

[672] Afghanistan, Bahrain, Comoros, Egypt, Iraq, Jordan, Malaysia, Maldives, Morocco, Pakistan, Palestine, Somalia, Syria, Tunisia, United Arab Emirates and Yemen.

[673] Algeria, Brunei and Mauritania.

[674] Constitution of Brunei-Darussalam (1959, amended 2011), art. 86(1), (2).

[675] Constitution of Egypt (2014), art. 192; Constitution of Iraq (2005), art. 90; Basic Law of Palestine, art. 103(1) ("laws, regulations and other enacted rules"). The previous authority of the Supreme Constitutional Court of Egypt to review "draft laws governing presidential, legislative or local elections" is not in the 2014 Constitution. Constitution of Egypt (2012), art. 177. The Federal Supreme Court of Iraq also has jurisdiction over "matters that arise from the application of" federal laws or acts. Constitution of Iraq (2005), art. 90.

[676] Constitution of the Comoros (2001), art. 31; Draft Constitution of Somalia (2012), art. 86(2) (by petition of 10,000 voters).

[677] In Malaysia and Pakistan this is implicit in the government's a general right to ask advice of the supreme court. Constitution of Afghanistan (2003), art. 121 ("the Constitution, laws and decrees"); Constitution of Kuwait (1962), art. 173 ("both the Government and the interested parties"); Constitution of Malaysia (1957, amended 2010), art. 130; Constitution of Pakistan (1973, amended 2012), art. 186(1).

Algeria, Bahrain, Jordan, Mauritania, Morocco and Somalia the government or a part of the legislature can do so.[678] In the Maldives the parliament can request review, or the court can review legislation at its own initiative.[679] Only an emirate may require the supreme court of the United Arab Emirates to assess Union laws against the constitution.[680] The constitutions of Algeria, Bahrain, Somalia, Syria and Tunisia envisage review of draft laws.[681] The supreme courts of the Comoros, Mauritania and Morocco must review all organic laws.[682] The Guardian Council in Iran certifies the "compatibility with the criteria of Islam and the Constitution" of all legislation passed by the Islamic Consultative Assembly.[683] This has echoes of the Ottoman *Shaykh al-Islam*, who had to issue a *fatwa* certifying the compatibility of the ruler's ordinances with Sharia.[684]

The main modern routes of judicial review in court cases, referring questions or appealing rulings, have Islamic antecedents. A referral mechanism has long existed, in the prerogative of a *qadi* to stay a case pending a *mufti*'s answer to a question. By contrast, no formal right of judicial appeal existed in the classical caliphate. The right to bring grievances (*mazalim*) to the caliph against acts of injustice or corruption,[685] did not apply to assertions of erroneous application of the law. *Qadis* could and did however revisit their predecessors' decisions,

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[678] Constitution of Algeria (1996, amended 2002), art. 165 (at the request of the president of either legislative house); Constitution of Bahrain (2002), art. 106 (the "Government, Consultative Council, the Chamber of Deputies and notable individuals and others"); Constitution of Jordan (1952, amended 2011), arts. 59(2) (review of Constitution), 60(1) (review of "applicable laws and provisions") (both requiring a majority of either legislative house); Constitution of Mauritania (1991, amended 2006), art. 86 (president or one third of the members of either legislative chamber); Constitution of Morocco (2011), art. 132 (president of either chamber or one quarter of the members of the Chamber of Councilors or one fifth of those of the Chamber of Representatives); Draft Constitution of Somalia (2012), art. 86(2) ("All members of the Upper House" or a representative of a federal state; the Council of Ministers; one third of the lower legislative house). In Jordan, if the courts have not interpreted a law, the prime minister may convoke a Special Tribunal consisting of the "President of the highest civil court", two judges and two senior officials, one of them "of the Ministry related to the requested interpretation". Constitution of Jordan (1952, amended 2011), art. 123.

[679] Constitution of the Maldives (2008), arts. 95, 143(a) (the court has "jurisdiction to enquire into and rule on the constitutional validity of any [enacted] statute").

[680] Constitution of the United Arab Emirates (1971, amended 1996), art. 99.

[681] In Bahrain this is at the king's initiative, in Somalia at that of the government or a part of the legislature, and in Algeria under the same conditions as for enacted laws. Constitution of Algeria (1996, amended 2002), art. 165; Constitution of Bahrain (2002), art. 106; Draft Constitution of Somalia (2012), art. 109C(1)(a)) (a legislative committee or ten members of either house). In Tunisia and Syria review is only possible before enactment, by request of the president or 1/5 of the members of the legislature. Constitution of Syria (2012), arts. 146(2) (the president may request review at the draft stage), 147(1) (the president or 20% of the legislature may require preliminary review of laws or "legislative decrees"); Constitution of Tunisia (2014), art. 120.

[682] Constitution of the Comoros (2001), art. 26; Constitution of Mauritania (1991, amended 2006), art. 86; Constitution of Morocco (2011), art. 132.

[683] Constitution of Iran (1979, amended 1989), art. 94. The *Fuqaha'* on the council certify compatibility with Islam, and the entire council does so regarding the constitution. Id., art. 96.

[684] Sami Zubaida, Law and Power in the Islamic World (I.B. Taurus, 2003) 60-61.

[685] Mohammad Hashim Kamali, Citizenship and Accountability of Government: An Islamic Perspective (Islamic Texts Society, 2011) 269.

providing a reasonably meaningful appeal (because *qadis* were typically appointed for two years or less).[686] With the act of reopening a decision having longstanding precedent, and a principle of institutional oversight established in the *mazalim* jurisdiction,[687] appeal to a higher court would appear to simply represent a use of administrative systems modelled on European prototypes as a means to realise Islamic principles of justice and accountability.

Constitutional courts in eleven Islamic states may address questions raised in a judicial action. Litigants may demand referral of pleas of unconstitutionality in the Comoros, Jordan, Malaysia, Morocco, Syria, Tunisia and Yemen.[688] In Afghanistan and the UAE courts may refer constitutional questions on their own initiative.[689] Decisions may be appealed to the highest constitutional court in Malaysia, Pakistan and Yemen.[690] In Somalia the constitutional court's prerogative to invalidate "[a]ny law, or administrative action that is contrary to the Constitution" implies a right of appeal.[691]

Modern Islamic governance can integrate a constitutional court or similar authority. Classical Islam offers only limited precedent, but largely because the concept of legislation did not then exist. Introducing legislation was the fundamental change, arguably rooted in *shura*. If an Islamic state can accept a constitution and legislation produced by an assembly rather than a sole ruler, then a supreme court as the arbiter of the constitution is uncontroversial. Drawing on relatively modern models of separation of powers, the constitutions of all Islamic states except Oman, Qatar and Saudi Arabia recognise a supreme interpretative authority.[692]

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[686] Wael B. Hallaq, Sharia: Theory, Practice, Transformations (Cambridge U. Press, 2009) 362-63 (text at note 21).

[687] Mohammad Hashim Kamali, Citizenship and Accountability of Government: An Islamic Perspective (Islamic Texts Society, 2011) 269. In about 870, the Abbasid Caliph al-Muhtadi established a *diwan* to exercise this *mazalim* jurisdiction on the caliph's behalf. Id.

[688] Constitution of the Comoros (2001), art. 31; Constitution of Jordan (1952, amended 2011), art. 60(2) (subject to the court's determination that the plea or challenge is "serious"); Constitution of Malaysia (1957, amended 2010), art. 128(2); Constitution of Morocco (2011), art. 133 (parties may plead "that the law on which the issue of the litigation depends, infringes the rights and freedoms guaranteed by the Constitution"); Constitution of Syria (2012), art. 147(2)(a) (subject to the court's determination that the plea or challenge is "serious"); Constitution of Tunisia (2014), art. 120; Constitution of Yemen (1991, amended 2001), art. 153(a) (the supreme court may decide "cases and pleas that laws, regulations, by laws and decisions are not constitutional"). In Syria, laws approved by referendum are not subject to review. Constitution of Syria (2012), art. 148.

[689] Constitution of Afghanistan (2003), art. 121; Constitution of the United Arab Emirates (1971, amended 1996), art. 99.

[690] Constitution of Malaysia (1957, amended 2010), art. 128(3) (leaving the precise appellate jurisdiction of the Federal Court to be determined by a law); Constitution of Pakistan (1973, amended 2012), art. 185(2)(f), (3) (the High Court must certify "that the case involves a substantial question of law as to the interpretation of the Constitution" or the Supreme Court must grant leave to appeal); Constitution of Yemen (1991, amended 2001), art. 153(d).

[691] Draft Constitution of Somalia (2012), art. 4(2).

[692] Constitutional interpretation in Qatar rests with the Court of Cassation as part of its jurisdiction "to hear appeals on the interpretation of the provisions and measures enacted by law". Law No. 10 of 2003 Promulgating

Most of the constitutional courts that review legislation do so at the request of the government or ruler, and are less commonly available to the legislature. Only in Afghanistan, Malaysia and Pakistan, of the states with legislatures, does the legislature or its members not enjoy a similar right to request review. Only in the Maldives does the legislature but not the executive have this right. The main access for individual citizens to constitutional review is in a court case, a right made explicitly available in the Comoros, Jordan, Malaysia, Morocco, Pakistan, Somalia, Syria and Tunisia, and implicit in the constitutions of Egypt, Iraq and Palestine. An obvious common feature in the constitutions that do not enable citizens to challenge laws or acts as unconstitutional is strong independent executives – but several such states have a powerful supreme court, notably Egypt as a large, influential state and the Comoros in providing universal access for citizens to review of both legislation and actions.

5.9. Conclusion

There is no single agreed recipe for democracy in an Islamic state. At the same time the fundamental principles of justice, rule by consent, participatory governance and the rule of law are inescapable. The Prophet's state in Medina was a historical singularity, but the Rashidun caliphate provides a historical example of correct Islamic rule that can continue to inform modern implementations of an Islamic state. Abu Bakr, Umar, Uthman and Ali each updated Islamic governance for changing times while scrupulously maintaining the religious character of the state, as well as justice and the rule of law. The Islamic empire they established respected not only the rights of the members of the *umma*, but also what modern international law would refer to as the basic human rights of their non-Muslim citizens, and even of the peoples they encountered who did not join the Islamic state.[693]

The determination of what forms of government are properly termed 'Islamic' depends in part on how one views the public trust assigned to the ruler. If it is God-given, then the ruling power is arguably indivisible, ruling out any fundamental transfer of power from the ruler besides simple delegation as to a governor or a judge or a secretary. If however the trust runs between God and the *umma*, with the ruler serving as the people's delegate, it becomes easier to admit features such as elections, separation of powers and parliamentary legislation. If Islamic rule reflects the peoples' cession of power to the ruler, then the people may also

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the Law on Judicial Authority, art. 6(1). See e.g., Court of Cassation of Qatar, ruling on Petition No. 64/2012 (construing "court judgments" in article 63 of the constitution as including arbitral awards, and overturning an award as it was not issued in the name of the Emir as that article requires).

[693] See above, chapter 4, section 4.1.2.

divide the power and cede it piecewise. If the power to rule passed from the Prophet back to the *umma*, the people could choose not to concentrate all executive power in the hands of a caliph, even if a caliph remained the chief religious figure. This modern-sounding view is more or less the ancient argument of the Kharijites that the proofs of law do not "require an imamate with a special religious status" but only rule "by the book and the law".[694]

No modern constitutions precisely reflect any of the historical examples or proposed models of an ideal Islamic state, except for Iran's which reflects the vision of the Ayatollah Khomeini. All other modern Islamic constitutions embody the traditional principles to varying degrees. In Brunei, Oman, Saudi Arabia and the UAE the ruler holds the entire governing power that does not implicate Sharia, as in the classical caliphate in the era of hereditary succession. Elsewhere the Ottoman and European influence is more visible, with the mixed model prototyped by Sanhuri in post-World War II civil codes predominating in the Middle East and Egypt. The constitutions are more heterodox towards the eastern regions. Those of Iraq, Malaysia, Afghanistan and Pakistan, especially the latter two, reflect considered attempts to merge Islamic values into pre-existing traditional and legal systems for organising society.

The revelation of the Quran and the Sharia was a unique event. The Prophet's religious authority could not descend, nor his adjudicative authority. This renders it impossible to re-create the perfect state of Medina, even allowing for transfer of its basic principles to modern nation-states. The reflection of Islamic law into modern governance must undergo a certain amount of institutional translation. The end result cannot realistically be exactly the same as the Rashidun caliphate or any other pre-modern example, but present-day structures can incorporate principles established in early Islam. Citizens of an Islamic state can give allegiance to a temporal ruler, so long as that ruler governs in the name of and with the acquiescence of the caliph, who remains the highest religious authority. Expressing that allegiance by voting for leaders to operate a system that divides power among multiple political institutions, and to do so for fixed, relatively brief terms of office, would have appeared strange to the early generations of Muslims. But only because it lay outside "that which was known", not because it was forbidden.

Whether or not state structures reflect the rules of governance enunciated in the Quran and the *sunna*, a constitution can embed Islamic norms into the state's law and institutional

[694] Sami Zubaida, Law and Power in the Islamic World (I.B. Taurus, 2003) 90.

priorities. Most modern Islamic constitutions do exactly this, while at the same time incorporating guarantees of civil rights that largely mirror widely recognised international human rights norms. This approach, which seeks to ensure the persistence of Islamic law and values in a modern society by transposing them into enforceable law so that regardless of the institutional design of the state, those institutions will recognise a duty to implement them, is the subject of the next chapter.

6. Sharia and municipal law in Islamic states

According to international standards, one measure of a law's moral legitimacy is its respect for human rights. For an Islamic state, this legitimacy stems from the law's compliance with Sharia. Because Sharia incorporates a human rights framework that in its substance, if not necessarily in its justification, mostly meets international expectations, Islamic states achieve a significant measure of their de facto compliance with the standards of rights laid out in international treaties through measures that ensure their domestic law complies with Sharia. Following the prior chapter that analysed the ways in which values such as just rule and participatory government are built into the structures of Islamic states, this chapter details how those states incorporate Islamic law systematically into their domestic legal orders.

Under the traditional *siyasah Sharia* system, the ruler's law-making power is, notionally at least, only ancillary to the revealed law. To achieve a similar effect, modern constitutions integrate Sharia into justiciable, state-enforceable law by constraining legislation to comply with Islamic law, or instructing courts to apply Islamic law in areas such as family and personal status law or where on-point legislation is lacking. The first part of this chapter analyses source of legislation clauses (legislation must be grounded in Islam) and repugnancy clauses (legislation must not contravene Islam), in particular comparing the jurisprudence of the courts in Egypt and Pakistan that have led the international understanding of the respective approaches. In its second part, the chapter looks at the direct applicability of Islamic law in courts. It reviews the introduction of Islamic law into civil codes as a sort of common law to apply in lieu of on-point legislation, and the widespread practice of reserving jurisdiction over personal status and family law to Islamic courts applying Islamic law. A third part briefly discusses how clauses that constrain legislation to comply with Sharia and laws instructing courts to apply Islamic law directly combine to empower national courts to protect human rights even before taking international law into account. A concluding part then reviews the trends the analysis contained in the chapter reveals in the way Islamic law manifests in the constitutions of modern Islamic states.

6.1. Limiting legislation through Sharia

This part considers how Islamic states use constitutional provisions to ensure that legislation complies with Sharia, providing a safeguard against laws sanctioning violations of rights that Sharia protects. The question of the appropriate relationship between Islamic standards and statutory law is a modern one. Until the late days of the Ottoman Empire there was no cause

to ask it: the ruler implemented the law by edict, with the *ulama* declaring its content and exercising a measure of oversight of the compliance of the ruler's actions with Sharia. The 1876 Ottoman constitution did not require that legislation comply with Islam. As caliph and "the protector of the Muslim religion",[695] who had to assent to all laws,[696] the sultan anyway had the power and the religious duty to keep the temporal laws within the permitted boundaries of Sharia. Only after World War II and decolonisation did legislation become a main source of law in majority Muslim states. Today, the constitutions of nearly all Islamic states provide for some sort of legislative participation in law-making.[697]

As advocated by 20th century reformists, most modern Islamic constitutions subject laws to oversight to ensure their compliance with Islamic values. The only exceptions outside North Africa are the Comoros, Jordan and Malaysia. In North Africa, only Egypt's constitution provides for Islamic scrutiny of legislation (although judges have construed the words of the preamble to Mauritania's constitution referring to Islam as "the sole source of law" as permitting them to draw on Sharia principles to support rulings that contradict the text of the constitution or enacted laws).[698] In Brunei and Saudi Arabia the question is moot, as the monarchies are absolute and in principle Islam is already the source of all law.[699]

Modern constitutions use two types of means to ensure that enacted laws do not violate Islamic norms. Source of legislation clauses, which require that laws be grounded in Islamic principles, are in place in 12 of the 24 Islamic constitutions. The second type, the repugnancy clause, is less prevalent, appearing in five constitutions. In either approach, there is a range of ways to phrase the language indicating an Islamic standard: Sharia, principles of Sharia, principles or tenets or established provisions of Islam, or simply Islam. Both types of clauses also invite the question of whether to require or permit retrospective review of laws in place at the time of the clause's adoption. The practical effect of these clauses is limited in most

[695] Ottoman Constitution (1876), art. 4.
[696] Ottoman Constitution (1876), art. 54.
[697] See above, chapter 5, section 5.6.3.
[698] Constitution of Mauritania (1991, amended 2006), preamble. In its decision 04/DC-2009 of 15 April 2009 the Constitutional Council invoked the principle of *maslahah* to declare the office of the president vacant prior to the expiry of the constitutionally mandated five year term.
[699] Basic Law of Saudi Arabia (1992), art. 1. In Brunei the Sultan is simultaneously head of state and government, and the chief religious authority. Constitution of Brunei-Darussalam (1959, amended 2011), arts. 3(2), 4.

countries, as courts empowered to apply them tend to adopt a deferential approach to legislative review, but quite significant in Pakistan.[700]

6.1.1. Sharia as a source of legislation

Syria's 1950 constitution introduced the first of the "sharia-as-source-of-legislation ("SSL") provisions" that have since proliferated in the Arab world.[701] Clauses that say Islamic law is "a" source of legislation seem to be widely understood as permitting laws that are not grounded in Islam, whereas those specifying Islamic law as "the" source do not.[702] Today, most of the Islamic constitutions in the Arabian Peninsula and the Middle East have what Lombardi terms SSL clauses. Iran's constitution states that all "laws and regulations must be based on Islamic criteria".[703] Otherwise, only Oman and Yemen explicitly make Sharia the sole source of legislation.[704] In Egypt it is "the principal" source.[705] This phrasing resulted from a 1980 amendment to the original "a" clause, modelled on that of Kuwait's 1962 constitution.[706] A further eight countries, four in the Arabian Peninsula and three in the Middle East, refer to Sharia as a main source of legislation.[707] Lombardi argues, however, that in the context of a constitution that for example proclaims Islam the state religion and provides for regulation of public order or morality, "a" clauses can also be applied "to require the state to respect Islamic law *and also to respect all other chief sources of Legislation*".[708]

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[700] Iran's Guardian Council can review any law for Islamic compliance, but in the clerically-controlled system of government of the Islamic Republic, laws that would transgress Islamic tenets are not likely to be enacted in the first place.

[701] Nathan J. Brown, *Constitutionalizing Islam in the Arab World*, in Robert Fatton, Jr. and R.K. Ramazani, eds., Religion, State and Society: Jefferson's Wall of Separation in Comparative Perspective (Palgrave Macmillan, 2009) 195-214 at 202-03.

[702] Clark B. Lombardi, *Constitutional Provisions Making Sharia "A" or "The" Chief Source of Legislation: Where did they come from? What do they mean? Do they matter?*, 28 Am. U. Int'l L. Rev. 3, 733-74 at 755-57.

[703] Constitution of Iran (1979, amended 1989), art. 4.

[704] Basic Statute of Oman (1996, amended 2011), art. 2 ("Islamic Sharia is the basis for legislation"); Constitution of Yemen (1991, amended 2001), art. 3 ("Islamic Shari'ah is the source of all legislation").

[705] Constitution of Egypt (2014), art. 2 ("The principles of Islamic Sharia are the principal source of legislation").

[706] Ran Hirschl, Constitutional Theocracy (Harvard U. Press, 2010) 115.

[707] Constitution of Bahrain (2002), art. 2 ("The Islamic Shari'a is a principal source for legislation"); Constitution of Iraq (2005), art. 2 ("Islam . . . is a fundamental source of legislation"); Constitution of Kuwait (1962), art. 2 ("the Islamic Shari'a shall be a main source of legislation"); Constitution of the Maldives (2008), art. 10(a) ("Islam shall be the one of the basis of all the laws of the Maldives"); Basic Law of Palestine (2005), art. 4(2) ("the principles of Islamic *Shari'a* shall be a principal source of legislation"); Constitution of Qatar (2004), art. 1 ("Shari'a law shall be a main source of [Qatar's] legislations"); Constitution of Syria (2012), art. 3(2) ("Islamic jurisprudence is a main source of legislation."); Constitution of the United Arab Emirates (1971, amended 1996), art. 7 ("The Islamic Shari'ah shall be a main source of legislation").

[708] Clark B. Lombardi, *Constitutional Provisions Making Sharia "A" or "The" Chief Source of Legislation: Where did they come from? What do they mean? Do they matter?*, 28 Am. U. Int'l L. Rev. 3, 733-74 at 769 (original emphasis).

Although none of the constitutional texts make it explicit, legislatures, courts and commentators generally understand SSL clauses as having only prospective effect. Egypt's Supreme Constitutional Court has consistently read article 2 as forbidding new legislation from contravening rules of Sharia that are "unambiguously established both in their authenticity and their meaning".[709] This creates a quite narrow rule out of the malleable constitutional language, placing outside its scope pre-1980 legislation on the one hand, and any principle of Islamic law that is controversial, for example subject to differing interpretations across the Islamic schools, or that is not clearly grounded in the traditional sources, on the other.[710] This supplied the flexibility for Egypt's Supreme Constitutional Court to uphold the constitutionality of the Personal Status Law against a challenge grounded in the SSL clause (having struck down its predecessor in 1985, albeit on procedural rather than Islamic grounds), as it found that the provision establishing a woman's right to obtain a no-fault divorce by court order was duly grounded in "definitive Qur'anic verses and corresponding *fiqh*".[711] That Court also applies an SSL clause as effectively a repugnancy clause, raising the question of whether there is any meaningful difference between the two types. The example of Iraq suggests there is a difference at least regarding "a" clauses, as the eventual language coupling such a clause with a repugnancy provision represents a compromise with advocates of stronger Sharia influence in the constitution who had proposed a "the" clause.[712]

6.1.2. Repugnancy clauses

Repugnancy clauses in Islamic constitutions provide for declaring the invalidity of laws that would contravene Islamic norms. Although functionally, at least strong "the" SSL clauses such as in Egypt produce at least the equivalent result ("the principle source" "surely must

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[709] Nathan J. Brown, *Constitutionalizing Islam in the Arab World*, in Robert Fatton, Jr. and R.K. Ramazani, eds., Religion, State and Society: Jefferson's Wall of Separation in Comparative Perspective (Palgrave Macmillan, 2009) 195-214 at 205-06.

[710] Nathan J. Brown, *Constitutionalizing Islam in the Arab World*, in Robert Fatton, Jr. and R.K. Ramazani, eds., Religion, State and Society: Jefferson's Wall of Separation in Comparative Perspective (Palgrave Macmillan, 2009) 195-214 at 205-06.

[711] Ran Hirschl, Constitutional Theocracy (Harvard U. Press, 2010) 111-12. The Court had in 1985 declared unconstitutional the Personal Status Law of 1979, which also sought among other aims to codify a right for women to divorce. It did not however reach the merits of the impugned law, ruling instead that the matter of personal status was not urgent enough to justify establishing a new law by presidential decree rather than by legislation. Enid Hill, *Al-Sanhuri and Islamic Law: The Place and Significance of Islamic Law in the Life and Work of 'Abd al-Razzag Ahmad al-Sanhuri, Egyptian Jurist and Scholar, 1895-1971 (Part II)*, 3 Arab L. Quarterly 2 (May, 1988) 182-218 at 212-13.

[712] Nathan J. Brown, *Constitutionalizing Islam in the Arab World*, in Robert Fatton, Jr. and R.K. Ramazani, eds., Religion, State and Society: Jefferson's Wall of Separation in Comparative Perspective (Palgrave Macmillan, 2009) 195-214 at 207-08.

mean that the legislation in question cannot be *repugnant* to the *shari'a*"),[713] repugnancy clauses are logically distinct. Laws might arise from sources unrelated to Islam yet contain no provisions that could be found repugnant to it.

Pakistan established the first Islamic constitutional repugnancy clause, whereby the Federal Shariat Court may declare laws "repugnant to the Injunctions of Islam, as laid down in the Holy Quran and the Sunnah of the Holy Prophet", subject to review only by the Supreme Court.[714] Pakistan's constitution permits the Shariat Court to review existing laws upon petition of any citizen or national or regional government, and since a 1982 amendment, at its own initiative.[715] The more recent constitutions of Afghanistan, Iraq, the Maldives and Somalia also forbid laws that contradict Islam (Iraq and the Maldives also utilise SSL clauses, of the "a" variety). Although they do not explicitly empower a court to review laws for compliance with Islam, nothing in these constitutions prohibits judicial review. In all except Afghanistan, the phrasing is apparently forward-looking, forbidding the act of enacting laws rather than the laws per se.[716] Only Pakistan's constitution explicitly imposes a retroactive obligation, to bring "existing laws [into] conformity with the Injunctions of Islam as laid down in the Holy Quran and Sunnah".[717] This clause does not apply to legislation relating to the personal and citizenship status of non-Muslims;[718] likewise Egypt's SSL clause does not apply to personal status and religious affairs of Christian and Jewish citizens.[719]

The judicially constructed repugnancy rule of Egypt's SSL clause is explicitly stated in article 2 of Iraq's constitution,[720] and was later adopted in the Maldives and Somalia as well. Article 2 forbids the (future) enactment of any "law that contradicts the established provisions of Islam".[721] Rather than following the Egyptian Court in reading "established

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[713] Haider Ala Hamoudi, *Repugnancy in the Arab World*, 48 Willamette L. Rev. (Nov. 2012) 427-50 at 431.
[714] Constitution of Pakistan (1973, amended 2012), arts. 203D, 203F. The 1956 constitution was the first to contain a repugnancy clause. The clause was removed by amendment. The current clause dates to 1973.
[715] Constitution of Pakistan (1973, amended 2012), art. 203D(1). A determination of repugnancy renders the provisions found in violation of Islamic standards void once the judgment takes effect. Id., art. 203D(3)(b).
[716] Constitution of Afghanistan (2003), art. 3 ("no law can be contrary to the sacred religion of Islam and the values of this Constitution"); Constitution of Iraq (2005), art. 2(1)A ("No law that contradicts the established provisions of Islam may be established") (art. 2(1)B, C protect respectively "the principles of democracy" and "the rights and basic freedoms stipulated in this Constitution"); Constitution of the Maldives (2008), arts. 10(b) ("No law contrary to any tenet of Islam shall be enacted"), 70(b)(2), 70(c); Draft Constitution of Somalia (2012), art. 2(3) ("No law which is not compliant with the general principles of Shari'ah can be enacted").
[717] Constitution of Pakistan (1973, amended 2012), art. 227(1).
[718] Constitution of Pakistan (1973, amended 2012), art. 227(1), (3). Similarly, laws relating to the personal status of Muslims should reflect the injunctions as interpreted by the person's sect. Explanation provided in the Constitution (Third Amendment) Order, 1980 (President's Order No. 14 of 1980).
[719] Constitution of Egypt (2014), art. 3.
[720] Haider Ala Hamoudi, *Repugnancy in the Arab World*, 48 Willamette L. Rev. (Nov. 2012) 427-50 at 439-40.
[721] Constitution of Iraq (2005), art. 2(1)A.

provisions" narrowly, however, the Federal Supreme Court of Iraq accomplished the same result of deferring to the legislature's judgment of what Islamic provisions permit by an alternative route. In two cases testing pre-existing laws against the repugnancy clause, the Iraqi Court declined to define the Islamic norm in question, asserting that reconciling the various interpretations of Islamic law in play was too complex to resolve without more detailed legislative guidance, and left the law in question to stand pending such guidance.[722] This represents a divergence from the jurisprudence of Egypt (and the UAE) wherein the supreme courts declared themselves competent to review, and did review, laws for compliance with SSL clauses.[723] In practice, the repugnancy clauses that restate the Egyptian rule of prospective review have not yet been applied to invalidate any laws. This may however simply reflect their recent provenance in states other than Iraq.

Only in Pakistan has a court with national jurisdiction interpreted an explicit Islamic repugnancy clause. In contrast to the more deferential approach of courts applying SSL clauses in for example Egypt and Iraq, the Federal Shariat Court of Pakistan has taken a robust approach to declaring its competence to invalidate laws. For example, needing in a 2010 judgment to establish a boundary between *hadd* and ordinary criminal jurisdiction, the Court firmly asserted its prerogative to interpret "in the light of Injunctions of Islam" both the meaning of the term '*huddud*' "and the extent of its jurisdiction", citing a decision of the Supreme Court that recognised a judicial duty "to assign meanings to" legal terms of art that are "willfully left undefined by legislature".[724]

The Shariat Court has exercised its power of review over laws that pre-dated the Court or even the repugnancy clause, on its own initiative as well as in response to petitions. At the same time, the Shariat Court has not interpreted its power to strike down "any law" as broadly as it might have,[725] as it has refrained from acting outside the realm of state-established written law. In *Saeedullah Kamzi v. Government of Pakistan*, the Court interpreted its power as extending only to "*formal* law—most importantly, legislated statutory law" (or administrative regulation or similar), and not to individual acts performed under

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[722] Haider Ala Hamoudi, *Repugnancy in the Arab World*, 48 Willamette L. Rev. (Nov. 2012) 427-50 at 441-42. One case concerned a law allowing the state to charge a fee for *waqf* regulation, the other a question of divorce.
[723] Clark B. Lombardi, *Constitutional Provisions Making Sharia "A" or "The" Chief Source of Legislation: Where did they come from? What do they mean? Do they matter?*, 28 Am. U. Int'l L. Rev. 3, 733-74 at 755-57.
[724] *Mian Abdur Razzaq Aamir and others v Federation of Pakistan and others*, Federal Shariat Court of Pakistan, petitions 01/I of 2007, 03/I of 2007 and 01/I of 2010, 22 December 2010, ¶ 55.
[725] The Court has the power to review "any custom or usage having the force of law". Constitution of Pakistan (1973, amended 2012), art. 203B.

colour of unwritten Islamic law.[726] The jurisprudence of the Shariat Court shows it "believes that no enforceable "law" is at stake when the question presented by a case concerns (1) a dispute between factions of a given Muslim sect or community, or (2) an issue associated with no formal legislation", in other words, on issues where the Muslim community has not announced a form of consensus.[727]

6.1.3. Defining the limit

Contravene what? Whether phrased as SSL or repugnancy clauses, constitutional provisions that require legislation to comply with Islamic standards usually refer either to 'Islam' or 'Sharia' as that standard. Both present challenges of interpretation. Iraq's SSL clause invokes Islam the religion, and its repugnancy clause refers to "the established provisions of Islam".[728] Read together, argues Rabb, these refer to Islamic law, particularly to settled "rules that apply to all Muslims, regardless of time or place".[729] In this view, Islam as a religion (rather than a system of law) is too broad and vague a concept to reasonably provide a source of legislation, and considering Iraq's constitutional guarantee of freedom of worship, it is unlikely the intent was to provide for legislation over the core beliefs of Islam.[730] Afghanistan's repugnancy clause, like Iraq's SSL clause, refers to Islam the religion. Without a clear link to a clause referring to Islamic law, and with non-Muslim religious practice potentially subordinated to law, the scope of Afghanistan's repugnancy clause may be broader than Iraq's, for example potentially prohibiting laws that offend in matters of *ibadat*, private Islamic ritual and belief. This is true also of the Maldives, where both clauses refer simply to Islam, the repugnancy clause specifying "any tenet of Islam". In neither state, however, is there an available judicial interpretation of the relevant term.

Constitutional provisions explicitly invoking Sharia as a constraint on legislation raise the issue of how to determine whether or not Sharia permits a particular text. Egypt's and Palestine's SSL clauses and Somalia's repugnancy clause refer to "the principles" and "the general principles of Shari'ah", which affords the legislature a certain amount of discretion to

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[726] Jeffrey A. Redding, *Constitutionalizing Islam: Theory and Pakistan*, 44 Virginia J. Int'l L. 3, 759-827 at 782 (original emphasis) (the petitioner had asked the court to enjoin local imams from announcing the Ramadan fast too early in the morning). Article 203B of Pakistan's constitution defines "law" to include "any custom or usage having the force of law".

[727] Jeffrey A. Redding, *Constitutionalizing Islam: Theory and Pakistan*, 44 Virginia J. Int'l L. 3, 759-827 at 783.

[728] Constitution of Iraq (2005), art. 2(1).

[729] Intisar A. Rabb, *"We the Jurists": Islamic Constitutionalism in Iraq*, 10 U. Pa. J. Const'l L. 3, 527-79 at 537-38.

[730] Intisar A. Rabb, *"We the Jurists": Islamic Constitutionalism in Iraq*, 10 U. Pa. J. Const'l L. 3, 527-79 at 536-37.

perform what amounts to *ijtihad* rather than following rulings of *fiqh*. Four of the "a" SSL clauses (i.e. that specify Sharia as a source of legislation), like Yemen and Oman's "the" clauses (i.e. that specify Sharia is the source of legislation), refer simply to Sharia.[731] In finding that a law requiring women voters and candidates to comply with Sharia was "too broad or vague and failed to specify . . . concrete norms" to require wearing the *hijab* in parliament, Kuwait's Constitutional Court interpreted a reference to Sharia similarly as did its counterpart in Egypt, as indicating those rules of Islamic law that reflect a widely-held consensus.[732] Syria's "a" clause indicates the *fiqh* ("Islamic jurisprudence"), which although it has not been judicially interpreted would seem to indicate at least those rulings of Islamic law on which the main Sunni schools agree. Pakistan's clause is the most straightforward to interpret, as it refers specifically to those "Injunctions" found in the Quran and the Prophetic *sunna*.[733] The Federal Shariat Court accordingly grounds its analysis of Islamic law in these sources, and invites leading Islamic jurists to advise it in its deliberations on their applicability to a particular case.

Lacking such specific guidance in the constitutional text, Egypt's Constitutional Court developed a two-part test of whether laws comport with the principles of Sharia. First, the law should not violate any rules established in the Quran or the Prophetic *sunna*; text capable of multiple understandings will be interpreted if possible so as to comply with these rules.[734] Second, it should be consistent with the agreed priorities of Sharia—"to promote and protect religion, life, reason, honor, and property"—and should not "undermine[] human justice and welfare".[735] The Supreme Constitutional Court's interpretative approach to Sharia incorporates *ijtihad*, albeit performed by senior civil judges rather than muftis, selecting from available rulings of the *madhahib*.[736] No other court has yet interpreted what "principles of Sharia" as distinct from "Sharia" means in the context of an SSL or repugnancy clause. The constitutions of Bahrain, Kuwait, Qatar and the UAE set "Sharia" as the standard. Of these, in Lombardi's survey, only in the UAE has a highest court struck down legislation as

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[731] Bahrain, Kuwait, Qatar, UAE. See section 6.1.1., above.
[732] Ran Hirschl, Constitutional Theocracy (Harvard U. Press, 2010) 116.
[733] Constitution of Pakistan (1973, amended 2012), art. 203D(1).
[734] Mohamed Abdelaal, *Religious Constitutionalism in Egypt: A Case Study*, 37 Fletcher Forum of World Affairs 1 (Winter 2013), 35-51 at 40.
[735] Mohamed Abdelaal, *Religious Constitutionalism in Egypt: A Case Study*, 37 Fletcher Forum of World Affairs 1 (Winter 2013), 35-51 at 40. Until 2014, Egypt's constitution extended its interpretation of "principles of Islamic Sharia" (art. 2) to "include general evidence, foundational rules, rules of jurisprudence, and credible sources accepted in Sunni doctrines and by the larger community". Constitution of Egypt (2012), art. 219. The 2014 Constitution lacks an equivalent article.
[736] Ran Hirschl, Constitutional Theocracy (Harvard U. Press, 2010) 108-09.

violating this standard, understood as indicating "general principles of sharia" or "essential principles of Islam".[737] The historical roots all of these clauses share with Egypt's constitution and the influence of Sanhuri's ideas make it likely that courts throughout the Arabian Peninsula would take a similar approach to understanding the standard of compliance with Sharia as indicating those "legal principles that had been implicitly respected by Muslims at all times during their history".[738]

6.2. Sharia in secular and ecclesiastical courts

In this second part, the chapter moves from measures that connect legislation to Sharia and takes up some of the means by which Islamic states empower their courts to apply Islamic law without specific legislative direction. Unlike legislative clauses, this approach has considerable historical precedent. As the caliphate outgrew the capacity of a single leader to adjudicate all disputes, *qadis* appointed by the caliph or governors provided the alternative to a return to the traditional model of tribe-based dispute resolution (which would have risked further fragmenting a still tenuous centralisation of authority). Under the system of *siyasah Sharia*, *qadis* and *muftis* shaped a balance between the revealed Sharia and the commands of the ruler. In principle, *qadis* judged entirely in accordance with Islamic law (with the ruler given a wide margin of discretion), turning to local customary practices on matters where the law was silent and the ruler had issued no edict.

The emergence of legislative assemblies and European-influenced civil law in the Muslim world represented a step away from the Ottoman autocracy, but also marginalised Sharia as a source of enforceable law and the *ulama* as its interpreters. Constitutional clauses requiring civil legislation to comply with Islamic law go some way toward ensuring the Islamic quality of the legal order, but their effectiveness may depend on assertive judicial interpretations that are not always forthcoming. More obviously, legislation is rarely comprehensive. In any system of law, particularly a hybrid one as exists in many modern Islamic states, judges at times need to resort to other sources of law.

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[737] Clark B. Lombardi, *Constitutional Provisions Making Sharia "A" or "The" Chief Source of Legislation: Where did they come from? What do they mean? Do they matter?*, 28 Am. U. Int'l L. Rev. 3, 733-74 at 760-61.
[738] Clark B. Lombardi & Nathan J. Brown, *Do Constitutions Requiring Adherence to* Shari'a *Threaten Human Rights? How Egypt's Constitutional Court Reconciles Islamic Law with the Liberal Rule of Law*, 21 Am. U. Int'l L. Rev. 3 (2006), 379-435 at 413.

The Ottoman solution was to divide jurisdiction between civil courts and Sharia courts, the latter holding sway in matters of personal status and family law.[739] The 1876 Ottoman Constitution reflected this division,[740] as did the 1907 Fundamental Law of Persia, reserving "all matters falling within the scope of the Ecclesiastical Law" to *mujtahidun*.[741] Many modern constitutions mirror this approach, placing certain areas of law within the exclusive jurisdiction of Sharia courts, while secular courts retain general jurisdiction. The 1949 Egyptian civil code prototyped another way to integrate Islamic and civil law. Drawing on Abd el-Razzak el-Sanhuri's proposal to follow the Swiss civil code as an example explicitly sanctioning judicial legislation in the absence of an applicable statutory provision, it established a hierarchy whereby first local custom, then Islamic law would fill any gaps between statutory provisions.[742] Modern Islamic constitutions use these two approaches both as alternatives and as complements.

6.2.1. Islamic law in the hierarchy of municipal law

In Islamic states, Sharia forms a natural backdrop against which to interpret statutory law, as a sort of shared common law. The issue did not arise in the pre-constitutional Muslim societies held up as models of an Islamic ideal: all legal study and education was Islamic, and the only available interpretive contexts for the edicts of the ruler were Sharia, local custom or the opinion of the individual jurist however arrived at. The eventual displacement of Islamic law by colonial regimes left subsequent independence constitutions to connect to daily society via a legacy of largely secular civil administration and courts. With the emergence of constitutionalism and representative government the people of many Muslim majority states now can and do express their wish to live by Islamic principles, among other ways through ratification or acceptance of constitutional provisions proclaiming an Islamic state or Islamic law or values as the governing norms of the land. This suggests Sharia is still an appropriate source of law to apply in the absence of a statutory provision. In any case, recognising Sharia as the default law does not affect the ability of legislatures to supplement it via enacted laws.

Among Islamic states that address the place of Islamic law in the municipal legal order, the prevailing approach resembles that of the 1949 Egyptian code, instructing courts to apply

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[739] Sami Zubaida, Law and Power in the Islamic World (I.B. Taurus, 2003) 133.
[740] Ottoman Constitution (1876), art. 87 ("Affairs touching the Şeriat are tried by the tribunals of the Şeriat. The judgment of civil affairs appertains to the civil tribunals").
[741] Supplementary Fundamental Law of Persia (1907), art. 71.
[742] Amr Shalakany, *Between Identity and Redistribution: Sanhuri, Genealogy and the Will to Islamise*, 8 Islamic L. and Society 2 (2001), 201-44 at 225. The provision remains in the current version of the code. Civil Code of Egypt, art. 1 (referring to "the principles of Moslem Law").

Islamic law where civil legislation does not provide a rule to decide the case. Variants on the Sanhuri approach exist in the civil codes of most of the Arab Islamic states—indeed in some cases, most prominently Iraq, Sanhuri helped draft the code.[743] Saudi Arabia's traditionalist model of *siyasah Sharia* also applies Islamic law even where it has not been transposed into civil law, allowing it also to displace the latter in case of conflict.[744] Outside the Arabian Peninsula and North Africa, the constitutions of Afghanistan, Iran and the Maldives contain clauses instructing judges to apply Islamic law in the lacunae between constitutional or statutory provisions (none of those clauses mention custom).[745] In Somalia, courts "may" consider Sharia when interpreting fundamental rights provisions of the constitution.[746]

Notably, Sanhuri's model code gave precedence to local custom over Sharia as a source of general law. This may evidence caution on Sanhuri's part to avoid conflict between majority and minority religious communities (the Coptic community is regionally concentrated), or in not going too far at first in re-introducing Islam to the European-derived municipal law. Newer codes typically give Islamic law greater prominence, reversing the Egyptian code's prioritisation of custom over Sharia,[747] or simply omitting to mention custom. This might however not make a significant practical difference. The term custom (*'urf*) is usually understood in Egypt to refer to customs that are based on Islamic law, and in Egypt local custom generally complies with Islamic norms.[748] The original Ottoman civil code, the 'Majalla' manual for the courts which presented a compilation of rulings gleaned from Hanafi jurisprudence, includes several references to custom as a source of enforceable law.[749]

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[743] Nabil Saleh, *Civil Codes of Arab Countries: The Sanhuri Codes*, 8 Arab L. Quarterly 2 (1993), 161-67 at 163. Absent "applicable legislative provisions", the Iraqi code prioritises first custom, then the "principles of the Islamic Shari'a where are most consistent with" the civil code, and finally "the laws of equity". Civil Code of Iraq (1951), art. 1(2).

[744] Basic Law of Saudi Arabia (1992), art. 48 (judges should apply Sharia according to the Quran and the Sunna, and royal decrees if they properly comply with Sharia).

[745] Constitution of Afghanistan (2003), arts. 130 (if not guided by the constitution or statutory law, courts are to "follow the provisions of the Hanafi jurisprudence"), 131 (except if both parties to a case are Shia, in which cases courts should rule according to Shia interpretations); Constitution of Iran (1979, amended 1989), art. 167 (judges apply codified law first, with resort to Islamic legal sources and *fatawa* in the absence of an applicable statutory provision); Constitution of the Maldives (2008), art. 142 ("When deciding matters on which the Constitution or the law is silent, Judges must consider Islamic Shari'ah").

[746] Draft Constitution of Somalia (2012), art. 40(2) ("In interpreting these rights, the court may consider the Shari'ah, international law, and decisions of courts in other countries").

[747] See e.g., Civil Code of Algeria (1975), art. 1 (giving precedence to Islamic law over custom in filling gaps between statutory provisions); Civil Code of Kuwait (1980), art. 2 (amended in 1996 to prioritise rules of *fiqh* over custom, rather than the reverse as in the original code).

[748] Enid Hill, *Islamic Law as a Source for the Development of a Comparative Jurisprudence: Theory and Practice in the Life and Work of Sanhuri*, in Aziz Al-Azmeh, ed., Islamic Law: Social and Historical Contexts (Routledge, 1988) 146-97 at 176.

[749] Ottoman Courts Manual, arts. 36 ("Custom . . . may be invoked to justify the giving of judgement"), 45 ("A matter established by custom is like a matter established by law").

And of course Islamic jurisprudence itself recognises *'urf* as a proof of law, albeit a subordinate one.

As the Ottoman code imposed the Hanafi interpretation of Sunni Islam, the constitutions or laws of most modern Islamic states specify a school whose rulings judges should apply. The constitutions of Afghanistan, Brunei-Darussalam and Iran indicate respectively the Hanafi, Shafi'i and Twelver Ja'fari schools.[750] Courts in Saudi Arabia judge according to the Hanbali school, in its Wahhabi variant. Jordan's 1976 civil code is innovative in that it directs judges, absent an applicable code provision, to look first to rulings of *fiqh* and only then to resort to general principles of Sharia, custom and equity to reach a decision; prior codes emphasised principles of Sharia and did not refer to *fiqh*.[751] The Jordanian code further referenced the methodologies of *fiqh* as the preferred means to interpret code provisions.[752] Such references to *fiqh* as a valid source of civil law entered into subsequent civil codes, with that of the UAE bearing a strong resemblance to the Jordanian code, although specifying that jurists should look first to Hanbali or Maliki rulings, and only if necessary to those of al-Shafi'i or Abu Hanifa.[753] Codes in North Africa instruct courts to follow the Maliki school, if they specify a school.[754] The civil code of Iraq specifies that if judges in civil courts apply Islamic law, they should do so "without being bound by any specific school of thought",[755] and that of Kuwait instructs the judge to adopt the rules of *fiqh* that best suit the public interest under the circumstances.[756] This is unsurprising in light of significant numbers of members of Muslim sects other than the majority in these countries. Malaysia and Pakistan follow a common law tradition and do not have civil codes, although under the rules of Pakistan's Federal Shariat Court petitioners should support their claims with citations directly to the Quran and Prophetic *Sunna* evidenced by *ahadith*, which indicates there is no preferred *maddhab*.[757]

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[750] Constitution of Afghanistan (2003), art. 130; Constitution of Brunei-Darussalam (1959, amended 2011), art. 2(1); Constitution of Iran (1979, amended 1989), art. 12.
[751] Nabil Saleh, *Civil Codes of Arab Countries: The Sanhuri Codes*, 8 Arab L. Quarterly 2 (1993), 161-67 at 164 (referencing Article 1 of the 1976 Civil Code of Jordan).
[752] Nabil Saleh, *Civil Codes of Arab Countries: The Sanhuri Codes*, 8 Arab L. Quarterly 2 (1993), 161-67 at 164 (referencing Article 3 of the 1976 Civil Code of Jordan).
[753] Nabil Saleh, *Civil Codes of Arab Countries: The Sanhuri Codes*, 8 Arab L. Quarterly 2 (1993), 161-67 at 165 (referencing Article 1 of the UAE's 1985 Code of Civil Transactions).
[754] See e.g. Mauritanian Ordonnance 89-126 du 14 septembre 1986 portant Code des Obligations et des Contrats, modifié par la loi 2001-31 du 7 février 2001, art. 455 (in matters of testimony, judges should rule according to the Maliki school in the absence of an applicable code provision).
[755] Civil Code of Iraq (1951), art. 1(2).
[756] Civil Code of Kuwait (1980), art. 2.
[757] Federal Shariat Court (Procedure) Rules, 1981, art. 31-B(3).

The idea of an Islamic state having a preferred *maddhab* predates even the Ottoman Empire. The preferences evidenced in modern legal systems largely reflect longstanding traditions of the majority of Muslims in each state. Nonetheless it is questionable in the classical Sunni tradition whether a senior judge or even a ruler (or the people acting as the ruler) may compel a duly qualified jurist to implement the decisions of a *maddhab* other than the jurist's own.[758] Longstanding rules of *fiqh* require jurists to recognise the validity of duly arrived-at rulings of other schools, and *ulama* have the prerogative to judge according to their own school. The choices made in modern constitutions do not typically reflect this ideal, but as the *madhahib* reached their maturity almost simultaneously with the fragmentation of the Abbasid caliphate into separate entities whose rulers each gave preference in appointment to jurists of the prevailing regional school, it is fair to say that this does not unduly violate tradition. Throughout their history the schools have been identified with the rule of law in each particular region.

The relationship between Islamic law and secular law can rest on principles drawn from both traditions, without necessarily diminishing the 'Islamicity' of the resulting legal order.[759] Innovations from outside the Islamic tradition such as separated powers of governance and legislation by elected representatives can be severed from the secular legal systems through which they came to Islamic states. This aligns with the view of modernists such as al-Jabri that, now that the Muslim people live not in a single polity with universalist aspirations but in states in an interconnected world, Islamic identity can only be asserted by learning from a historical experience that includes other civilisations, applying "rationality and critical outlook" to reinvigorate Islamic society in "an age of science, technologies and ideologies".[760] By analogy, innovations in administration and governance can also be adopted as long as they do not violate fundamental Islamic values; indeed this process began as soon as the caliphate began to extend its rule beyond the tribes of the Arabian Peninsula. These technocratic innovations do not displace longstanding institutions or practices, as wholesale adoption of for example a European-inspired civil code can.

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[758] See e.g., Sherman A. Jackson, Islamic Law and the State: The Constitutional Jurisprudence of Shihab al-Din al-Qarafi (E.J. Brill, 1996) 111-12 (the 13th century Maliki jurist al-Qarafi argued that a rule of *ijma* forbids the application of a rule of a *maddhab* other a petitioner's own, apparently at least in part for the purpose of protecting jurists of politically weaker *madhahib*, such as himself, from potential government interference).

[759] Hamoudi used the term 'Islamicity' to signify the degree to which legislation reflects a conscious choice to adhere to Islamic values. Haider Ala Hamoudi, *Repugnancy in the Arab World*, 48 Willamette L. Rev. (Nov. 2012) 427-50 at 428.

[760] Mohammed Abed al-Jabri, Democracy, Human Rights and Law in Islamic Thought (I.B. Tauris, 2009) 69.

Nonetheless, with Islamic jurisprudence or principles assigned a subordinate place in the legal order, a hybrid system can develop through legislative enactment. This represents a departure from the classical or medieval models, whereby at least in principle the courts of the ruler operated entirely within an Islamic framework, but is a necessary consequence of placing law-making power in the hands of a legislature. Enforceable Islamic legislation clauses can guard against this, if desired. However as Egypt's example shows, even a strongly worded SSL clause can leave a wide margin of discretion for the government and legislature to interpret "principles of Sharia" as they see fit, when an otherwise sometimes assertive court remains deferential toward the other branches of government when asked to apply Islamic law.[761]

Once the relative standing of Islamic and secular law is established, the question arises of how to derive specific rules of law within the Islamic tradition. The variations in use in modern Islamic states reflect the age-old, apparently unavoidable debate of *taqlid* (imitation) versus *ijtihad* (scholarly endeavour). Codified law in the Maghreb and the eastern Islamic regions tends to bind judges to follow rulings of the *madhahib* where available, while many of the more geographically central states adopt the view common to fundamentalists and modernists alike, that judges should be allowed to reason either from the textual sources or from established principles of Islam, in what amounts to a renewal of *ijtihad.* Either choice comports with Islamic legal theory.

6.2.2. Dividing jurisdiction: Sharia courts and civil courts

Whether or not Islamic law has a general role in the national legal order, it is widespread practice in Islamic states to reserve certain areas to Islamic jurisdiction, typically in specialised Sharia courts. The most prevalent such areas are family law and the law of personal status. Where this is done, civil courts retain general jurisdiction. This split harks back to the early caliphate, where the ruler appointed *qadis* to judge according to Sharia, but also operated a caliph's court—the *mazalim* jurisdiction—for matters outside the purview of Sharia. Although these courts had in principle unlimited jurisdiction, in practice they would sometimes refer ordinary litigation "to the *qadi* court, considering it a waste of the *mazalim* court's time".[762] The *mazalim* tribunals heard claims of injustice relating to public service, including alleged misconduct by Sharia judges, and "enforced Sharia court decisions that the

[761] Ran Hirschl, Constitutional Theocracy (Harvard U. Press, 2010) 114-15 (noting cases where the Supreme Constitutional Court has ruled expansively in areas concerning civil rights and due process).
[762] Sami Zubaida, Law and Power in the Islamic World (I.B. Taurus, 2003) 54.

qadi was unable to carry out".[763] A significant proportion of the rules of *fiqh* pertain to personal and family law, which therefore occupied a large share of the attention of the Sharia judges. As the state grew larger and more complex, the ruler's secular courts gained proportionately in importance. Criminal jurisdiction as well shifted from the Sharia judges to the ruler's courts, a natural consequence of the ruler's police power. The doctrine of *siyasah Sharia* represented an attempt to bridge this split by bringing secular jurisdiction under Sharia and therefore subject to the interpretations of the *ulama* according to *usul al-fiqh*.[764]

An Islamic state evidently may provide for separated judicial regulation of civil law and Sharia. The Quran indicates that some acts (or omissions) are *mubah*, i.e. Sharia neither favours nor disfavours them. In some of these matters a ruler cannot avoid the responsibility to regulate,[765] guided by *maslahah* and the five main objectives of Sharia (life, religion, intellect, lineage and property). The Ottoman Majalla code formalised the assignment of general civil jurisdiction to civil courts, but despite being rooted in the Hanafi *maddhab*, did not purport to regulate marriage or divorce.[766] While it is in principle not necessary to split jurisdiction between secular and Sharia courts, there may be pragmatic reasons to do so. It is more efficient to utilise the detailed and widely accepted rules of *fiqh* as a family and personal law code than to legislate a new one. Islamic judges can be appointed from among the *ulama* or other suitably qualified Islamic jurists, with minimal formal training in the municipal law. Traditionally, *qadis* are also often leaders of their local community, enabling them to apply local custom where appropriate, and ensuring a degree of respect for their decisions. Finally, in most conceptions of an Islamic state, a key state duty is to facilitate peoples' ability to live in accordance with their faith. Providing for regulation of the areas of law most in touch with individuals' lives (at least the non-commercial portion) according to the individual's faith advances this goal. This reflects Islamic practice dating at least to the

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[763] Wael B. Hallaq, Shari'a: Theory, Practice, Transformations (Cambridge U. Press, 2010) 55.
[764] Mathieu Tillier, *Courts*, in Emad El-Din Shahin (ed.), The Oxford Encyclopedia of Islam and Politics (Oxford U. Press, 2014) 231-32.
[765] See e.g., Sherman A. Jackson, *Shari'ah, Democracy and the Modern Nation-State: Some Reflections on Islam, Popular Rule and pluralism*, 27 Fordham Int'l L.J. (2003-04) 88-107 at 101 ("The idea that the jurists would preside over the concrete substance of economic policy, the granting of medical licenses, or the setting of speed limits is simply misguided").
[766] Wael B. Hallaq, Shari'a: Theory, Practice, Transformations (Cambridge U. Press, 2010) 411.

early Abbasid caliphate, whereby believers enjoyed the right to live under the rule of their own preferred *maddhab*.[767]

The institutional division between religious and temporal jurisdiction that persisted in the Ottoman caliphate presented a model for post-colonial Islamic states to emulate. When European-inspired constitutions became widespread in Muslim countries, it was natural that the areas left to Sharia were those that already lay mostly outside the ruler's prerogative. To gain public acceptance of the new constitutions and civil codes, and probably for efficiency as well, many modern Islamic constitutions likewise assign family and personal status to religious rather than municipal law, usually by assigning exclusive jurisdiction over them to Sharia courts.[768] States that leave family and personal status law to independent Islamic jurisdiction often specify the *maddhab* those courts should follow. This practice prevails in the Arabian Peninsula, where Bahrain, Oman, Qatar, Saudi Arabia and the UAE lack codified family law "and instead direct judges to impose classical law according to the schools that the citizens follow".[769] By contrast, in Pakistan jurisdiction over all cases remains with a unified municipal court system, as although High Courts must follow the Federal Shariat Court's decisions regarding the validity of laws with respect to Sharia, the latter court lacks the power to stay or make orders regarding proceedings in any other courts.[770] Some states also reserve jurisdiction over the personal status of followers of minority Muslim sects to their own respective authorities. The constitution of Iran grants Islamic schools other than the Twelver Ja'fari "official status in matters pertaining to religious education, affairs of personal status

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[767] Realisation of this right could however require relocation to a region within the caliphate where a compatible *maddhab* prevailed. See Sherman A. Jackson, Islamic Law and the State: The Constitutional Jurisprudence of Shihab al-Din al-Qarafi (E.J. Brill, 1996), 3rd chapter.

[768] See e.g. Bahrain Civil and Commercial Procedures Act (1971), arts. 1, 10 (Civil Courts have competence over all civil and commercial disputes except those concerning the personal status of Muslims.); Constitution of Jordan (1952, amended 2011), art. 105 (the Sharia courts also have exclusive jurisdiction over *diyas* if both parties to a case are Muslim, or if one is Muslim and the other consents, and over *awqaf*); Basic Law of Palestine (2005), art. 101(1) (assigning personal status, as well as "[m]atters governed by Sharia law", to "Sharia and religious courts, in accordance with the law"); Constitution of Malaysia (1957, amended 2010), art. 121(1A) (the High Courts may not exercise jurisdiction in matters where the Sharia courts have jurisdiction), Ninth Schedule, List II.1 (Sharia courts' exclusive jurisdiction includes *inter alia* personal and family law of Muslims, oversight of *awqaf*, and *zakat* and "religious revenue"). In Jordan, the Tribunals of Religious Communities handle issues relating to non-Muslims that would fall under the jurisdiction of the Sharia courts if they pertained to Muslims. Id., art. 109. It is the prerogative of the government to recognise non-Muslim communities, thus empowering them to establish tribunals. Id., art. 108.

[769] Intisar A. Rabb, *"We the Jurists": Islamic Constitutionalism in Iraq*, 10 U. Pa. J. Const'l L. 3, 527-79 at 568-69 (Shia majority with Shafi'ite and Maliki minorities in Bahrain; Sunni majority and Shia minority in the UAE; Ibadi majority in Oman; Hanbali majorities in Qatar and Saudi Arabia).

[770] Constitution of Pakistan (1973, amended 2012), art. 203H.

(marriage, divorce, inheritance, and wills) and related litigation in courts of law".[771] Afghanistan's courts address matters of personal status of followers of Shia Islam through the application of Shia jurisprudence.[772]

Pakistan demonstrates an alternative approach for countries to maintain a unified system of jurisprudence without going as far as to make Islamic law the sole law of the land, acknowledging no space for secular law. In Pakistan, Sharia is not confined to particular substantive areas, but rather is applied as needed to keep (or bring) municipal legislation within the realm of what is permissible in Islam. In addition to its power to review legislation for repugnancy, under article 203DD of the constitution the Federal Shariat Court may review any criminal court decision "under any law relating to the enforcement of *Hudood*" with wide discretion to order the modification of decisions.[773] A 2010 decision that joined three petitions challenging the Protection of Women Act, 2006 demonstrated the court's expansive view of this jurisdiction.[774] The court in *Mian Abdur Razzaq Aamir and others v Federation of Pakistan and others* staked its claim to "all the legally conceivable powers and jurisdiction . . . relating to the enforcement of *Hudood*" in any court, defined *hudud* to include not only the traditional Islamic criminal punishments but also all "matters relating to the Family life of Muslims" and asserted its duty not to follow precedent (not even its own) but to exercise *ijtihad*.[775]

It would be conceivable to enact a similar rule pertaining to civil jurisdiction, enabling judicial review to extend into any substantive area where municipal law might encroach upon a rule of Islamic law. There would be an obvious potential detriment in terms of legal certainty. This might not, however, represent a large increment of cases above those already concerned with criminal and family laws, because of the large swathe of civil jurisdiction that falls within the ruler's purview under the classical understanding of Islam and thus would not be subject to overturning. The model of leaving Islamic and secular jurisdiction within a single court system, but subject to review by Sharia courts, might better balance the benefits of specialisation (Islamic courts looking at the most developed areas of Islamic law, civil

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[771] Constitution of Iran (1979, amended 1989), art. 12. Iran also requires local councils in regions where Muslims of minority schools constitute a majority to enact regulations "in accordance with the respective school of fiqh, without infringing upon the rights of the followers of other schools". Id.

[772] Constitution of Afghanistan (2003), art. 131.

[773] Constitution of Pakistan (1973, amended 2012), art. 203DD(1), (2).

[774] *Mian Abdur Razzaq Aamir and others v Federation of Pakistan and others*, Federal Shariat Court of Pakistan, petitions 01/I of 2007, 03/I of 2007 and 01/I of 2010, 22 December 2010.

[775] *Mian Abdur Razzaq Aamir and others v Federation of Pakistan and others*, Federal Shariat Court of Pakistan, petitions 01/I of 2007, 03/I of 2007 and 01/I of 2010, 22 December 2010 ¶¶ 91, 114, 99.

courts at things that came from Europe or were always in the sultan's jurisdiction) and governmental efficiency, as sooner or later the two systems must meet, for example to compel the use of state machinery to enforce judgments. One could imagine a system where courts of general jurisdiction apply Sharia as well as municipal law, but specialised courts handle for example family matters, criminal prosecutions, small civil claims and so on.

6.3. The integration of Islamic law and municipal law

Constitutional guarantees that municipal law will respect Sharia norms provide a first level of protection of human rights in an Islamic state. If governments implement in good faith the principles of rule by consent, rule with justice and consultation analysed in the previous chapter, then the measures discussed in the first part of this chapter are unlikely to be engaged often. In a well-functioning Islamic state, leaders chosen by a predominantly Muslim population will reflect the beliefs of their constituents accurately enough not to pass laws that transgress fundamental tenets of Islam. Nonetheless, constitutional clauses constraining legislation to comport with Sharia provide scope for independent courts to intervene as a safeguard. Clauses or laws that give courts the authority to invoke Islamic law when not otherwise directed by legislation further insure against un-Islamic rulings arising in legislative gaps. In view of the human rights principles embedded in Sharia,[776] the types of constitutional measures discussed in this chapter empower courts to protect citizens against rights violations, even in the absence of adherence to international agreements.

The ways in which states integrate Islamic law into their national legal order demonstrate the *de facto* outlines of modern 'Islamic law'. Most countries that seek to Islamise their law make some provision to keep legislation compliant with Islamic norms. As understood by courts, this almost always means the general principles of Islam, which in effect is a modern sanction for legislatures and judges to perform *ijtihad*. At the same time it is almost universal to leave matters of personal status, family and canon law entirely to courts that specialise in Islamic law. This encourages the formal application of *taqlid*, because of the focus historically placed on these areas of law by Islamic jurists, and the similarity of the issues that arise from one generation to the next. In neither general nor subject-matter specific law, legislation nor judge-made, is this a sharp, clear division. As is evident in many civil codes, legislatures often eschew *ijtihad* in favour of enacting laws that reflect known rulings of *taqlid*, where available, and judges in Sharia courts are often *ulama*, well able to perform traditional *ijtihad*.

[776] See above, chapter 3, part 3.3.

There is a basic tension between legislative and judicial power. An unfettered legislature can potentially act to reinforce Islamic norms as well as to subordinate or replace them, but either act reduces the scope of the jurist to independently apply Islamic law. Source of law clauses, repugnancy clauses and rules requiring the application of Islamic law to fill gaps all tend to tip the balance toward judges, as does a rule such as Somalia's whereby the entire constitutional order is subordinated to Sharia. As a further safeguard, Islamic courts can be accorded scope to intervene in the judicial system, as in Pakistan. These various approaches can be used in tandem. Although for example Abdelaal considers it incongruous that Egypt should require legislation to comply with principles of Sharia, while instructing its judges to apply Sharia only in the absence of on-point legislation or customary law,[777] this merely represents a shift of responsibility toward the legislature within an Islamic framework. A judge who applies Sharia-compliant legislation in lieu of applying a rule of *fiqh* or even the judge's own *ijtihad* or *ra'y* is still applying Islamic law.

6.4. Conclusion

Islamic law touches the state structures and legal order relatively lightly in the Maghreb region, the Middle East and Malaysia. This may reflect the relatively diverse religious and cultural affiliations of those regions, as well as the secularist influence of the French constitutional tradition in the Maghreb. The states most prominently influenced by Islamic law are Afghanistan, Egypt, Iran, Pakistan and Saudi Arabia. Within this group there are significant differences. Egypt's Al-Azhar has a particularly strong influence in its society and beyond, but governments and courts have left standing a significant portion of the legacy of the secular military and socialist regimes of the 20th century. Afghanistan's constitution states a strong commitment to Islam, for example with a particularly strong SSL clause, but the state has not yet developed the institutional stability to overcome local practices and apply a unifying understanding of Islamic law. Iran and Saudi Arabia differ from most OIC states in invoking a single, comprehensive understanding and application of Islamic law. Of all the OIC states, Pakistan performs the most intricate weaving of Islamic norms into a constitutional order that otherwise resembles western models of governance.

Building Islamic law into the national legal order, whether as a constraint on the legislative prerogative or by providing for its application in civil courts, or religious courts with

[777] Mohamed Abdelaal, *Religious Constitutionalism in Egypt: A Case Study*, 37 Fletcher Forum of World Affairs 1 (Winter 2013), 35-51 at 42.

exclusive jurisdiction, can serve two broad purposes of an Islamic state. First, it may inoculate against possibly undesirable side effects of legal reform efforts of the kind undertaken in the 19th and 20th centuries, that apply ideas gleaned from foreign models, or protect against occasional efforts by rulers to secularise national law as happened in the first decades after the end of colonial rule. Second and more subtly, establishing Islamic law as part of the national legal order provides a forum to contain and resolve disputes arising out of the pluralism of Islamic beliefs and social practice: the law may pre-emptively sanction one set of rules for use in public life, or carve out zones of tolerance within which sects are understood to enjoy the right to follow their own ways.

Given the pluralistic nature of Islamic law, it is of course possible that courts or other authorities could select and apply rulings of Islamic law that cause rather than prevent violations of rights that Sharia or international law should protect. Only the Prophet completely understood Sharia. Even eminently qualified and well-intentioned *mujtahidun* can err. A government that lacks sufficient commitment to the Islamic ideals of justice, mercy and upholding the rights of its citizens could choose to carry out actions that not only harm the people, but fail to comport with Sharia. Even during the classical caliphate there were rulers who failed to govern according to their Islamic duties. Such risks are multiplied in a world where the *umma* is ruled not by a single rightly-guided caliph, but by a diversity of rulers with varying understandings of Islam, as was the situation during the slow fragmentation of the Abbasid caliphate. Today, however, Islamic states can utilise a range of international legal frameworks that were not available in the classical age. International law provides institutional support through the UN and a shared global understanding of human rights in the treaties developed under its auspices. The OIC supplies another set of instruments to safeguard the rights and enhance the well-being of the *umma*, through declarations of agreed Islamic principles as well as in the mechanisms of the OIC that facilitate ongoing consultation among the leaders of Islamic states. The next chapter studies how these international regimes can help to guide those states to more fully realise their citizens' human rights under both Islamic and international law.

7. The modern Islamic human rights regime

The central argument of this thesis is that recent decades have seen the emergence of an international Islamic law of human rights. Islamic states today are subject in varying degrees to Islamic, international and international human rights law. Modern international Islamic human rights norms are visible in Islamic states' pattern of participation in the UN treaty system, and in a supplementary set of international Islamic human rights instruments that developed in the second half of the 20th century. Many Islamic constitutions now also reflect the rights and principles recognised in these documents. This chapter presents the three-level framework of law that comprises this emergent body of law. One level is Sharia. The first part of this chapter describes the second level, which consists of the commitments to uphold human rights that Islamic states have made through adherence to the UN human rights treaties, particularly the international bill of rights. Part two of the chapter presents the final level of international Islamic human rights law, composed of customary international law as demonstrated through joint declarations and aspirational statements of the Islamic states concerning human rights, particularly those issued under the aegis of the OIC. The chapter's third and final part describes how these three layers of law fit together and argues that as a result, all Islamic states, including those that have not adhered to the ICCPR and ICESCR, have committed to uphold a set of human rights closely similar to those set out in the UDHR.

Islamic law has only relatively recently acquired the language of international human rights. Instruments such as the OIC's Charter and its 1990 Cairo Declaration on Human Rights in Islam, and the 1981 Universal Islamic Declaration of Human Rights, highlight Islamic states' understanding of their international commitments to uphold human rights. They also document the modern understanding of human rights in Islamic law, as they reflect both the considered conclusions of eminent Islamic jurists, and statements of international Islamic law collectively endorsed by the world's Islamic states. Islamic states that participate in both this and the global human rights treaty system presumably aim to enact laws and policies that satisfy both sets of human rights related commitments.

When comparing systems of law, it is difficult to avoid using one system as a reference model against which to compare the others. Here there are three candidates: Sharia, the international human rights regime that began with the UDHR, and the later Islamic international human rights regime. As a system of law, Sharia long predates international human rights law, or international law itself. However the UDHR and the subsequent UN

treaties presented human rights in a new framework, as individual rights mutually guaranteed by states. Modern Islamic states adopted that framework and built on it. The Islamic international human rights framework is openly derivative of the other two. Explicitly grounded in Sharia, it implicitly recognises the international human rights system in the way it describes Islamic human rights.[778] Therefore although the choice of a reference model is ultimately somewhat arbitrary, because all Islamic states have accepted the general idea of state-guaranteed human rights it seems reasonable to first assess Islamic states' participation in the UN human rights system, before proceeding to analyse its modern international Islamic counterpart, which presents itself as a specification or fulfilment of the UN vision of human rights that is based on Sharia norms.

7.1. International human rights commitments of Islamic states

This part analyses the commitments Islamic states have made to uphold human rights through participating in the UN human rights treaties. An Islamic state that perceives sufficient potential for conflict between a provision in an international instrument and Islamic law to enter a reservation or a declaration recognises a delicate situation. It is incumbent on such a state not to transgress Sharia, yet a basic rule of Sharia is that agreements, once made, must be upheld even if to do so may entail violating Sharia. For this reason, Islamic states must exercise caution when adhering to international agreements.

For the most part, modern Islamic states participate in the international human rights treaty system. Some of them hedge their commitments with reservations or interpretations that give priority to Islamic law, should an incompatibility arise. Although such reservations have attracted considerable attention as well as strong objections from other states party, their existence should not obscure the generally high rate of participation of modern Islamic states in international human rights treaties. Viewed across the entirety of the UN human rights treaties, most predominantly Muslim states participate fully in most of the treaties, with only a minority of those states reserving against any provisions. Most Islamic states have therefore undertaken to find ways to apply the treaties compatibly with their municipal understanding of Islamic law.

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[778] See e.g., Ann Elizabeth Mayer, Islam and Human Rights, 4th ed. (Westview Press, 2007) 57 ("Even while promoting Islamic versions of human rights, [the authors of Islamic human rights schemes] seem to regard international human rights as the ultimate norm against which all rights schemes are inevitably measured").

This part presents an overview of Islamic states' adherence to the UN human rights treaties, and performs a comprehensive analysis of the Sharia-related reservations the seventeen Islamic states party to the ICCPR and the ICESCR have entered, and of their treaty partners' corresponding objections. The first of four sections details the treaty participation and the reservations, finding that at least some reservations to the ICCPR lack meaningful effect or are entirely inoperative. The second section reviews the objections and their stated grounds and concludes that while some objections are invalid as a matter of international treaty law, others do indeed cast doubt on the validity of the reservations they refer to. The third section focuses on Pakistan's ICCPR reservations, which were extensive and drew equally extensive objections. The section argues that through subsequent state action these reservations and objections have been almost entirely resolved, with two significant results. The first result is that Pakistan is now a full party to the ICCPR. The second is that in signalling acceptance of Pakistan's remaining reservations, the states party to the ICCPR have demonstrated that the scope of interpretation of an international treaty can expand to accommodate injunctions of Sharia that the law of an Islamic state party incorporates. A short concluding section observes that Sharia-based reservations to particular human rights treaty provisions, even if they are operative, do not necessarily negate the rights described, as Sharia itself might protect them.

7.1.1. Treaty participation and reservations

Islamic states generally participate in the main human rights instruments. Of those that were UN members in 1948, Afghanistan, Egypt, Iran, Iraq, Pakistan and Syria voted for the General Assembly resolution proclaiming the UDHR, while Saudi Arabia abstained.[779] All but seven—Brunei, Malaysia, Oman, Palestine, Qatar, Saudi Arabia and the UAE—are party to the ICCPR and ICESCR. At the turn of the 21st century, for each of the ICCPR, ICESCR, CRC, CERD, CEDAW and CAT, Baderin counted at least 38 OIC member states party.[780] African Islamic states also adhere to the African Union's Human and People's Rights Charter.[781] The League of Arab States' revised Arab Charter on Human Rights entered force

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[779] Yearbook of the United Nations 1948-1949 535.

[780] Mashood A. Baderin, *A Macroscopic Analysis of the Practice of Muslim State Parties to International Human Rights Treaties: Conflict or Congruence?*, 1 Human Rts L Rev 2 (2001) 265-303 at 269 (out of the 57 OIC member states 40 "are parties to the IICESCR and the ICCPR, 55 [to] the CRC, 48 [to] the CERD, 41 [to] the CEDAW and 38 [to] the CAT").

[781] All African states adhere to the Charter. The other AU human rights treaties attract varying numbers of states party, with most states having ratified the OAU Refugee Convention and Child Charter, but far fewer ratifying the protocols relating to a human rights court and women's rights. Tiyanjana Maluwa, *Ratification of African Union Treaties by Member States: Law, Policy and Practice*, 13 Melbourne J Intl L (2012) 1-49 at 23-24. An Islamic state, Egypt, entered one of the two reservations to the Charter (Zambia entered the other). Rachel

in 2008, ratified as of 2013 by 11 Islamic states and Libya.[782] Some Islamic states qualify their treaty commitments with reservations or declarations that give priority to Islamic law. Many of these have drawn objections from treaty partners that they are "incompatible with the object and purpose of the treaty".[783] This need not necessarily produce an impasse, but instead can provide a starting point for states to signal to one another their understanding of key treaty principles, and possibly to narrow or eliminate areas of disagreement.[784] Assessing the reservations and objections that remain in force in order to determine exactly which treaty terms operate between pairs of states remains, however, a complex endeavour.

Complications due to unresolved reservations and objections render the exact terms of some human rights treaty commitments of Islamic states uncertain. Out of the seventeen Islamic states party to the ICCPR and ICESCR, seven entered reservations or declarations rooted in Islamic law.[785] None entered a general reservation based on Islamic law, as with for example Pakistan's subordinating the CEDAW to its constitution, or Pakistan's and Iran's reservations to the CRC.[786] Sometimes, as with Algeria's CRC reservations, extensive reservations to specific provisions can amount to a general reservation or lack of engagement with the treaty,[787] but this is not true of any operative set of Sharia-based reservations to the ICCPR. Egypt did not enter reservations to the ICCPR and ICESCR, but made a general declaration "[t]aking into consideration the provisions of the Islamic Sharia and the fact that they do not conflict with the text".[788] Algeria, Bahrain, Kuwait, the Maldives, Mauritania and Pakistan based reservations or interpretive declarations to specific provisions of the ICCPR on Islamic

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Murray, The African Commission on Human and People's Rights and International Law (Hart Publishing, 2000) 10. Egypt reserved on Islamic law grounds against articles 8 and 18(3) of the Charter, which approximately reflect ICCPR articles 18 and 23 concerning freedom of religion and family rights. Reservation of Egypt to the African Union Human and People's Rights Charter (16 November 1981). This reservation may be of limited substantive effect, given Egypt's subsequent declaration that the entirety of the ICCPR is compatible with Islamic law. Declaration upon ratification by Egypt of the ICCPR and ICESCR (14 January 1982).

[782] Algeria, Bahrain, Iraq, Jordan, Kuwait, Palestine, Qatar, Saudi Arabia, Syria, the UAE and Yemen. See Mohamed Y. Mattar, *Article 43 of the Arab Charter on Human Rights: Reconciling National, Regional, and International Standards*, 26 Harvard Hum Rts J (2013) 91-147 at 93.

[783] Vienna Convention on the Law of Treaties, article 19(c).

[784] Edward T. Swaine, *Reserving*, 31 Yale J Intl L (2006) 307-66 at 340-41.

[785] Out of Afghanistan, Algeria, Bahrain, Egypt, Iran, Iraq, Jordan, Kuwait, the Maldives, Mauritania, Morocco, Pakistan, Palestine, Somalia, Syria, Tunisia and Yemen, Algeria, Bahrain, Kuwait, the Maldives, Mauritania and Pakistan entered reservations and Egypt made an interpretive declaration. Libya and Sudan also ratified the ICCPR, without normative reservations. The Comoros signed but did not ratify the ICCPR and IICESCR.

[786] Nisrine Abiad, Sharia, Muslim States and International Human Rights Treaty Obligations: A Comparative Study (British Institute of International and Comparative Law, 2008) 69-70 (Iran's reservation subjects the CSC to "Islamic laws and the internal legislation in effect", while Pakistan's is far more precise).

[787] Nisrine Abiad, Sharia, Muslim States and International Human Rights Treaty Obligations: A Comparative Study (British Institute of International and Comparative Law, 2008) 75.

[788] Declaration upon ratification by Egypt of the ICCPR and ICESCR (14 January 1982).

law, either explicitly or by reference to areas of their national legal orders where Islamic law holds sway. Abiad details several further clusters of reservations that cite Islam, some of which drew objections, targeting specific provisions of the CEDAW and the CRC.[789] For example, the reservations of Bahrain, Egypt, Malaysia and Morocco to CEDAW articles 2 and 16, which respectively commit states to actively eliminate discrimination against women and guarantee equality of the sexes in marriage and as relates to children, drew objections from western states and a finding of invalidity from the Committee on the Elimination of Discrimination Against Women.[790] These typify the disagreements that can arise in the course of efforts by Islamic states to join international treaties without risking encroaching upon Islamic norms in their domestic legal orders.

Judging by the instruments and provisions they reserve against, Islamic states' greatest concerns regarding the compatibility of human rights treaty terms with Sharia relate to equal treatment based on sex or religion, and to freedom of religion. Reservations or declarations to the ICCPR grounded in Islamic law focus on article 18, which guarantees "freedom of thought, conscience and religion", and articles 23 and 3, which require equality of rights between men and women regarding marriage, and generally. The Maldives and Mauritania entered reservations to article 18, the Maldives subordinating it to the constitution and Mauritania subordinating it to Sharia. Algeria, Kuwait and Mauritania referred to Islamic law in reserving against article 23, in its entirety in Kuwait's case while the others specified article 23(4) regarding "equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution".[791] Kuwait further stated that article 3 would be applied subject to municipal law, which in principle conforms to Islamic law.[792] Bahrain's declaration interprets articles 3, 18 and 23 "as not affecting in any way the prescriptions of" Sharia. Construed as a reservation, this attracted numerous objections citing for example lack of specificity or improper reference to national law, but was ultimately not accepted for

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[789] Nisrine Abiad, Sharia, Muslim States and International Human Rights Treaty Obligations: A Comparative Study (British Institute of International and Comparative Law, 2008) 73-79.

[790] Nisrine Abiad, Sharia, Muslim States and International Human Rights Treaty Obligations: A Comparative Study (British Institute of International and Comparative Law, 2008) 72-73 (citing as an example the Netherlands' objection that Bahrain's reservations by invoking Sharia "may raise doubt as to the commitment of [Bahrain] to the object and purpose of the convention and moreover, contribute to undermining the basis of international treaty law"); id. at 74 (citing the Committee's 1987 report and further opinions).

[791] Algeria "interprets [article 23(4)] as in no way impairing the essential foundations of the Algerian legal system", which in matters of family law is Sharia-based. Kuwait entered a general reservation that the provisions of article 23 must yield if they conflict with the national personal-status law, which is "based on Islamic law". Mauritania referred to Sharia.

[792] Kuwait's declaration, which did not explicitly invoke Islam but cited "Kuwaiti law", applies also to article 2(1) ICCPR and articles 2(2) and 3 ICESCR.

deposit by the Secretary-General, in agreement with objections that it was submitted after ratification and thus invalid under international treaty law.[793] Pakistan entered extensive reservations based on Islamic law, but withdrew nearly all of them in September 2011 under economic pressure from the EU,[794] substituting instead considerably narrower reservations to articles 3 and 25. Otherwise, states have not cited Islamic law as grounds for reservations to the ICCPR or ICESCR.

7.1.2. Treaty partners' objections to reservations

Sharia-based reservations and declarations to the ICCPR have drawn objections from numerous states party, predominantly in Europe. Objections to the Maldives' article 18 reservation focused on its uncertain scope due to its general reference to the Maldivian constitution, or cited the rule (included in the Vienna Convention as article 27) that a state may not invoke its internal law to justify failure to uphold treaty undertakings.[795] Slovakia's objection also expressed concern that because "the Maldivian legal system [is] mainly based on the principles of Islamic law, the reservation raises doubts as to the commitment of the Republic of Maldives to its obligations under the Covenant".[796] Similarly, ten states objected to the uncertain scope of Mauritania's reservation subjecting the interpretation of articles 18 and 23(4) to Islamic law, with France, Latvia, the Netherlands and Sweden noting the

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[793] "A State may, *when signing, ratifying, accepting, approving or acceding to a treaty*, formulate a reservation". Vienna Convention on the Law of Treaties, article 19 (emphasis added). Objections registered by Australia (18 September 2007) (reference to Sharia is unclear; invocation of internal law), Canada (18 September 2007) (reference to Sharia is unclear; article 18 is non-derogable), the Czech Republic (12 September 2007) (unclear; invocation of internal law), Estonia (12 September 2007) (reference to Sharia is unclear), Hungary (4 December 2007) (invocation of internal law), Ireland (27 September 2007) ("a reservation which consists of a general reference to religious law may cast doubts on the commitment of the reserving State to fulfil its obligations under the Covenant"), Italy (1 November 2007) (unclear), Mexico (13 December 2007) (subjection of these articles to Sharia "would constitute discrimination"), the Netherlands (27 July 2007) (reference to Sharia is unclear), Poland (3 December 2007) (reference to Sharia is unclear), Portugal (27 August 2007) (unclear), Sweden (3 December 2007) (unclear), Slovakia (18 December 2007) (unclear) and the UK (27 December 2007) ("A reservation which consists of a general reference to a system of law without specifying its contents" is unclear). All of these except Italy and Slovakia objected as well that Bahrain's reservations were submitted after ratification and thus were invalid. Latvia (13 August 2007) objected only based on lack of timely submission of the reservations.

[794] Lorenz Langer, Religious Offence and Human Rights : The Implications of Defamation of Religions (Cambridge U. Press, 2014) 364.

[795] Objections registered by Austria (18 September 2007), Canada (18 September 2007), Estonia (12 September 2007), France (19 September 2007), Germany (12 September 2007), Hungary (18 September 2007), Ireland (19 September 2007), Italy (1 November 2007), the Netherlands (27 July 2007), Portugal (29 August 2007), Slovakia (21 November 2007), Spain (17 September 2007), Sweden (18 September 2007) and the UK (6 September 2007) objected to the reservation for its unclear scope. Australia (18 September 2007), the Czech Republic (12 September 2007) and Finland (14 September 2007) further cited the rule against invoking domestic law to avoid treaty commitments. Latvia (4 September 2007) cited only the latter rule. Australia and Canada further noted that article 4(2) of the ICCPR does not permit derogations from article18.

[796] Objection registered by Slovakia (21 November 2007).

invocation of Sharia.[797] Kuwait's subjection of articles 3 and 23 to "Kuwaiti law", and the reservation that article 25(2) would not be applied against the national electoral law, which allows only men to stand for election or to vote, drew objections from Finland, Germany, the Netherlands, Norway and Sweden, mostly citing the impropriety of reservations based on general references to national law.[798] Pakistan's original reservations affecting articles 3, 6, 7, 12, 13, 18, 19, 25 and 40 drew numerous objections, rendered largely moot when Pakistan sharply narrowed its reservations.[799] Only Portugal objected to Algeria's declaration that article 23(4) does not "[impair] the essential foundations of [its] legal system", although Germany declared its understanding that this means Algeria will fully implement article 23(4).[800] Except for these pairs of reservations and objections, the terms of the ICCPR are not subject to open disagreement by parties over concerns that relate to Islamic law.

Overall, Islamic states party to the ICCPR and ICESCR have indicated by their acceptance of most of the treaties' terms that they see international human rights standards as mostly compatible with Sharia. Possible exceptions lie in the reservations of the Maldives and Mauritania regarding freedom of religion, and of Kuwait, Mauritania and Pakistan regarding equality. These reservations and objections delineate a limited, reasonably clear zone of contention between the rights enumerated in the ICCPR and states party who assert the priority of Islamic law. Neither Algeria's declaration regarding article 23(4) nor the responses to it specified how Sharia could conflict with the requirements of the article. Bahrain's reservations are inoperative, as the UN Secretary-General did not accept their deposit. This

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[797] Objections registered by Finland (15 November 2005) (also citing the rule against invoking domestic law to avoid treaty commitments), France (18 November 2005) (because they invoke Sharia, the reservations have a "general, indeterminate scope"), Germany (15 November 2005), Greece (24 October 2005), Latvia (15 November 2005) (reference to Sharia makes "the provisions of International Covenant subject to the prescriptions of the Islamic Shariah", thus unclear), the Netherlands (31 May 2005) (unclear, because the articles' application "has been made subject to religious considerations"), Poland (22 November 2005), Portugal (21 November 2005) ("a reservation that seeks to limit the scope of the Covenant on a unilateral basis and that is not authorised by the Covenant"), Sweden (5 October 2005) (noting "general references to the Islamic Sharia"), UK (17 August 2005).

[798] Objections registered by Finland (25 July 1997), Germany (10 July 1997), the Netherlands (22 July 1997) (reason unspecified), Norway (22 July 1997) and Sweden (23 July 1997).

[799] Objections registered by Australia (28 June 2011), Austria (24 June 2011), Belgium (28 June 2011), Canada (27 June 2011), Czech Republic (20 June 2011), Denmark (28 June 2011), Estonia (21 June 2011), Finland (28 June 2011), France (24 June 2011), Germany (28 June 2011), Greece (22 June 2011), Hungary (28 June 2011), Ireland (23 June 2011), Italy (28 June 2011), Latvia (29 June 2011), the Netherlands (30 June 2011), Norway (29 June 2011), Poland (20 June 2011), Portugal (28 June 2011), Slovakia (23 June 2011), Spain (9 June 2011), Sweden (22 June 2011), Switzerland (28 June 2011), UK (28 June 2011), US (29 June 2011). Pakistan modified its reservations in September 2011, since when no further objections have been registered.

[800] Objection registered by Portugal (26 October 1990) (understanding Algeria's declarations as reservations, and making a general objection to them); Declaration of Germany (25 October 1990) (interpreting Algeria's declaration regarding article 23(4) to mean that Algeria "to mean that Algeria, by referring to its domestic legal system, does not intend to restrict its obligation to ensure through appropriate steps equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution").

leaves Kuwait, the Maldives, Mauritania and Pakistan as the states formally seeking to subordinate portions of the ICCPR to Islamic law, either explicitly or through the operation of Sharia-based municipal law. Disagreements with other states party relate to the Maldives and Mauritania's reservations regarding freedom of religion (article 18), and to the principle of equality between men and women, generally in Kuwait's case (article 3) and as related to marriage in Kuwait and Mauritania (article 23 and 23(4), respectively). Pakistan's remaining reservations also concern equality: between men and women, qualifying the application of article 3 by reference to Pakistan's Personal Law and Law of Evidence, and between Muslims and non-Muslims, subordinating article 25, which guarantees equal access to public office, to the constitutional provisions prohibiting non-Muslims from serving as president or prime minister.[801] Kuwait's general subjection of article 25(2) to its electoral law that permits only men to stand for and vote in elections did not purport to be based on Sharia.[802]

The validity of these contested reservations is uncertain. Under the Vienna Convention on the Law of Treaties, reservations incompatible with the object and purpose of a treaty are invalid (even with respect to states that did not object).[803] It is unclear whether this rule is dispositive, because although the Vienna Convention purported to codify customary international law it is debatable whether it correctly did so in this regard,[804] and fewer than half of modern Islamic states have ratified or acceded to it.[805] In any event, states evidently disagree on whether the reservations made by Kuwait, the Maldives, Mauritania and Pakistan are compatible with the object and purpose of the ICCPR. Absent the withdrawal of objections or reservations, or guidance from an international tribunal, at least some uncertainty will remain as to their validity.

Beyond the threshold question of validity, the effect of invalid reservations is also unclear. They might nullify the reserving party's ratification, or leave it bound by all provisions except those the reservations related to, or might simply be severed from the treaty, leaving

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[801] UN Depositary Notification C.N.590.2011.TREATIES-40. Article 25 "shall be subject to the principle laid down in Article 41 (2) and Article 91 (3) of the Constitution of Pakistan", under which respectively a person can only become president if "he is a Muslim of not less than forty-five years of age and is qualified to be elected as member of the National Assembly", and that a newly seated National Assembly should, after electing its Speaker and Deputy Speaker, elect "one of its Muslim members to be the Prime Minister".

[802] See e.g., Mashood A. Baderin, International Human Rights and Islamic Law (Oxford U. Press, 2003) 160 (similarly, Kuwait's reservation against article 7(a) of CEDAW that would prevent women from voting "is on the grounds of the Kuwaiti Electoral Act and not on Islamic law per se").

[803] Vienna Convention on the Law of Treaties, article 19(c).

[804] Edward T. Swaine, *Reserving*, 31 Yale J Intl L (2006) 307-66.

[805] Afghanistan, Iran, Pakistan and Sudan signed the Vienna Convention but only Sudan has ratified it. Egypt, Libya, Malaysia, the Maldives, Oman, Palestine, Saudi Arabia, Syria and Tunisia have acceded to it.

the reserving state bound by its obligations toward (at least) the objecting states as if it had not entered the reservation.[806] Out of the states objecting to the reservations of Kuwait, the Maldives, Mauritania and Pakistan to the ICCPR, Canada, the Czech Republic, Finland, Latvia and Sweden asserted their severance.[807] Accordingly, at least between these states it is questionable whether the disputed provisions are binding.

7.1.3. A middle ground: Pakistan's ICCPR reservations

The interplay between reservations and objections can help to resolve or at least to narrow areas of perceived friction between Islamic law and treaty terms. For example, Egypt and Jordan's reservations to CRC articles 20 and 21, which deal with the adoption of children, arguably demonstrate that a Sharia-based reservation describing a specific concern (Egypt's) can gain acceptance while a reservation on the same point supported by a general reference to Sharia (Jordan's) draws objections.[808] This is in keeping with a general tendency of states to object less to reservations the more specifically those reservations indicate which source of law they propose to supplant the treaty terms with.

Pakistan's revised ICCPR reservations also appear to have gained acceptance, which would represent an international accommodation of the principle of equality based on sex or religion with Pakistan's interpretation of Islamic law. Pakistan's partial withdrawal left in place a reduced set of reservations that remain based on Islamic law. Most of the original objections raised concerns about imprecise references to internal law, or the impropriety of citing internal law at all. The revised reservations are more precise, referring to specific legislation and particular constitutional provisions, with no explicit mention of Sharia, although they still do not indicate exactly how articles 3 and 25 might conflict with those sources of law.

Most states that objected to Pakistan's ICCPR reservations cited their vagueness. Since Pakistan grounded its remaining reservations in specific constitutional clauses and legal codes, objections that references to Sharia or generally to its constitution were not clear enough for treaty partners to understand the reservations' scope may no longer hold.

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[806] Ryan Goodman, *Human Rights Treaties, Invalid Reservations, and State Consent*, 96 American J Intl L (2002) 531-60 at 531.

[807] Conversely, the objections registered by the USA appear to accept the reservations objected to as having modified the treaty terms. See e.g., USA objection to Pakistan's reservations (29 June 2011) ("This objection does not constitute an obstacle to the entry into force of the Covenant between the United States and Pakistan, and the aforementioned articles shall apply between our two states, except to the extent of Pakistan's reservations").

[808] Nisrine Abiad, Sharia, Muslim States and International Human Rights Treaty Obligations: A Comparative Study (British Institute of International and Comparative Law, 2008) 77-79.

Removing such references may, based on their plain text, have entirely remedied the vagueness objections of the Czech Republic, Greece, Hungary, Slovakia and Spain.[809] Reservations to the ICCPR often describe their scope by reference to specific legal codes and constitutional provisions,[810] a standard which Pakistan's revised reservations reach. Pakistan's clarifications regarding articles 3 and 25 may also assuage objections to "general reference to a national law without specifying its content" (or similar), which account for a further twelve states' objections.[811] Of the remaining objections that the scope of Pakistan's reservations is insufficiently clear, Austria and Belgium considered reference to national laws to be *per se* insufficient, with the UK specifying individual "constitutional provision[s]" as well, and the Netherlands applying a blanket objection to reservations based in national, constitutional or Sharia law as unclear.[812] Of the original objections to Pakistan's ICCPR reservations as vague, only these appear to clash with the remaining reservation to article 3, and only those of the UK and the Netherlands remain at odds with Pakistan's reservation to article 25 in favour of constitutional provisions permitting only Muslims to serve as head of state or government.

Most of the objections to Pakistan's reservations that cited grounds other than vagueness also now seem moot. Denmark, Ireland, Latvia, Norway, Poland, and Sweden objected essentially

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[809] Objections registered by the Czech Republic (20 June 2011) (references to the constitution or Sharia in reservations to articles 3, 6, 7, 18 and 19 or to "law relating to foreigners" regarding articles 12 and 25 are too vague), Greece (22 June 2011) ("general reference to" the constitution and Sharia "without specifying the extent of the derogation"), Hungary (28 June 2011) (unclear "general reference to the provisions of the Constitution [or] the Sharia laws"), Slovakia (23 June 2011) (lack of clarity due to subjecting "Articles 3, 6, 7, 18 and 19 . . . to the Islamic Sharia law"), Spain (9 June 2011) ("subordinating [ICCPR articles to Sharia or the constitution] to which general reference is made without specifying their content").

[810] Sandra L. Bunn-Livingstone, Juricultural Pluralism vis-à-vis Treaty Law (Martinus Nijhoff, 2002) 217-19. In all, 30 states entered 79 reservations to the ICCPR. Id. 217.

[811] Objections registered by Australia (28 June 2011) (vague; "the provisions of general domestic law"), Canada (27 June 2011) ("general reference to national law or to the prescriptions of the Islamic Sharia" leads to "a general, indeterminate scope"), Estonia (21 June 2011) ("general reference to a national law without specifying its content"), Finland (28 June 2011) ("general reference to national law without specifying its content"), France (24 June 2011) ("general and indeterminate . . . vague since they do not specify which provisions of domestic law are affected"), Germany (28 June 2011) ("to a system of domestic norms without specifying the contents thereof"), Ireland (23 June 2011) ("general reference to the Constitution or the domestic law of the reserving State or to religious law"), Italy (28 June 2011) ("general reference to national provisions without specifying its implications makes it unclear"), Latvia (29 June 2011) (the reservations to articles 3, 6 and 7 "are ambiguous, thereby lacking clarity"), Poland (20 June 2011) ("Pakistan refers in its reservations to the Sharia laws and to its domestic legislation . . . it does not specify the exact content of these"), Switzerland (28 June 2011) (Pakistan's reservations, "which refer to the provisions of domestic law and Islamic Sharia law, do not specify their scope"), US (29 June 2011) (the reservations "obscure the extent to which Pakistan intends to modify its substantive obligations").

[812] Objections registered by Austria (24 June 2011) ("general and indeterminate scope" of references to the constitution, "Sharia laws and certain national laws"), Belgium (28 June 2011) ("contingent upon their compatibility with the Islamic Sharia and/or legislation in force in Pakistan. This creates uncertainty"), the Netherlands (30 June 2011), UK (28 June 2011) ("general reference to a constitutional provision, law or system of laws without specifying their contents").

that the reservations were so extensive as to call into question Pakistan's engagement with the ICCPR as a whole.[813] Pakistan arguably rectified this by withdrawing seven of its original nine reservations, and narrowing the remaining two through more precise reference to internal law. Objections by the Czech Republic, Hungary and Poland that Pakistan "may not invoke the provisions of its internal law as justification for its failure to perform a treaty" do not obviously apply to reservations.[814] Finally, Portugal objected in general that the reservations invoked the constitution, national law or Sharia, Spain considered them "intended to exempt Pakistan from its commitment to respect and guarantee certain [essential] rights", and Slovakia objected to the reservations to articles 12, 13, 25 and 40 as *per se* incompatible with the ICCPR's object and purpose.[815] From the objections not grounded in vagueness, only those of Portugal and Spain to the reservations to article 3, and theirs and Slovakia's objection to the article 25 reservation, appear likely to remain of concern.

If so many objections have indeed lapsed, then nearly all parties to the ICCPR have accepted Pakistan's remaining reservations. This would appear to indicate that an Islamic state can assuage international partners' concerns about grounding reservations to human rights treaties in Islamic law by specifying which national laws that apply Islamic standards would take precedence over particular treaty obligations. The EU's linking extension of 'GSP+' status

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[813] Objections registered by Denmark (28 June 2011) (reserving against articles 3, 6, 7, 12, 13, 18, 19 and 25 "subject to Sharia and/or constitutional and/or national law . . . raise doubts as to what extent the Islamic Republic of Pakistan considers itself bound by the obligations of the treaty"), Latvia (29 June 2011) (articles 3, 6 and 7 represent the object and purpose of the treaty, and thus may not be subjected "to the regime of the Constitution of the Islamic Republic of Pakistan or of Sharia law "), the Netherlands (30 June 2011) (the reservations to articles 3, 6 7, 18, 19 and 25 " raise[] concerns as to the commitment of the Islamic Republic of Pakistan to the object and purpose"), Norway (29 June 2011) ("the reservations . . . are so extensive as to be contrary to [the ICCPR's] object and purpose"), Poland (20 June 2011) (considering the reservations so extensive as to "considerably limit the ability to benefit from the rights guaranteed"), Sweden (22 June 2011) ("these reservations raise serious doubt as to the commitment of the Islamic Republic of Pakistan to the object and purpose of the Covenant, as the reservations are likely to deprive the provisions of the Covenant of their effect"), Switzerland (28 June 2011) (Pakistan's reservations "raise doubts about [Pakistan's ability] to honour its obligations").

[814] Vienna Convention on the Law of Treaties, article 27. Objections registered by the Czech Republic (20 June 2011) ("references to [Pakistan's] domestic law" violate article 27 of the Vienna Convention), Hungary (28 June 2011) (cannot "invoke . . . internal law as justification for failure to perform according to" treaty obligations), Poland (20 June 2011) (citing the Vienna Convention for the rule against invoking internal law to justify "failure to perform a treaty"). Here, as Pakistan invoked internal law not to justify a failure to perform, but as a reason not to accept a particular obligation in the first place.

[815] Objection registered by Portugal (28 June 2011) (Pakistan's "reservations . . . to Articles 3, 6, 7, 12, 13, 18, 19 and 25 . . . seek to subject the application of the Covenant to its Constitution, its domestic law or/and Sharia Law, limiting the scope of the [Covenant] on [a] unilateral basis and contributing to undermining the basis of International Law"), Slovakia (23 June 2011) ("consider[ing] the reservations with respect to Articles 12, 13, 25 and 40 . . . incompatible with the object and purpose"), Spain (9 June 2011) (the reservations are "intended to exempt Pakistan from its commitment to respect and guarantee certain rights essential for the fulfilment of the object and purpose of the Covenant").

under the Generalised System of Preferences to the partial withdrawal could also signal acquiescence in the revised reservations, as that decision required the consent of all the EU member states' representatives in the European Council.[816] The Federal Shariat Court's prerogative to review laws for compliance with Sharia means that Pakistan's partial withdrawal cannot have eliminated Islamic law entirely from the scope of reservation. At the same time, that Court's requirement that laws be justified based not on juristic rulings but on the proofs of Islamic law provides the possibility to construct new interpretations based on those sources that would better comport with international understandings of the rights concerned. Finally, if no such interpretations could be found, the Shariat Court might accept severability because under Islamic law pacts must be honoured, even if their terms contradict Sharia.[817]

7.1.4. Conclusion

The Islamic states that adhere to the main international human rights treaties have agreed to uphold the bulk of those treaties' provisions. Reservations that cite Islamic law are concentrated in a few sensitive areas concerning for example freedom of religious practice, family relationships and the status of women and non-Muslims. The fact of reservation is reason for concern, but referring to Islamic law does not automatically disable a right. Islamic law recognises certain rights of the *umma* that not even the ruler may transgress. At least to the extent that the substance of those rights coincides with that recognised in international treaties, a reservation taken in the name of Islamic law might not be capable of disabling a right recognised by international treaty. Whether there is a conflict will depend on the interpretation both of the treaty terms and of Islamic law, in a given situation. In states that recognise Islamic law as the highest law of the land, international human rights law can displace Islamic law at most to the extent of the treaty commitments they have undertaken. In areas where such commitments are absent, an Islamic state might nonetheless find common ground with international norms in a given situation through exploring alternative interpretations of the Islamic injunctions.

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[816] Council of the European Union, Council conclusions on Pakistan, 3016th Foreign Affairs Council meeting, Brussels, 18 July 2011, 1 (noting Pakistan's intent "to formally withdraw many of its reservations"), 4 ("reiterat[ing the Council's] commitment to Pakistan's eligibility to GSP+, as from 2014, provided that it meets the necessary criteria. In this context, the effective implementation of the International Conventions listed in the EU's GSP regulation should be pursued by Pakistan"). See also Council Regulation (EC) No 732/2008, OJ L 211/1-39, art. 8(1)(a) (for "[t]he special incentive arrangement for sustainable development" countries must *inter alia* ratify and implement a set of international treaties), Annex III(A) (specifying the ICCPR and other "Core human and labour rights UN/ILO Conventions").

[817] See above, chapter 4, section 4.2.3.

7.2. Islamic human rights instruments

This part introduces the third and final component of the framework of Islamic international human rights law whose emergence is the main proposition of this thesis. Unlike Sharia which is divine law, and the international bill of rights which is almost entirely defined in positive international law obligations, the third layer of Islamic international human rights law is formed predominantly from customary international law, although also mostly derived from Sharia. Its main evidences are aspirational statements of the human rights inherent in Islam, accorded widespread respect by Islamic states and prominent Muslim scholars and jurists, and the institutions and statements of the Organisation of Islamic Cooperation (OIC). This part argues that although western commentators have criticised these Islamic statements of human rights for failing to live up to international standards or even undermining those standards, their perceived shortcomings diminish considerably when they are interpreted in light of the main rights-oriented principles of Sharia outlined earlier in this thesis.[818] Consequently, they serve to buttress international human rights law in two ways: by re-emphasising the commitments of Islamic states party to the ICCPR and ICESCR, and by establishing that the Islamic states that are not party to those treaties acknowledge a broadly similar (though not identical) set of human rights obligations.

In addition to their significant participation in the international human rights system, Islamic states endorse a subsequent set of international Islamic human rights documents. This developed in the second half of the twentieth century, largely in an effort to construct Islamic interpretations of the rights described in the UN human rights regime. As with the international system, the Islamic human rights paradigm centres upon an aspirational document, the Universal Islamic Declaration of Human Rights (UIDHR),[819] as well as interstate institutions and agreements, most prominently the OIC and its 1990 Cairo Declaration on Human Rights in Islam, agreed by the OIC's 19th Conference of Foreign Ministers. While it lacks the Cairo Declaration's state imprimatur, the UIDHR has won wide respect as a correct statement of universal rights implicit in Islam. It describes Islamic human rights per the collective understanding of an international conference of "eminent Islamic scholars and representatives of Islamic movements".[820] Together, these instruments show a

[818] See above, chapter 3, part 3.3.
[819] Statute of the OIC Independent Permanent Human Rights Commission, articles 8-17 (specifying the Commission's objectives and mandate), 50 International Legal Materials 6 (2011) 1148-60 at 1157-58.
[820] C. G. Weeramantry, Islamic Jurisprudence: An International Perspective (Macmillan, 1988) 122.

consensus baseline understanding among modern Islamic states of their human rights obligations.

The international Islamic human rights framework aims not to supplant the international human rights system, but to refine it. The objectives of the OIC Charter include "support for the rights of peoples under the UN Charter and international law" and promotion and protection of "human rights and fundamental freedoms including the rights of women, children, youth, elderly and people with special needs as well as the preservation of Islamic family values".[821] The Charter called for an Independent Permanent Commission on Human Rights (established in 2011) to promote rights declared in OIC and international covenants "in conformity with Islamic values",[822] but did not bind its signatories to any specific standards. Nevertheless, the recognition in the Charter of both the UN system and human rights and freedoms shows an understanding by the OIC member states that supranational law requires them to protect human rights. That far at least, international law and the Islamic instruments agree. It remains debatable whether they are compatible in their understandings of the content of those rights, and the ways in which states may (or must) restrict their exercise.

The Cairo Declaration and the UIDHR outline specific rights. Their structure and phrasing (as presented in English) closely resemble the UDHR and similar instruments. They also cover many of the same substantive areas as the UDHR, such as rights to life and freedom;[823] freedom of expression;[824] civil equality, justice and non-discrimination;[825] asylum;[826] and the right to participate in public administration.[827] In their content, however, the UIDHR and the Cairo Declaration hew closely to the proofs of Islamic law and the conclusions of *fiqh*. The UIDHR draws explicitly on Quranic verses and the most widely referenced *hadith* collections. The Cairo Declaration's specification of Sharia as "the only source of reference

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[821] Charter of the Organisation of Islamic Cooperation (2008), article 1(7), 1(14).
[822] Charter of the Organisation of Islamic Cooperation (2008), article 15.
[823] Universal Declaration of Human Rights, article 3; Cairo Declaration on Human Rights in Islam, articles 2 (life), 20 (freedom from arbitrary arrest, torture or non-consensual medical experimentation); Universal Islamic Declaration of Human Rights, articles 1 (life), 2 (freedom).
[824] Universal Declaration of Human Rights, article 19; Cairo Declaration on Human Rights in Islam, article 22; Universal Islamic Declaration of Human Rights, article 12.
[825] Universal Declaration of Human Rights, article 7; Cairo Declaration on Human Rights in Islam, articles 1, 19(a); Universal Islamic Declaration of Human Rights, articles 3, 4.
[826] Universal Declaration of Human Rights, article 14; Cairo Declaration on Human Rights in Islam, article 12; Universal Islamic Declaration of Human Rights, article 9.
[827] Universal Declaration of Human Rights, articles 20 (association), 21 (participation); Cairo Declaration on Human Rights in Islam, article 23(b) (participation); Universal Islamic Declaration of Human Rights, articles 11 (participation), 14 (association).

for the explanation or clarification" of its provisions implicitly affirms the legal frameworks OIC states apply in their constitutions or civil laws defining how to implement Islamic law.

Both the UIDHR and the Cairo Declaration present an Islamic view of human rights, for example placing 'first generation' rights, many of them universally accepted, such as prohibitions against torture or racial discrimination, alongside what the international framework views as second or third generation rights such as employment, education and a clean environment. There are also distinctly Islamic emphases, such as strong respect for privacy and the sanctity of the home, which are less prominent in the main international instruments. The Cairo Declaration does not reflect all of the rights described in the UIDHR, although it is arguably a stronger indicator of law because of its endorsement by the OIC Council of Foreign Ministers.[828] As a joint statement of representatives of states that hold a wide range of views on how to interpret and apply Islam in municipal law, it may not have been feasible to come to a consensus on all points. The Cairo Declaration omits freedom of association or a worker's right to leisure, both of which the Universal Declarations promise.[829] Unlike the Universal Declarations,[830] the Cairo Declaration does not explicitly state a right to freedom of worship, but like the UIDHR it restates the Islamic rule that "there is no compulsion in religion".[831] While they do not rise to the level of ratified treaties in establishing states' international commitments, by declaring a shared understanding of the basic human rights that Islamic law requires states to honour, the UIDHR and the Cairo Declaration give evidence of a customary international Islamic law of human rights.

Critics argue that the Islamic human rights instruments fall in significant ways short of international standards. As with doubts about Islamic states' fidelity to the international bill of rights, the influence of Sharia is a main concern. Another general concern about the UIDHR is the existence of obvious discrepancies between the English and the governing

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[828] The Cairo Declaration is non-binding. The OIC adopted a binding Covenant on the Rights of the Child in Islam in 2004, which includes provision for a monitoring committee, whose mandate, however, "is only vaguely drafted". Kathleen Cavanaugh, *Narrating Law*, in Anver M. Emon et al., eds., Islamic Law and International Human Rights Law (Oxford U. Press, 2012) 17-51 at 48.

[829] Universal Declaration of Human Rights, articles 20, 24; Universal Islamic Declaration of Human Rights, articles 14, 17.

[830] Universal Declaration of Human Rights, article 18 ("Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance"); Universal Islamic Declaration of Human Rights, article 13 ("Every person has the right to freedom of conscience and worship in accordance with his religious beliefs").

[831] Cairo Declaration on Human Rights in Islam, article 10; Universal Islamic Declaration of Human Rights, article 10(a).

Arabic version.[832] The bulk of these, however, appear in the preamble rather than in provisions that enumerate rights, and serve mostly to package those provisions in secular rather than Islamic justifications.[833] This may merely indicate that the authors of the UIDHR aimed to present the rights to two audiences with differing values regarding what could be a compelling justification for recognising those rights. The Cairo Declaration similarly pronounces principles resembling those that support the international bill of rights, asserting the conceptual unity between international efforts to enhance human rights and the Islamic vision of a just society.[834]

Invocations of Sharia in the international Islamic instruments draw general criticism for vagueness, as well as specific concerns over disparate treatment of women and religious minorities, *hadd* punishments and the prohibition on apostasy, which are considered inimical to international norms. Mayer finds "a pattern of borrowing substantive rights from international human rights instruments while restricting the rights by providing that they can be enjoyed only within the limits of the *shari'a*".[835] In Mayer's view, because of both the classical rule of legal schools tolerating each other's divergent conclusions and the more recent reformist and revivalist reinterpretations, such references are inherently ambiguous, a fact which Islamic states will tend to exploit in order to resolve conflicts between their policies and the rights supposedly protected, at the expense of the latter.[836] This may overstate the risk. Municipal law in most Islamic states constrains the government's choice of Sharia interpretations, through for example specifying a preferred *maddhab* or requiring that legal acts be grounded in laws based on the established principles of Islam.[837] Where there is a judicial authority or another independent body competent to review laws or administrative

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[832] See e.g., Ann Elizabeth Mayer, Islam and Human Rights, 4th ed. (Westview Press, 2007) 89; Jacques Waardenburg, Islam: Historical, Social and Political Perspectives (De Gruyter, 2002) 173.

[833] The English and French versions omit invocations and quotations from the Islamic proofs that are found in the Arabic version, add explanatory text "on the difference between the ideal code of Islam and reality" and introduce extra aspirations and beliefs not present in the Arabic version. Jacques Waardenburg, Islam: Historical, Social and Political Perspectives (De Gruyter, 2002) 173.

[834] Mashood A. Baderin, International Human Rights and Islamic Law (Oxford U. Press, 2003) 51 (the Cairo Declaration "declar[es] the wish of Muslim States 'to contribute to the efforts of mankind to assert human rights, to protect man from exploitation and persecution, and to affirm his freedom and right to a dignified life in accordance with the Islamic Shari'ah'. It also states that the fundamental rights and universal freedoms are an integral part of Islam and are binding divine commandments").

[835] Ann Elizabeth Mayer, Islam and Human Rights, 4th ed. (Westview Press, 2007) 80. Under the UIDHR this potentially affects the rights to life (article 1.a.), liberty (2.a.), justice (4.a.), to serve in public office (11.a.), expression (12.a.), "to protest and strive" (12.c.), to disseminate information (12.d.), to earn a living (15.b.), to engage in general economic activity (15.g.), rights of spouses (19.a.), and a wife's divorce (20.c.) and inheritance 920.d.) rights. Id. 90-91.

[836] Ann Elizabeth Mayer, Islam and Human Rights, 4th ed. (Westview Press, 2007) 80-81.

[837] See above, chapter 6.

acts for compliance with Islamic standards, it should be possible to predict which rulings of Islamic law might apply to limit the rights described in the international Islamic human rights instruments.

Beyond these general concerns, the Islamic international instruments have attracted relatively little detailed analysis or criticism. Mayer has been their leading critic, citing especially their unequal treatment of women and non-Muslims (as compared to male Muslims), and restrictions on religious and expressive freedom. In Mayer's view, the Cairo Declaration's main guarantee of "equality in "dignity" and "obligations" is not intended to signify equality in "rights"".[838] For example, article 6 recognises women as "equal to [men] in human dignity", but despite elsewhere explicitly acknowledging that women have rights, omits "rights" when asserting equality.[839] This, argues Mayer, could open the way for restrictive interpretations of Sharia to limit rights such as freedom of movement, access to employment or to public office, and to freely choose a spouse.[840] Similarly, the "vague provision in Article 18(a) to the effect that everyone shall have the right to live in security for himself and his religion, his dependents, his honor, and his property . . . provides no real protection for religious minorities against discrimination, as can be seen in Article 23(b), which imposes *shari'a* restrictions on the right to serve in public office, in effect allowing the use of religious criteria to exclude non-Muslims".[841] Mayer considers that the Cairo Declaration does not "offer[] any guarantee of freedom of religion".[842]

The Arabic text of the UIDHR, argues Mayer, lends itself to the understanding that the guarantee of equal protection under Sharia does not include sex and religion among

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[838] Ann Elizabeth Mayer, Islam and Human Rights, 4th ed. (Westview Press, 2007) 102. See Cairo Declaration on Human Rights in Islam, article 1(a) ("All human beings . . . are equal in terms of basic human dignity and basic obligations and responsibilities").

[839] Ann Elizabeth Mayer, Islam and Human Rights, 4th ed. (Westview Press, 2007) 138. See Cairo Declaration on Human Rights in Islam, article 6.

[840] Ann Elizabeth Mayer, Islam and Human Rights, 4th ed. (Westview Press, 2007) 138-39 (article 12, which guarantees free movement and choice of residence "within the framework of Shari'ah" "would accommodate restrictions on women's mobility" according to "traditional *shari'a* rules"; although article 13 guarantees fair pay, it "does not prohibit restricting the fields in which women are permitted to work"; article 23's application of Sharia to the right to public office "could be exploited by conservatives opposed to women's participation in government"; and article 5's prohibition on restricting the right to marry based on "race, color or nationality [leaves] intact the old *shari'a* rules restricting the ability of Muslims to marry outside their faith", which disproportionately affect women).

[841] Ann Elizabeth Mayer, Islam and Human Rights, 4th ed. (Westview Press, 2007) 163.

[842] Ann Elizabeth Mayer, Islam and Human Rights, 4th ed. (Westview Press, 2007) 189 (article 10's prohibition of conversion by compulsion will not likely protect non-Muslims, as Mayer "assumes that all conversions from Islam would be deemed to have resulted from "compulsion" or "exploitation," whereas presumably any technique that was applied to convert people *to* Islam would be acceptable").

"categories on the basis of which it is impermissible to discriminate".[843] This is evident in appended quotations of the Prophet and Abu Bakr, which forbid discrimination "based on ethnic background, color, social standing, and political connections" but not based on sex or religion, thus for example impliedly permitting the application of "conservative" interpretations of Islam that "may exclude women and non-Muslims from public office and employment".[844] Similarly with respect to non-Muslims, article 10(b) in the Arabic version of the UIDHR, affirming the "no compulsion in religion" rule of Quran 2:256, seems to imply that it extends only to the other people of the book, leaving others' freedom of worship unprotected.[845] Article 13 of the Arabic version cites Quran 109:7, "For you your religion, and for me my religion" in the *sura* "*al-kafirun*" (a pejorative term for unbelievers), which shows that the apparent "right to follow one's own religion . . . in a *shari'a*-based system would be a right accorded only to Muslims and, within limitations, to the *ahl al-kitab*".[846] The UIDHR's protection for expression is also flawed according to Mayer, because particularly the Arabic version hedges it with limitations based on Sharia, "using the criteria of one religion to set limits on rights[, which] is unacceptable under international human rights law".[847]

Mayer is certainly correct that there are significant differences of nuance, emphasis and justification between the rights pronounced in the Islamic human rights instruments and those specified in the UDHR, but it is not clear that the substantive impact of such Sharia-slanted interpretations of those rights would necessarily carry much greater risk of disabling them than do the scope for interpretation or derogation accorded to states regarding the equivalent rights in the international bill of rights. While Islamic law clearly does not treat men and women identically, nor Muslims and non-Muslims, it is not obvious that it would permit an Islamic state to apply these distinctions to, for example, deny the right to serve in public

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[843] Ann Elizabeth Mayer, Islam and Human Rights, 4th ed. (Westview Press, 2007) 106 (citing article 3.a. of the Arabic version of the Universal Islamic Declaration of Human Rights).

[844] Ann Elizabeth Mayer, Islam and Human Rights, 4th ed. (Westview Press, 2007) 106-07 (citing article 11 of both the English and the Arabic versions of the Universal Islamic Declaration of Human Rights).

[845] Ann Elizabeth Mayer, Islam and Human Rights, 4th ed. (Westview Press, 2007) 156-57 (while the English version lets "religious minorities" choose to be governed under their own personal status laws, the Arabic text qualifies this by requiring "that they (seemingly, the non-Muslims) believe that those laws are of divine origin", which, given article 10(b)'s reference to Quran 5:42 and 5:47 which refer respectively to the Torah and the Gospel, "leaves open the question as to what status is accorded to non-Muslims outside the category of *dhimmis*, who under the *shari'a* were considered nonpersons").

[846] Ann Elizabeth Mayer, Islam and Human Rights, 4th ed. (Westview Press, 2007) 179 (citing Quran 109:6).

[847] Ann Elizabeth Mayer, Islam and Human Rights, 4th ed. (Westview Press, 2007) 178 (quoting a translation of the Arabic version of article 12.a.: "Everyone may think, believe and express his ideas and beliefs without interference or opposition from anyone as long as he obeys the limits *[hudud]* set by the *shari'a*. It is not permitted to spread falsehood *[al-batil]* or disseminate that which involves encouraging abomination *[al-fahisha]* or forsaking the Islamic community *[takhdhil li'l-umma]*).

office. In the realm of individual liberties such as freedom of worship or expression, there may be still less need for concern. An Islamic state would not find it easy to interpret Quran 109 to deny non-Muslims the right to maintain their beliefs,[848] as it was revealed in Mecca, in the form of a conversation acknowledging that neither interlocutor had succeeded in convincing the other—the appearance of this verse as support for the UIDHR's promise of freedom of religion thus reinforces the impression that, as in Mecca, Muslims should accept that not everyone who hears their message will join them. Likewise, the concern that allowing Sharia to limit freedom of expression could result in broad or vague scope for restricting speech deserves careful scrutiny in light of how Islamic law relates to speech and expression.

The international Islamic instruments define a minimum standard of human rights that Islamic states must protect. In Islamic states that do not adhere to the main international human rights treaties, the Islamic international regime is the main supranational promise of rights. If its protections fall short of international standards, then identifying the specific substantive rights concerned and the severity of their potential (lawful) infringement is the first step toward searching for ways to bridge such gaps without violating fundamental precepts of either Islam or international law. Conversely, it is possible that states that adhere to both regimes are bound through Islam to extend greater protection of human rights in some areas than international human rights law requires. Which of these is true in any given state will depend considerably upon the ranking in the constitutional order of legislation, Islamic principles, treaties and international law, and on the state's preferred method of interpretation of Islamic law. Ultimately, modern Islamic constitutions incorporate most of the rights recognised in international instruments, whether by stating them directly, or importing them through reference to Islamic law or international law or Islamic international law. In most situations, citizens of Islamic states should therefore have recourse against violations of internationally recognised human rights, regardless of whether or not their states have specifically undertaken to protect them through accession to international treaties.

7.3. Human rights commitments of Islamic states

This final part of the chapter completes the main task of the thesis, describing the emergent three-layer system of Islamic international human rights law that modern Islamic states

[848] "In the name of Allah, the Gracious, the Merciful/Say, 'O ye disbelievers!/I worship not that which you worship/Nor worship you what I worship/And I am not going to worship that which you worship/Nor will you worship what I worship/For you your religion, and for me my religion'".

adhere to. All Islamic states by definition aspire to uphold Sharia, including its human rights components. All Islamic states also acknowledge the UIDHR and the OIC instruments that make up the customary component of Islamic international human rights law. Finally, with the entry into force in 2008 of the Arab Charter on Human Rights, nearly every Islamic state has committed to at least one binding international treaty that realises the rights described in the UDHR. Mapping the provisions of all these instruments, including all the complications of some states having chosen not to participate in one or another, or to have entered reservations, demonstrates that in substance today's Islamic states have committed to uphold standards of human rights that are similar to the most widely subscribed international norms. Consideration of the shared backdrop of a rights-based understanding of Sharia serves to reinforce this conclusion, as does the degree of flexibility international law showed when the states party to the ICCPR accepted Pakistan's limited Sharia based reservations.[849]

Islamic states share a common baseline of human rights law. Its most widely shared basis is not positive law, but the cumulative effect of a collection of statements and principles arising from Sharia and relating to human rights. All Islamic states endorsed the Cairo Declaration, which along with the UIDHR may have gained enough respect for its correct encapsulation of the Islamic understanding of human rights to amount to standing as an international Islamic customary law. Even Islamic states that do not incorporate Islamic law deeply in their constitutional orders should give this backdrop of agreed, shared Sharia norms its due weight as a source of international Islamic customary law. At the same time, the "theocentric approach to human rights" of the Cairo Declaration "does not impede the shared noble objective of protecting and enhancing human dignity under both international human rights law and Islamic law".[850]

The UN treaties remain at the centre of the next layer, the positive international human rights law that binds Islamic states. Out of the seven Islamic states that have not adhered to the ICCPR and ICESCR, Palestine, Qatar, Saudi Arabia and the UAE have ratified the Arab Charter on Human Rights, which "is based on many of the norms stipulated in" the ICCPR and ICESCR.[851] Other than a passing reference to the Cairo Declaration in its preamble,[852]

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[849] See above, section 7.1.3.

[850] Mashood A. Baderin, International Human Rights and Islamic Law (Oxford U. Press, 2003) 51 (citing "the reference to Islamic *Shari'ah* and to 'binding divine commandments' in the Cairo Declaration" as "reaffirm[ing] a theocentric approach to human rights under Islamic law as distinguished from the anthropocentric approach under the ICCPR").

[851] Mohamed Y. Mattar, *Article 43 of the Arab Charter on Human Rights: Reconciling National, Regional, and International Standards*, 26 Harvard Hum Rts J (2013) 91-147 at 96.

this Charter does not engage with the Islamic understanding of human rights. Nonetheless, it helps to bridge international standards and Islamic international standards, as it is framed essentially in international terms but still reflects the cultural background of the Arab region, including Islam.[853] This leaves only Brunei, Malaysia and Oman among Islamic states outside any binding international treaty that addresses the main substantive rights described in the international bill of rights. Brunei and Malaysia took part in the non-binding ASEAN Human Rights Declaration, "[r]eaffirming [their] commitment to the" UDHR.[854] Along with further participation in UN human rights treaties by nearly every Islamic state, these commitments represent engagement by Islamic states with international and regional human rights instruments not very different from that found in other regions.

This level of involvement by Islamic states in human rights treaties and monitoring mechanisms suggests they are willing to participate in the human rights aims of the UN, even "whilst at the same time (through reservations and derogations), tak[ing] exception to their expression".[855] Yet once the individual reservations are analysed alongside the objections raised against them, their total effect hardly pervades Islamic states' participation in the ICCPR, ICESCR and similar treaties. Across all states party, Bunn-Livingstone counts 910 reservations to six of the main UN human rights treaties, more than half of them "due to preference of domestic juriculture, constitutional, legislative, or procedural" and the next largest proportions citing international law or aiming at "preservation of religious values, or other values and customs".[856] On the whole Islamic states' rates and depth of participation in these treaties does not appear to be far out of line with the participation of states generally.

The fact that nearly every Islamic state participates in at least one binding treaty that promises rights outlined in the UDHR argues for the existence of a second layer of Islamic customary international law beyond the Islamic international instruments. Only Oman has not at least indicated its support for the basic human descriptions of human rights that are

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[852] Arab Charter on Human Rights (2004), Preamble ("reaffirming the principles of the Charter of the United Nations, the [UIDHR] and the provisions of the [ICCPR and ICESCR], and having regard to the Cairo Declaration").

[853] Mohamed Y. Mattar, *Article 43 of the Arab Charter on Human Rights: Reconciling National, Regional, and International Standards*, 26 Harvard Hum Rts J (2013) 91-147 at 96.

[854] ASEAN Human Rights Declaration (19 November 2012), preamble.

[855] Kathleen Cavanaugh, *Narrating Law*, in Anver M. Emon et al., eds., Islamic Law and International Human Rights Law (Oxford U. Press, 2012) 17-51 at 48.

[856] Sandra L. Bunn-Livingstone, Juricultural Pluralism vis-à-vis Treaty Law (Martinus Nijhoff, 2002) 296 (36% of states party to the CRC entered reservations, "the IICESCR, 27%, ICCPR, 36.43%, ICERD, 33%, CPPCG, 21%, and CEDAW, 34.8%". 57.1% of reservations cited "domestic jurisculture", 20.1% international law, and 12.4% religious or similar concerns).

common across the ICCPR, African Charter, Arab Charter and the aspirational ASEAN declaration. At its margins there remain points where it is unclear whether a particular Islamic state fully recognises a particular right as described in the ICCPR. But each such point merits analysis to determine whether an actual conflict exists and how far it extends, not outright dismissal as a point of inherent incompatibility between current understandings of Sharia and international law (though such points may indeed exist). The next chapter explores some possible approaches to performing such analyses.

8. Sharia and Islamic international law of human rights

This final main chapter tests the main assertion of the thesis that international human rights law and Islamic law can coexist in the context of modern Islamic constitutions. It does so by pinpointing areas of possible conflict between international human rights law and Sharia within the scope of the ICCPR, after taking into account the resolution of reservations discussed in the preceding chapter, and with regard to the Islamic international human rights documents. The part consists of three sections. The first section proposes that some of these conflicts may be illusory, once assessed with due regard for Sharia's inherent respect for human rights. The second part argues that invocations of Sharia in the ICCPR and international Islamic instruments may not have as wide an effect as some commentators have perceived, due to the restrictions Islamic states place on their own interpretations of Sharia (for example by specifying a preferred *maddhab*), and to the entry into force of the Arab Charter on Human Rights, which binds some key Islamic states closer to international norms. The final part admits that even so, there remain a few interpretations of Sharia operative in Islamic states that collide with international norms. It proposes that in these areas, Islamic states can take up the recent work of Muslim scholars such as Baderin or al-Jabri, and seek to revisit their conclusions of Islamic law in light of changed circumstances.

Whether 'human rights' in the modern sense inhere in classical Islam is debatable. Regardless, Islamic states have recognised international human rights standards, even as they have constitutionalised Islamic law to varying degrees. Therefore modern Islamic states have undertaken to allow Islam and international human rights norms to simultaneously guide their law-making and governance. The OIC Charter reflects this dual commitment: member states pledge to "be guided and inspired by the noble Islamic teachings and [to] uphold and promote, at the national and international levels, good governance, democracy, human rights and fundamental freedoms, and the rule of law".[857]

When a modern Islamic constitution guarantees a right, the contours of that right can be shaped by any or all of classical Islamic law, international law or modern Islamic international law. The constitutions of the Maldives and Somalia epitomise this blended legal environment. Somali courts should consider and "as far as possible" make "decisions compatible with" the fundamental rights provisions of the constitution in all cases that come

[857] Charter of the Organisation of Islamic Cooperation (2008), article 2(7).

before them,[858] and may use international law and jurisprudence in interpreting those provisions.[859] In the Maldives courts must "consider international treaties" when "interpreting and applying" the fundamental rights chapter of the constitution.[860] When contemplating limitations on rights and freedoms they must apply proportionality and narrow tailoring, and consider the nature of the right, the purpose of the limitation, and how far "the right or freedom must be limited in order to protect the tenets of Islam".[861] Whether Islamic law or international law predominates in any given context may not matter if applying either would lead to the same result. Where they diverge, it may be more feasible to try to utilise the flexible aspects of Islamic and international law to arrive at rulings acceptable to both, than to argue that one or the other should predominate in general in a given area of law.

8.1. Intersections of Islamic and international instruments

This part postulates a considerable overlap in the substance of rights guaranteed by the international and the Islamic international systems of human rights law. Even where there appear to be conflicts or mismatches, these may result from a tendency to apply analytical techniques of international law to Sharia-based rights guarantees or vice-versa. To illustrate this phenomenon, the part examines the claim that the Islamic international system fails to safeguard the internationally accepted right of freedom of association in any meaningful way, finding the claim to be doubtful once the right is viewed from an Islamic perspective.

Islamic and international human rights declarations broadly agree on a core set of basic rights. Nearly every right laid out in the UDHR finds expression as well in the UIDHR or the Cairo Declaration. Disregarding whether they are phrased in Islamic or secular terms and the caveats they sometimes apply in defining rights, the UDHR and associated UN treaties, the UIDHR and the Cairo Declaration, as well as the Arab League and African Union Charters, recognise rights of life, liberty and security of person; access to justice; free movement; family life; free opinion, expression and religious belief; participation in government; elementary education; and access to health care, and absolutely prohibit slavery or torture. While the two frameworks may well clash on certain points, in most matters of core human rights, applying international or Islamic standards would reach the same results. If Islamic

[858] Draft Constitution of Somalia (2012), art. 40(3).
[859] Draft Constitution of Somalia (2012), art. 40(2) (a court may "consider . . . international law, and decisions of courts in other countries, though it is not bound to follow these decisions").
[860] Constitution of the Maldives (2008), art. 68.
[861] Constitution of the Maldives (2008), art. 16(c).

law and international human rights law are not compatible, the incompatibility is at least limited to a discrete set of conflicts, rather than general.

Where Islamic and international human rights rules diverge in substance, it rarely involves one set of instruments denying a right the other guarantees. More often it is a matter of one document specifying rights that another does not address, or adding qualifying language that permits derogations, or applying differing interpretive methods to key terms. For example the Islamic documents omit a right to a nationality, which the international instruments specify, but only the Cairo Declaration promises homes will not be entered without permission.[862] The ICCPR permits states to restrict the right of expression to protect national security or public health, neither of which the Cairo Declaration would permit, but only the latter document forbids speech that "may be an incitement to any form [of] racial discrimination".[863] Both documents permit restricting expression in order to protect public morals, a term that is naturally susceptible of different interpretations between Islamic and western cultures.[864] These indicators of discord between the two legal regimes may indicate actual conflict, or simply differences in terminology and approach that, within their respective legal traditions, lead to equivalent substantive results.

Where differences between Islamic and international instruments are due to omission or nuance rather than clearly conflicting terms, further analysis is needed. Given their different assumptions and methods of reasoning, it is in principle possible that where one or the other system of law seems not to address a particular right, it actually satisfies the substance of the right in some other way. In their areas of most visible difference—their preambles; the types of exceptions and derogations they tend to permit; interpretive guidance—the Islamic documents and the international bill of rights provide at least some means to discover whether they implicitly protect further, unstated rights. Assessing the Islamic instruments in light not of international standards but of Sharia can thus have the perhaps counter-intuitive result of leading to a result compatible with international human rights norms.

Example: Freedom of Association

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[862] Cairo Declaration on Human Rights in Islam, article 18(c).
[863] International Covenant on Civil and Political Rights, article 19(3)(b), Cairo Declaration on Human Rights in Islam, article 22(d).
[864] International Covenant on Civil and Political Rights, article 19(3)(b) ("For the protection of . . . public health or morals"), Cairo Declaration on Human Rights in Islam, article 22(c) ("undermine moral and ethical values").

Viewed against a backdrop of *fiqh* and the Islamic proofs of law, some apparent discrepancies between the Islamic and international documents become largely illusory. For example, the right of association is not guaranteed in the Cairo Declaration or the Arab League's Charter, and in the UIDHR bears little resemblance to its international definition. But arguably the UIDHR's recognition of the right to establish associations as applying specifically to associations "meant to enjoin what is right *(ma'roof)* and to prevent what is wrong *(munkar)*" approximates the internationally recognised general right of association.[865] In the context of the Islamic civic duty to promote good and prevent evil, this may merely amount to a prohibition on forming organisations that set out to harm the public interest—a principle not drastically different from that of the ICCPR and ECHR, for example, which permit states to constrain the right to association by law when that is in the public interest.[866] In light of the importance of *hisbah*, the duty to enjoin good and forbid evil, and *shura*, consultation among the believers, a similar right of association might inhere in Islam itself, thus making its statement in an international instrument redundant for an Islamic state.

The Arabic version of the UIDHR, however, frames the article quite differently, as "*haqq al-da'wa wa'l-balagh*, or the right to propagate Islam and to disseminate the Islamic message".[867] In Mayer's view this appears "to result in a curb on the associational freedom of non-Muslims".[868] The apparently discriminatory aspect is not easily dismissed, but it is at least not as broad as Mayer states it—non-Muslims are free to form associations that advance Islamic aims. In a holistic view of an Islamic society, this may allow scope for political or charitable activities nearly as broad as the ICCPR and ECHR promise. Kamali argues that although the classical jurists did not explicitly frame a right to association, Islamic law "encourages association in pursuit of lawful objectives", as shown by analogy to "the Qur'anic principle of *hisbah*, that is commanding good and forbidding evil, the principle of *nasihah*, sincere advice, and *shura*, consultation".[869]

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[865] Universal Islamic Declaration of Human Rights, article 14(a).
[866] International Covenant on Civil and Political Rights, article 22(2) ("necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others"); European Convention for the Protection of Human Rights and Fundamental Freedoms, article 11(2) ("necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others").
[867] Ann Elizabeth Mayer, Islam and Human Rights, 4th ed. (Westview Press, 2007) 109-10.
[868] Ann Elizabeth Mayer, Islam and Human Rights, 4th ed. (Westview Press, 2007) 110.
[869] Mashood A. Baderin, International Human Rights and Islamic Law (Oxford U. Press, 2003) 132 (quoting Kamali, Freedom of Expression in Islam (Islamic Texts Society, 1997) 73ff).

It is thus possible to construe the right to spread the *da'wah* and promote Islamic values as sanctioning any association that would facilitate the development of an ideal Islamic society, which would include for example recognition of the right of all citizens to question and criticise their government, to help the needy and to maintain peaceful relations in a diverse community. Allowing and encouraging people to pool their efforts and experiment in ways to apply these values in society might be construed as facilitating the spread of Islam, and except for their underlying motivation, are not very different from the activities of secular charities or civic organisations. Thus the disparity between international and Islamic international understandings of the right to free association is likely limited to the question of association for purposes that would be considered socially useful, or at least acceptable, in some societies but reprehensible in an Islamic state, for example an association with the mission of proselytising for a non-Muslim religion. This represents a much narrower gap between the rules of the two traditions than appears at first from the lack of an explicit guarantee of a general right of association in the international Islamic instruments.

8.2. The impact of Sharia

This part isolates the points in the international and Islamic international systems of human rights law where Sharia is explicitly invoked. The purpose is to identify the exact scope and nature of Sharia's impact, then if possible to determine whether application of Sharia would indeed likely result in a violation of an internationally protected right. The first section returns to the reservations and objections concerning the ICCPR that remained unresolved following the analysis in the preceding chapter. It determines that the disagreement over questions of equality may be relatively narrow, in part because Kuwait's reservations are too broad to understand whether or not they have a basis in Sharia, and in part because Pakistan's remaining reservations appear to be acceptable to the international community. Resolving reservations regarding religious freedom entered by the Maldives and Mauritania, by contrast, may hinge on how apostasy is treated under Sharia. The second section examines the Islamic international instruments from the standpoint of Sharia, observing that while they represent customary rather than binding law, the fact that twelve Islamic states have recently adhered to the binding Arab Charter on Human Rights, which explicitly ties in to the UN framework, suggests the possibility of enacting binding Islamic human rights treaties grounded in Islamic rulings that comport with international norms.

Independently of its place in the domestic legal order, Sharia shapes Islamic states' international human rights commitments on multiple levels. This manifests in its exceptional use with reference to international treaties, and its standing as the interpretive background for the Islamic human rights documents. In the context of the main international human rights instruments, the influence of Islamic law is explicit in Islamic states' reservations and declarations, and implicit via the insight it may shed on a state's understanding of a treaty. It is central to the Islamic international instruments: all provisions of the UIDHR are explicitly grounded in the Quran or widely recognised *ahadith*. It is also a primary interpretative resource: "Shari'ah is the only source of reference for the explanation or clarification of" the Cairo Declaration.[870]

8.2.1. Scope of reservations to the ICCPR

The influence of Sharia on Islamic states' international human rights commitments is most readily visible in their use of reservations and declarations. Regarding the ICCPR, these reflect differences in understanding of the principle of equality (articles 3, 23 and 25), and of the right to freedom of worship (article 18). Upon closer inspection, the potential zone of conflict with Sharia is still narrower, because the Kuwaiti reservations may not implicate Sharia, and Pakistan's reservations have arguably gained acceptance. This narrows the scope of controversy concerning equality to Mauritania's reservation concerning article 23(4), which guarantees equality of rights between spouses in a marriage, otherwise leaving only the reservations of the Maldives and Mauritania against article 18 as points of controversy regarding the use of Sharia to justify reservations against the ICCPR.

In entering reservations against provisions of the ICCPR that promise equality between the sexes, Kuwait cited national law while Mauritania referred to Sharia. Treaty partners objected to both. Kuwait's reservation seeks to subject article 3 to "the limits set by Kuwaiti law", which would essentially nullify it.[871] Similarly, although its reservation against article 23 (family and marriage) cites "personal-status law, which is based on Islamic law", its effect is total because in case of "conflict with Kuwaiti law, Kuwait will apply its national law". Although Sharia comprises at least part of Kuwaiti law, it would be difficult to disaggregate

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[870] Cairo Declaration on Human Rights in Islam, article 25.

[871] Kuwait's reservation, termed an "interpretive declaration", "endorses the worthy principles embodied in [articles 2(1) and 3] as consistent with . . . article 29" of Kuwait's constitution, which guarantees non-discrimination but omits mention of sex based discrimination. See Constitution of Kuwait (1962), art. 29 ("All people are equal in human dignity and in public rights and duties before the law, without distinction to race, origin, language or religion").

its effect from the rest of Kuwaiti law within such a broad and malleable reservation. Mauritania, by contrast, grounded its reservation to article 23(4) explicitly in Sharia, implying that it is possible to interpret Islamic law as compatible with the phrasing of article 23(1)-(3). Baderin considers that article 23(1)-(3), in their emphasis on protection of the family unit and the right to marry and form families, closely match Islamic family law.[872] This relies on selecting an interpretation of Islam that does not require women to have the consent of a male relative in order to marry. Article 23(4), by contrast, does appear potentially at odds with norms of Islamic law. Kuwait's reservation against article 25(b) guaranteeing universal suffrage and access to elected office for citizens, which would restrict those rights to men, is also grounded in Kuwaiti law rather than Islamic law. It is in any case questionable whether Islamic law can prohibit women from participating in elections.[873]

Just as it may be possible to seek interpretations of Sharia that more closely reflect international human rights language, Pakistan's example shows that where the principle of equality is concerned, the international human rights treaties can admit at least some reservations based on Sharia. Pakistan's narrowed reservation to article 3 appears to have gained the acquiescence of the states party to the ICCPR, meaning that Sharia (insofar as it is reflected in the Law of Evidence and the Personal Law) can take precedence over the promise of equality between the sexes in article 3. The only distinction made between the sexes in the Law of Evidence is that "in matters pertaining to financial or future obligations, if reduced to writing", either two men or one man and two women may attest the document.[874] In all other matters male and female testimony are equal.[875] This is a literal but narrow reading of the Quranic rule that allows the substitution of two women for one man as witnesses to written fixed-term contracts of debt.[876] The Personal Law explicitly incorporates Sharia as the effective law as between Muslims in matters such as family, marriage, inheritance, etc.,[877] which in Pakistan means the injunctions of Islam as revealed in the Quran and the Prophetic *sunna*. While referring generally to Sharia is not as clear as the specific language the Law of

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[872] Mashood A. Baderin, International Human Rights and Islamic Law (Oxford U. Press, 2003) 133.
[873] Mashood A. Baderin, International Human Rights and Islamic Law (Oxford U. Press, 2003) 162.
[874] Qanun-e-Shahadat Order, 1984, art. 17(2)(a).
[875] Qanun-e-Shahadat Order, 1984, art. 17(2)(b).
[876] Quran 2:282.
[877] West Pakistan Muslim Personal Law (Shariat) Application Act, 1962, article 2 ("all questions regarding succession (whether testate or intestate), special property of females, betrothal, marriage, divorce, dower, adoption, guardianship, minority, legitimacy or bastardy, family relations, wills, legacies, gifts, religious usages or institutions, including waqfs, trusts and trust properties").

Evidence provides, in most of the personal law topics the Law assigns to Sharia, states commonly allow the application of canon law as between coreligionists.

The situation is less clear with respect to article 18, which protects freedom of worship. Islamic and international law largely agree on the importance of leaving people free to decide for themselves in matters of belief. Nonetheless, the disagreement over the reservations against article 18 is starker and more clearly based on questions of interpreting Islamic law than is that over the equality related provisions of the ICCPR. Mauritania's reservation explicitly invokes Sharia, while that of the Maldives references the constitution, which seeks to establish an Islamic state. According to Baderin, while there remains some dissent, the mainstream view even among traditionalist Islamic scholars is "that Islamic law prohibits the compulsion of anyone in matters of faith".[878] In Baderin's analysis, the only significant difference between Islamic and international interpretations of the freedom of religion concerns apostasy, where Muslim scholars disagree whether the state may or should impose punishments against those who renounce Islam.[879] It is reasonable to assume the main concern underlying both reservations relates to apostasy. The effect of the Maldivian reservation against article 18 is not immediately clear. The Maldivian constitution contains no explicit guarantee of freedom of worship. It permits to citizens "any conduct or activity that is not expressly prohibited by Islamic Shari'ah or by law".[880] Only Muslims may become citizens, but citizenship once awarded cannot be revoked.[881] Under the constitution, this leaves open the possibility of punishment short of the revocation of citizenship for apostasy, which might well be permissible in the Shafi'ite interpretation of Islam that prevails in the Maldives, but is probably reprehensible to non-Islamic states party to the ICCPR. The Mauritanian reservation against article 18 highlights the same conflict more explicitly, subordinating article 18 to Sharia, which in Mauritania would raise the question of how the Maliki school treats apostasy. While it is only one aspect of the right to freedom of religion, the question of permitting apostasy remains problematic.

By contrast, it may be possible to resolve all outstanding differences between Islamic states invoking Sharia and other states party to the ICCPR as regards equality. Kuwait's reservations concerning equality between the sexes, to articles 3, 23 and 25, are grounded more broadly even than Sharia. They encompass any national law, making their future

[878] Mashood A. Baderin, International Human Rights and Islamic Law (Oxford U. Press, 2003) 122.
[879] Mashood A. Baderin, International Human Rights and Islamic Law (Oxford U. Press, 2003) 124.
[880] Constitution of the Maldives (2008), art. 19.
[881] Constitution of the Maldives (2008), art. 9(d), (b).

content unpredictable. By contrast, Pakistan's more limited reservations allowing exclusions of non-Muslims from the offices of head of state or government (article 25), and subordinating the general ICCPR guarantee of equality between the sexes (article 3) to Sharia in the realm of personal law and in the weighting of testimony in evidence of a written contract of debt, appear to have addressed the objections to its original reservations. Acceptance on these points would indicate a willingness of the community of nations to acknowledge that while an Islamic state has a certain amount of flexibility in how it interprets Sharia, it cannot be expected to forego adherence to a literal dictate of the Quran (the evidence rule) or to violate consensus (a Muslim head of state). It would also indicate the possibility of accepting—at least partially—an Islamic state's prioritisation of Sharia over the provisions of the ICCPR in the realm of family and personal status law. In this light, it might also be possible for the international community to accept Mauritania's subordination to Sharia of the rules regarding the respective rights and roles of spouses.

Judging by the reservations and declarations they have made in acceding to international instruments, Islamic states appear to broadly agree with the international community regarding the content of most civil, political and economic rights. Reservations that reflect Sharia concerns tend to cluster in a few areas, most prominently equality between the sexes and freedom of worship, as well as the *hadd* punishments. When states "cite Sharia as justification for their limited acceptance of international human rights instruments" they generally do so "without isolating and identifying the specific Islamic norm that is perceived to be in conflict with the reserved provisions" leaving their treaty partners and other stakeholders "in a difficult position in knowing how to deal with this broad and undefined subject".[882] Reference to Sharia need not mean wholesale denial of the right as stated in the instrument; it merely necessitates an inquiry into the respective provisions of international and Islamic law, to see if there is actually a conflict and how it might be resolved. Sometimes even a general reference to Islamic law, in a legal regime with clear parameters for interpreting Islamic law, can suffice. For example, Iran and Pakistan's general reservations to the CRC both invoke Islamic law, but differ in scope. Iran's reservation is comprehensive of "Islamic laws and legislation in force", while Pakistan's is limited to "the principles of Islamic law and values".[883] While the latter terminology standing on its own or against the

[882] Nisrine Abiad, Sharia, Muslim States and International Human Rights Treaty Obligations: A Comparative Study (British Institute of International and Comparative Law, 2008) 79-80.
[883] Nisrine Abiad, Sharia, Muslim States and International Human Rights Treaty Obligations: A Comparative Study (British Institute of International and Comparative Law, 2008) 69-70.

rich backdrop of alternative interpretations of Islam may be "so vague and potentially infinite that it is difficult to define exactly what the parameters of Pakistan's obligations under the CRC are",[884] in the particular case of Pakistan the Federal Shariat Court is receptive to arguments built on the Quran and *ahadith*, but does not automatically apply conclusions of *fiqh*. It is therefore possible in Pakistan at least to propose and test interpretations of Sharia that might satisfy international human rights norms. The more Islamic states can specify either the content of their reservations, or the ways in which their national legal orders go about interpreting Sharia, the greater the possibility for international treaty partners to understand and accept their concerns in acceding fully to international human rights instruments.

8.2.2. Interpreting Islamic instruments

Unlike the state commitments in the UN treaties, which at least in principle are justiciable, the Islamic human rights regime rests mainly on custom and statements of shared principles. There is no equivalent forum to the UN treaty regime for states to negotiate a mutual accommodation between conflicting understandings of basic human rights and their relationship to Sharia. The commitments undertaken by Islamic states party to binding treaties such as the ICCPR and the Arab League Charter help to highlight their understanding of what human rights oriented promises they may make under Sharia. The effect of Islamic law on the interpretation of the avowedly Islamic documents, the UIDHR and the Cairo Declaration, is useful in shedding light on how Islamic states understand customary law.

In addition to the grounding of these three instruments in Islamic principles, Sharia formally influences the two aspirational Islamic declarations. Yet the UIDHR and the Cairo Declaration approach Sharia differently to each other. Notwithstanding the strong invocations of Islam and Islamic principles in its preamble and the firm grounding of its provisions in the Islamic proofs, on its face the UIDHR is a human rights document that expresses certain restrictions and limitations by referring to Sharia. The Cairo Declaration, by contrast, explicitly subordinates all the rights it describes to Sharia,[885] and furthermore refers to Sharia as its sole source for authoritative interpretation. The Arab League Charter represents a waypoint between Islamic law and international law, as it expressly invokes the values and main instruments of the international bill of rights, as well as the Cairo Declaration. It also

[884] Nisrine Abiad, Sharia, Muslim States and International Human Rights Treaty Obligations: A Comparative Study (British Institute of International and Comparative Law, 2008) 70.
[885] Cairo Declaration on Human Rights in Islam, article 24.

serves the important role of committing some of the Islamic states that are not party to the ICCPR—Palestine, Qatar, Saudi Arabia and the UAE—to uphold standards of civil and political rights similar (but not identical) to those in the ICCPR. The provisions of the Charter fall short of international standards in some ways,[886] which need not matter so much with regard to those states that participate more or less fully in the UN treaty system, because of the Charter's saving clause, but which would represent a lesser guarantee in states that have ratified the Charter but not the ICCPR.

The influence of Sharia on the rights declared in the UIDHR and the Cairo Declaration is immediately apparent. It appears most obviously in specific invocations of Sharia to give content to, or conversely to circumscribe the exercise of, rights. It also manifests in some of the particular rights outlined, which appear unusual to the internationally oriented observer alongside more widely recognised rights. The latter category includes for example the explicit right to question authority, the right to correct treatment of one's corpse and the duty to act in defence of the rights of others. The UIDHR invokes Sharia in over half its articles, considerably more than does the Cairo Declaration, doubtless due to the latter document's saving clause acknowledging the supremacy of Sharia on any points of conflict or doubt. For example, specific references to Sharia forbid the taking of life or punishment except for Sharia prescribed reasons; restrict expression that violates Sharia; and constrain free movement and residence. At the same time Sharia is invoked in some places to define positive rights and obligations, such as to participate in public debate and hold office and for the poor to share in the wealth of the community. The UIDHR declares the right of non-Muslims to choose to be governed either by Islamic personal status law or by the law of their own communities, a right not recognised for Muslims.

Although its states party are Islamic, the structure and phrasing of the Arab Charter closely resemble the international bill of rights. This suggests that with careful drafting, Islamic human rights instruments can simultaneously meet the concerns of the international community. In the relatively few areas where it does overtly invoke Islamic standards, the Charter arguably exceeds international standards. For example the Charter includes non-discrimination protections, as do most international instruments, but further "imposes a

[886] Mohamed Y. Mattar, *Article 43 of the Arab Charter on Human Rights: Reconciling National, Regional, and International Standards*, 26 Harvard Hum Rts J (2013) 91-147 at 124-25.

positive obligation to implement the principle of equality".[887] The only reference to Sharia within its substantive provisions recognises equality of the sexes "in respect of human dignity, rights and obligations within the framework of the positive discrimination established in favour of women by the Islamic Shariah" and other sources of law.[888] Mattar concludes that the Charter expresses many norms relating to marriage and the family in language that emphasises the rights of women that accrue to their traditional Islamic roles and the duties of men towards them, rather than the reverse.[889]

Sharia suffuses the Islamic international human rights regime. Recourse to Sharia as the basis of an international agreement is ambiguous, but the ambiguity is limited to the range of approaches states take in interpreting Sharia. Most Islamic states either follow a preferred *maddhab*, or like Pakistan provide rules for interpreting and applying the Islamic proofs in municipal courts. As Islamic states cooperate in bringing an Islamic interpretation to international human rights law, they both establish the acceptability in international discourse of a plurality of interpretations of Islamic standards, and ease the process of integrating international human rights standards into municipal law. For example, Mattar ties the introduction into the 2011 constitutions of Morocco and (to a lesser extent) Jordan of human rights provisions reflective of international norms to standards set by the Arab Charter.[890] In promoting an alternative system of human rights instruments, modern Islamic states are experimenting with an amalgamation of the Islamic and international law of human rights. Subjecting these documents to the supremacy of Sharia adds to their weight as international instruments, because by implying the freedom to interpret the rights within their own preferred understanding of Islam, such a guarantee enables the participation of states that give high priority to Islamic law in their national legal orders without enforcing a particular interpretation that might drive other states away. This suggests that it would be possible to evolve the values encapsulated in the UIDHR and the Cairo Declaration toward establishment in binding Islamic instruments, or even providing principles to guide Islamic states in defining the boundaries of their participation in the UN treaties.

8.3. Reconciling Islam and international human rights law

[887] Mohamed Y. Mattar, *Article 43 of the Arab Charter on Human Rights: Reconciling National, Regional, and International Standards*, 26 Harvard Hum Rts J (2013) 91-147 at 102.
[888] Arab Charter on Human Rights (2004), article 3(3).
[889] Mohamed Y. Mattar, *Article 43 of the Arab Charter on Human Rights: Reconciling National, Regional, and International Standards*, 26 Harvard Hum Rts J (2013) 91-147 at 108-09.
[890] Mohamed Y. Mattar, *Article 43 of the Arab Charter on Human Rights: Reconciling National, Regional, and International Standards*, 26 Harvard Hum Rts J (2013) 91-147 at 116-18.

This final substantial part of the chapter, and of the thesis, confronts the fact that even after applying those limitations an international instrument can permit, and utilising the flexibility of the *fiqh* to select the most favourable defensible interpretation, there appear to remain several areas where Islamic law and international human rights law inevitably collide. Baderin highlights "women's rights, minority rights, and the application of Islamic criminal punishments" as points of potential friction.[891] For example, application of the Islamic "principle of 'equal but not equivalent'", which prescribes equality but differentiated gender roles, may "amount to discrimination by the threshold of international human rights law".[892] In matters such as these, an Islamic state wishing to apply Sharia in full faith might at least be able to reduce the scope of conflict with international norms to a concern of principle rather than actual practice, so that the discrepancy need not actually infringe the rights of any specific individual.

8.3.1. Flexibility of Islamic law

If an Islamic state's prevailing interpretation of Sharia were to unambiguously clash with an international norm, the state might still not need to opt out of that aspect of international agreements, if it could recast its understanding of Islamic law. Weeramantry sees two alternative conceptual paths by which to develop a modern Islamic understanding of human rights: *siyasah Sharia*, in the duty it places on the ruler to further "the protection of life, lineage, mind, character and property and the elimination of corruption"; and renewed *ijtihad* applied to the classical proofs of law.[893]

Within *siyasah Sharia*, the areas that fall within the ruler's law-making discretion, an Islamic ruler must govern in the public interest (*maslahah*). Baderin advocates the application of *maslahah* doctrine to "realiz[e] international human rights within the dispensation of Islamic law".[894] One possible way to bring rulings of *fiqh* closer to international human rights standards as pronounced in for example the UDHR runs through applying *maslahah* in conjunction with *maqasid al-Sharia* (the purposes of Sharia).[895] Where rigid application of traditional *fiqh* rulings would yield less than optimal results in terms of the broader aims of Sharia, all the main schools except the Shafi'ite recognise the principle of *istihsan*, which

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[891] Mashood A. Baderin, International Human Rights and Islamic Law (Oxford U. Press, 2003) 219.
[892] Mashood A. Baderin, International Human Rights and Islamic Law (Oxford U. Press, 2003) 60-61.
[893] C. G. Weeramantry, Islamic Jurisprudence: An International Perspective (Macmillan, 1988) 120.
[894] Mashood A. Baderin, International Human Rights and Islamic Law (Oxford U. Press, 2003) 43.
[895] David L. Johnston, Maqasid al-shari'a: *epistemology and hermeneutics of Muslim theologies of human rights*, in Gavin N. Picken, ed., Islamic Law in the Modern World, (Routledge, 2011) 309-43 at 331.

allows jurists to selectively apply lesser or minority rulings if to do so would better uphold the *maqasid al-Sharia* in a particular case. Since these interests are compatible with the goals of international human rights standards, a jurist might eschew received rulings of *fiqh* in cases where it would be possible to reason to a result more conducive to serving these aims, and that would also fall within the range of practices deemed acceptable under secular international standards.

Another way often advocated to resolve conflicts between Islamic norms and provisions of international human rights instruments is to re-open the rulings by which those norms were derived to *ijtihad* in light of modern circumstances. As well as a renewed *ijtihad* in lieu of reliance on settled but troublesome *fiqh* rulings, An-Na'im proposes expanding *ijtihad*'s remit so it is capable of challenging rules of *ijma* or even of the basic texts.[896] In this approach, Quranic verses affirming rights and dignity in all humans could take precedence over even specific instructions like that of Quran 9:29 to fight unbelievers until they submit to the *dhimmah* contract.[897] Although the latter type of abrogation would be controversial among classical jurists, the broader idea of updating rulings to changed circumstances is not radical. Moosa cites the views of Ibn Qayyim al-Jawziyya, who argued that the aim of realising the truth and justice in Sharia justifies whatever analytical means are used to achieve them, as demonstrating the legitimacy of "efforts of juridical reconstruction in drawing on eminent authorities of the past".[898] Any reinterpretation that would challenge the words of the Quran, *ahadith* or *ijma* would however be difficult to accept within a fundamentalist framework.

8.3.2. Interpreting Sharia for Islamic international law

Islamic states may be able to move closer to international human rights standards by experimenting with new public expressions of traditional principles of law. The institutions of *shura* (consultation) and Islamic oversight are well enough developed in most Islamic states to ensure that any changes have the support of the community as well as the approval of the recognised Islamic experts or authorities in the state. At the international level, the OIC, the Arab League and other institutions provide fora for Islamic states, jurists and civil

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[896] Abdullahi An-Na'im, *Human Rights in the Muslim World, Socio-Political Conditions and Scriptural Imperatives*, in Mashood A. Baderin, ed., Islam and Human Rights: Selected Essays of Abdullahi An-Na'im (Ashgate, 2010) 67-106 at 102-03.

[897] Abdullahi An-Na'im, *Human Rights in the Muslim World, Socio-Political Conditions and Scriptural Imperatives*, in Mashood A. Baderin, ed., Islam and Human Rights: Selected Essays of Abdullahi An-Na'im (Ashgate, 2010) 67-106 at 103.

[898] Ebrahim Moosa, *The Dilemma of Islamic Rights Schemes*, XV Journal of Law & Religion 1/2 (2001) 185-215 at 210-11.

society actors to develop a shared understanding of what Islamic law means with regard to human rights in a modern international context. Through the operation of Islamic constitutions and international commitments, this understanding can then feed in to the national legal orders of Islamic states.

In seeking a way to bring Islamic law closer to international human rights norms on points where the two seem incompatible, three paths suggest themselves: choosing among rulings, re-evaluating rulings in light of their traditional justifications, and expressing consensus among Islamic states through treaty commitments. The pluralistic nature of Islamic jurisprudence allows or even at times requires selection among differing opinions of the *mujtahidun* where they diverge on a point. The justice system of an Islamic state could possibly be set up to require decision-makers faced with such a situation to choose a ruling that comports with international norms. Another approach is to revisit the original justifications for a particular ruling and assess whether it should still apply. Finally, the emergent international Islamic law of human rights can exert a centripetal pull on the laws of Islamic states. Declarations and treaty participation and declarations of common principles can either, over time, lock in modern understandings to the exclusion of some traditional rulings, or declare a preferred rule that modern Islamic states should choose to implement. Applying one or more of these approaches can enable Islamic states to revisit conclusions of Islamic law that as currently interpreted might lead to reservations based on Sharia, as with Mauritania's reservation to article 23(4) of the ICCPR.

The first approach, choosing among rulings, is arguably necessary in Islamic law at least at times, because of the doctrine that no *mujtahid* who reasons correctly and in good faith is in error. For example the Hanafi interpretation differs from the other Sunni schools in that women may make their own marriage contracts,[899] which would eliminate one possible source of friction with article 23(4) of the ICCPR requiring equality in marriage. However the rules surrounding the use of juristic choice may not be flexible enough to entirely overcome the strictures of received *fiqh* in states that follow other schools. A *mujtahid*, qualified to exercise *ijtihad*, may exercise the doctrine of *istihsan*, juristic preference, to select a weaker (less well proven in the sources) over a stronger ruling if to do so would

[899] Mohammad Hashim Kamali, Freedom, Equality and Justice in Islam (Islamic Texts Society, 2002) 75 ("Modern law reform on this subject is generally in line with the Hanafi position, and recognises the right of an adult female to conclude her own marriage contract").

advance the *maqasid al-Sharia*. In exercising *taqlid*, a *mujtahid* also has the discretion to adopt the rulings of *madhahib* other than the *mujtahid*'s own school.

Juristic choice is more limited when exercised by lower ranking jurists applying *taqlid*, consulting books of *fiqh* supplied by senior scholars. When faced with apparently contradictory rulings, a decision maker might apply *takhyir*, a form of *taqlid* that permits the selection and application of any ruling arrived at by a duly qualified and recognised *mujtahid*. *Takhyir* is however controversial, with iconic jurists like al-Ghazali and al-Shatibi calling it immoral for being too permissive, and potentially chaotic as a lone *mujtahid* could empower *qadis* everywhere to choose between rulings, merely by issuing one.[900] Instead, they would require *tarjih*, resolving the difference in favour of the opinion of the jurist with the greatest reputation for learning and piety.[901] *Takhyir* is therefore a relatively weak doctrine on which to try to base a re-interpretation of Islamic law aimed at reaching a ruling more compatible with western understanding of international norms. It might be possible at least in principle for an Islamic state to arrange its judicial system so as to enable juristic choice, while directing it toward rulings compatible with international human rights standards, but this will not likely suffice in itself to resolve the perceived incompatibilities between the UN treaties and Sharia.

As an alternative to juristic choice, whether because the particular state's legal system does not support or there simply is not a suitable ruling available, it may be possible to re-assess traditional rulings in light of modern circumstances. Since the Quran usually supplies a justification alongside the rules it pronounces, *fiqh* rulings are also tied to justifications grounded in the stated priorities of Sharia, so "[w]hen the justifications attaching to certain legal provisions change then the legal rule may also change".[902] For example, the Sokoto High Court in Nigeria, after consultation with the state's Grand Kadi, cited the obsolescence of the *fiqh* justification for refusing the testimony of a non-Muslim ("fear of their being unjust due to their lack of Islamic belief") in requiring a lower court to give equal weight to the testimony of non-Muslim citizens.[903] Allowing civil courts to refer questions to

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[900] Mohammad Fadel, *"*Istafti qalbaka wa in aftaka al-nasu wa aftuka*": The Ethical Obligations of the* Muqallid *between Autonomy and Trust*, in Kevin Reinhart and Robert Gleave, eds., Islamic Law in Theory: Studies on Jurisprudence in Honor of Bernard Weiss (Brill, 2014) 105-28 at 115-16.

[901] Mohammad Fadel, *"*Istafti qalbaka wa in aftaka al-nasu wa aftuka*": The Ethical Obligations of the* Muqallid *between Autonomy and Trust*, in Kevin Reinhart and Robert Gleave, eds., Islamic Law in Theory: Studies on Jurisprudence in Honor of Bernard Weiss (Brill, 2014) 105-28 at 117.

[902] Mashood A. Baderin, International Human Rights and Islamic Law (Oxford U. Press, 2003) 45-46.

[903] Mashood A. Baderin, International Human Rights and Islamic Law (Oxford U. Press, 2003) 46-47.

authorities qualified to conduct *ijtihad* is a time-tested means of enabling Islamic law to evolve to ensure that the revelations of the proofs of law remain relevant to a changing society. An Islamic state can also codify such updated rulings of Islamic law as municipal civil law to ensure consistent application. The state may not remove the prerogative of the *mujtahidun* to arrive at and issue their own independent rulings, but it might more readily constrain other decision makers to follow the state's preferred ruling in a type of case, or to enact that preference as civil legislation.

In addition to these doctrinal tools to help human understanding of Sharia keep up with an evolving social order, Islamic states can elect to agree amongst themselves to a common understanding of international law. This is not the same as binding Islamic consensus, *ijma*, but rather akin to international customary law, whereby states demonstrate through declarations of purpose and by their actions a shared understanding of their legal duties. This type of consensus lacks *ijma*'s permanence, but can achieve similar practical effects as Islamic states make binding, durable treaty commitments to new norms. For example, despite the toleration of the existence of slavery in the proofs of law and in historical Muslim practice, today's Islamic states have agreed to categorically ban slavery.[904] Slavery was an institutional fact of the Prophet's time, whose total abolition was then literally "unthinkable".[905] But Islam certainly tended toward its elimination, as the Quran "considers manumission a work of worship", and "a number of eminent Companions" had previously been slaves.[906] Since abolition is clearly now conceivable, in the context of today's society, "abolition of slavery is completely in keeping with the teachings of Islam".[907] Confirming and promising to uphold mutually agreed norms is one way treaties and other declarations provide for Islamic states to shape modern Islamic law. Islamic documents can also state

[904] International Covenant on Civil and Political Rights, article 8; Arab Charter on Human Rights (2004), article 10(1); African Union Human and People's Rights Charter, article 5; Cairo Declaration on Human Rights in Islam, article 11(a) ("Human beings are born free, and no one has the right to enslave, humiliate, oppress or exploit them"). The Cairo Declaration goes on to forbid colonialism as "one of the most evil forms of enslavement". Id., article 11(b). The UIDHR does not address slavery in its provisions, but in its preamble affirms that all persons are born free, and abhors slavery is abhorrent. Universal Islamic Declaration of Human Rights, preamble g)ii), iii). Among Islamic states only Brunei, Malaysia and Oman are not party to at least one of the ICCPR, African Union Charter or Arab Charter, but all of them endorsed the Cairo Declaration.

[905] Mohammed Abed al-Jabri, Democracy, Human Rights and Law in Islamic Thought (I.B. Tauris, 2009) 234.

[906] Mohammed Abed al-Jabri, Democracy, Human Rights and Law in Islamic Thought (I.B. Tauris, 2009) 234-35.

[907] Mohammed Abed al-Jabri, Democracy, Human Rights and Law in Islamic Thought (I.B. Tauris, 2009) 235.

ideals and encourage states to choose interpretations of Islamic law that align with international standards, as with the UIDHR's declaring forced marriage forbidden.[908]

Article 23(4) of the ICCPR represents a relatively minor point of controversy between Islamic and other states party, but the issue it raises affects other agreements as well, most notably CEDAW. At some points, the Quran applies different treatment to men than to women. This is facially at odds with the general principle of equality under Sharia, as well as with the understanding of the principle of equality in the UN treaty framework. Baderin identifies as key concerns relating to the article 23(4) guarantee of equality in marriage the Islamic rulings regarding polygamy; permissibility of marriage outside the faith; disparate "share[s] in inheritance; and the right to divorce".[909] However these rulings, like all "Muslim family laws . . . are the product of *fiqh*" and "belong to the realm of *mu'amalat*" where rulings are open to *ijtihad* and to change, if necessary to bring them more "in line with the justice that is the spirit of the Shari'a".[910] Reconciling the traditional rulings with the modern understanding of equality between the sexes requires consideration of the circumstances in which the Quran was revealed and the ways in which the Prophet guided the development of Muslim society.

Most of the Islamic interpretations that Baderin identified as problematic with regard to article 23(4) can arguably be resolved through re-evaluation of the reasons behind them. The exception is the imbalance between Muslim men being allowed to marry Jewish or Christian women, whereas Muslim women traditionally lack an equivalent right.[911] In the remaining aspects, polygamy, inheritance and divorce, the Islamic proofs and *usul al-fiqh* appear able to support interpretations that comport in substance with secular understandings of international human rights law.

As with slavery, the revelations inevitably recognised polygamy, a "dominant" social institution of seventh century Arabia often used to build peace among tribes, "but with a strong leaning towards prohibition" expressed in the Quran's limiting the number of wives to

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[908] Ann Elizabeth Mayer, Islam and Human Rights, 4th ed. (Westview Press, 2007) 125. See Universal Islamic Declaration of Human Rights, article 19(i) ("No person may be married against his or her will").
[909] Mashood A. Baderin, International Human Rights and Islamic Law (Oxford U. Press, 2003) 138.
[910] Ziba Mir-Hosseini, *Women in Search of Common Ground: Between Islamic and International Human Rights Law*, in Anver M. Emon et al., eds., Islamic Law and International Human Rights Law (Oxford U. Press, 2012) 291-303 at 300 (presenting conclusions of the Musawah movement and a group of reformist Muslin thinkers it consulted).
[911] Mashood A. Baderin, International Human Rights and Islamic Law (Oxford U. Press, 2003) 144-45.

four and requiring absolutely equal treatment of the wives (arguably an impossibility).[912] For this reason, al-Jabri argues, "abolition of polygamy would not be discordant with the teachings of Islam. The Qur'an does not *enjoin* polygamy, it rather encourages monogamy for fear of injustice in treatment".[913] Baderin more cautiously recommends the Sunni "doctrines of 'suspended repudiation' (*ta'lîq al-talâq*) and 'delegated repudiation' (*tafwîd al-talâq*)", by which the husband may either agree to a condition (like taking a second wife) under which the marriage would become repudiated, or the wife would gain the right to pronounce divorce.[914] So long as the state ensures that women are informed of these rights and their discretion to utilise them, the effect would promote equality as women could exercise "their formerly available but suppressed rights against the rights of men to polygamy".[915]

Inheritance law in Islam is complex. It amended traditional practice by requiring that female as well as male relatives share in an inheritance, in some but not all cases awarding a double share based on the verse "as regards your children's [inheritance]: to the male a portion equal to that of two females".[916] In al-Jabri's analysis, the rule awarding female relatives a half of a male's share in inheritance balanced equality—guaranteeing the right of daughters to share in the inheritance—against the reality that in Arab tribal society where girls often married into different tribes, full female inheritance would result in tribes claiming one another's wealth, resulting in "conflict to no end".[917] In the public interest, the law made an exception to the general position of equality, and offset the resulting inequality with a further rule "mak[ing] the male responsible for her welfare whether she was a wife or a [widowed] mother".[918] Baderin concurs that in the overall context of Muslim family law, the main effect of the inheritance rules is simply "to ensure that certain close relations are not disinherited".[919]

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[912] Mohammed Abed al-Jabri, Democracy, Human Rights and Law in Islamic Thought (I.B. Tauris, 2009) 236-37.
[913] Mohammed Abed al-Jabri, Democracy, Human Rights and Law in Islamic Thought (I.B. Tauris, 2009) 237.
[914] Mashood A. Baderin, International Human Rights and Islamic Law (Oxford U. Press, 2003) 142-43.
[915] Mashood A. Baderin, International Human Rights and Islamic Law (Oxford U. Press, 2003) 143.
[916] Mashood A. Baderin, International Human Rights and Islamic Law (Oxford U. Press, 2003) 146 (quoting Quran 4:11). Examples of female relatives taking equal shares include the parents of a deceased son; a deceased wife's husband and sister; and a uterine brother and sister. In some instances the rules of particular shares for particular relations could result in a female relative receiving double the share of a male relative. Id.
[917] Mohammed Abed al-Jabri, Democracy, Human Rights and Law in Islamic Thought (I.B. Tauris, 2009) 236.
[918] Mohammed Abed al-Jabri, Democracy, Human Rights and Law in Islamic Thought (I.B. Tauris, 2009) 236.
[919] Mashood A. Baderin, International Human Rights and Islamic Law (Oxford U. Press, 2003) 148.

In divorce as in other areas, Sharia did not require or commend the act, but rather proscribed it by imposing limits on pre-existing traditional practice.[920] Islam traditionally allows the husband to simply proclaim divorce (*talaq*) while the wife, if she desires to dissolve the marriage, must cite particular reasons (such as the husband's destitution or impotence) and secure the support of a court. Baderin recognises this imbalance and argues that since *talaq* has been abused, there is a "need to combine the moral content with the procedural aspect of marriage dissolution in Islamic law".[921] The same rights of stipulation that can prevent polygamy could support this (as a condition of the marriage contract, the wife could demand the husband abandon his right of *talaq*); or because the right of *talaq* has been abused an Islamic state could arguably abrogate it based on the doctrines of *hisbah* (encouraging good and preventing evil) and *maslahah*; or courts could require the husband to provide compensation if he pronounces *talaq* without just cause, as is done for example in Morocco, Syria, Algeria and Iran.[922]

As they related to polygamy, inheritance and divorce, the Quranic rules modified the institutions of a pre-modern tribal society toward greater equality. The residual rules from an older tradition might be better seen as temporary measures to be lifted in favour of the default principle of equality. Arguably, in a modern society where civil governments keep the peace; women are self-supporting through employment or social security; and marriage often involves the civil courts at least in mundane aspects such as licensing and registration for tax purposes, the specific rules the Quran decreed for a particular time and place should now yield to the general Islamic principle of equality.

The pattern of Islamic reservations against the ICCPR hints at the possibility of compromise between Islamic law and international human rights treaty regimes. Pakistan's refinement of its reservations may show the potential for reconciliation through clarifying the scope of Sharia-oriented concerns. The international community showed itself willing to acquiesce in Pakistan's reservations that apply Islamic law rather than the text of the ICCPR. Reservations entered by the Maldives and Mauritania regarding freedom of worship, and Mauritania regarding equality of men and women in a marriage, have not gained acceptance. The key distinguishing factors are the different subject matter, and the specificity of Pakistan's reservations. If the reservations against article 18 stated the concerns based on Islamic law

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[920] See e.g., Mohammed Abed al-Jabri, Democracy, Human Rights and Law in Islamic Thought (I.B. Tauris, 2009) 203.
[921] Mashood A. Baderin, International Human Rights and Islamic Law (Oxford U. Press, 2003) 150.
[922] Mashood A. Baderin, International Human Rights and Islamic Law (Oxford U. Press, 2003) 151-52.

more precisely, it appears likely that they would centre on apostasy. Moosa contends that the medieval consensus that treated apostasy as a religious offence punishable by law has given way to a greater emphasis on the teachings of the Quran that "advocate greater freedom to choose one's faith" and the view that apostasy is if anything a political offence, which the state may elect not to punish.[923] Acceptance of this view by Islamic states, demonstrated by withdrawing reservations to article 18, would considerably weaken the force of arguments that the international interpretation of equality is incompatible with Islamic states allowing Islamic law to pre-empt international treaty commitments in the area of marriage, because Islamic personal status and family law applies only to Muslims. Once an Islamic state can tolerate apostasy, its Muslim citizens can, if they wish, escape the strictures of Islamic family law simply by renouncing Islam and following the personal laws of another religious community.

[923] Ebrahim Moosa, *The Dilemma of Islamic Rights Schemes*, 13 J Law and Religion Vol. 15 No. 1/2 185-215 at 201-02.

9. Conclusion

Despite their arising from dissimilar sources of law—the will of God and the practice of states—Islamic law and international law share a mutual affinity. Through the acts of Islamic states, Islamic law has since the mid-20th century continued to adapt to the realities of a world of nation-states and a multiplicity of Islamic rulers. Thus Islamic law and international law have resumed a process of coevolution that had lain dormant since the decline and fall of the Ottoman Empire, now accelerated by the need to fashion new Islamic norms that can admit the existence of multiple Islamic states. Far from being mutually repugnant, Islam and international law have informed each other's development, and Islam has always recognised and protected people of other faiths, whether they are affiliated to the Islamic state or not.

A process of convergence is under way between Islamic and international understandings of human rights norms. With careful use of the flexibility available for shaping the application of some of the main rights specified in the international bill of rights, Islamic states may need to make only very limited use of the reservations and declarations they have entered against international treaties in order to maintain their fidelity to Islamic norms. In some instances, they may find the reservations and declarations unnecessary, in light of their currently prevailing interpretations of Islam. At the same time, the operation of Islamic principles of human rights "will enhance the realization of international human rights objectives" in states that apply Islamic law.[924] Baderin proposes that international and Islamic views of human rights law could continue to constructively co-evolve through the establishment of binding treaties and a regional court by Islamic states, and the introduction into international law of a 'margin of appreciation' as a means to tolerate diversity of interpretation of treaty terms where consensus has not yet built.[925] Islamic states can add another dimension of malleability to Islamic law by using the frameworks of international treaty law and cooperation to demonstrate consensus, thereby either confirming or leading the evolution of Islamic human rights law.

Islamic states have established an Islamic understanding of human rights. They have made international commitments both among the community of Islamic states and within the wider world. This, along with the establishment of Sharia in their domestic legal orders, requires them to interpret their constitutional commitments to human rights compatibly with all of

[924] Mashood Baderin, International Human Rights and Islamic Law Oxford U Press, 2003) 12.
[925] Mashood Baderin, International Human Rights and Islamic Law Oxford U Press, 2003) 229-34.

these standards. This may rule out certain interpretations of Sharia that simply cannot conform to modern international norms. It may also rule out uses of international norms that must violate Sharia. In keeping with the cardinal rule of both the Islamic and international legal frameworks that states must honour their agreements, Islamic states have a duty to apply their domestic laws so as to respect not only Islamic norms, but those of the international community. To accomplish that, an Islamic state has two ready tools: treaty language that may admit Sharia-based exceptions, and *takhyir*, the Islamic norm that permits selection of the most beneficial among multiple legal options. Arguably, it would be in the public interest to enable an Islamic state to hew closer to the spirit of international agreements it accedes to.

Bibliography

Islamic sources

Holy Quran (English translation)

Sahih Muslim

Sunan al-Tirmidhi

Books

Abdul-Rahman, Muhammad Said, Jurisprudence and Islamic Rulings: Transactions – Part 8 (MSA Publication, 2007)

Abiad, Nisrine, Sharia, Muslim States and International Human Rights Treaty Obligations: A Comparative Study (British Institute of International and Comparative Law, 2008)

Abou El-Fadl, Khaled, Islam and the Challenge of Democracy (Princeton U. Press, 2004).

Abou El-Fadl, Khaled, And God Knows the Soldiers: The Authoritative and Authoritarian in Islamic Discourses (University Press of America, 2001).

Afsaruddin, Asma, Striving in the Path of God: *Jihad* and Martyrdom in Islamic Thought (Oxford U Press, 2013).

Al-Azmeh, Aziz (ed), Islamic Law: Social and Historical Contexts (Routledge, 1988)

Al-Jabri, Mohammed Abed, Democracy, Human Rights and Law in Islamic Thought (I.B. Tauris, 2009)

Al-Shafi'i, Muhammad ibn Idris, *Al-Risala fi Usul al-Fiqh* (Majid Khadduri tr, 2nd ed.) (The Islamic Texts Society, 1987)

An-Naim, Abdullahi Ahmed, Islam and the Secular State: Negotiating the Future of Shari'a (Harvard U. Press, 2008).

Anwar, Zainah (ed), Wanted: Equality and Justice in the Muslim Family (Musawah, 2009)

Asad, Muhammad, The Message of the Quran (Dar Al-Andalus, 1980)

Asad, Muhammad, The Principles of State and Government in Islam, 2nd ed. (Islamic Book Trust, 1980)

Badawi, Abdul-Azeem, The Concise Presentation of the Fiqh of the Sunnah and the Noble Book (Jamaal al-Din M. Zarabozo tr, International Islamic Publishing House, 2007)

Baderin, Mashood A. International Human Rights and Islamic Law (Oxford U. Press, 2003)

Baderin, Mashood (ed), International Law and Islamic Law (Ashgate, 2008)

Baderin, Mashood (ed), Islam and Human Rights: Selected Essays of Abdullahi An-Na'im (Ashgate, 2010)

Bantekas, Ilias and Oette, Lutz, International Human Rights Law and Practice (Cambridge U. Press, 2013)

Bin Muhammad, Ghazi et al. (eds), War and Peace in Islam: The Uses and Abuses of Jihad (Royal Islamic Strategic Studies Centre, 2013)

Bokhari, Kamran and Senzai, Farid, Political Islam in the Age of Democratization (Palgrave Macmillan 2013)

Bunn-Livingstone, Sandra L., Juricultural Pluralism vis-à-vis Treaty Law (Martinus Nijhoff, 2002)

Cook, Michael et al. (eds), Law and Tradition in Classical Islamic Thought: Studies in Honor of Professor Hossein Modarressi (Palgrave MacMillan, 2013)

Crone, Patricia and Hinds, Martin, God's Caliph: Religious Authority in the First Centuries of Islam (Cambridge U. Press, 1986)

Donner, Fred M. (ed), The Articulation of Early Islamic State Structures (Ashgate Publishing Ltd., 2012)

Emon, Anver M. et al. (eds), Islamic Law and International Human Rights Law (Oxford U. Press, 2012)

Esposito, John L. and Shahin, Emad El-Din (eds), The Oxford Handbook of Islam and Politics (Oxford U. Press, 2013)

Euben, Roxanne L. and Zaman, Muhammad Qasim (eds), Princeton Readings in Islamist Thought (Princeton U. Press, 2009)

Fatton, Robert Jr. and Ramazani, R.K. (eds), Religion, State and Society: Jefferson's Wall of Separation in Comparative Perspective (Palgrave Macmillan, 2009)

Feldman, Noah, The Fall and Rise of the Islamic State (Princeton U. Press, 2008)

Ghazi, Mahmood Ahmad (tr), Kitab al-Siyar al-Saghir by Muhammad ibn al-Hasan al-Shaybani (Islamic Research Institute, 1998)

Hallaq, Wael B., A History of Islamic Legal Theories (Cambridge U. Press, 1997)

Hallaq, Wael B., Sharia: Theory, Practice, Transformations (Cambridge U. Press, 2009)

Hallaq, Wael B., The Origins and Evolution of Islamic Law (Cambridge U. Press, 2005)

Hashemi, Nader, Islam, Secularism, and Liberal Democracy (Oxford U. Press, 2009)

Hashmi, Sohail H. (ed), Islamic Political Ethics: Civil Society, Pluralism, and Conflict (Princeton U. Press, 2002)

Hirschl, Ran, Constitutional Theocracy (Harvard U. Press, 2010)

Jackson, Sherman A., Islamic Law and the State: The Constitutional Jurisprudence of Shihab al-Din al-Qarafi (E.J. Brill, 1996)

Kamali, Mohammad Hashim, Citizenship and Accountability of Government: An Islamic Perspective (Islamic Texts Society, 2011).

Kamali, Mohammad Hashim, Freedom, Equality and Justice in Islam (Islamic Texts Society, 2002)

Kamali, Mohammad Hashim, Principles of Islamic Jurisprudence (Islamic Texts Society, 1991)

Kamali, Mohammad Hashim, The Dignity of Man: An Islamic Perspective (Islamic Texts Society, 2002)

Kelsay, John, Arguing the Just War in Islam (Harvard U. Press, 2007)

Kelsay, John and Johnson, James Turner (eds), Just War and Islam: Historical and Theoretical Perspectives on War and Peace in Western and Islamic Traditions (Greenwood Press, 1991)

Khadduri, Majid, War and Peace in the Law of Islam (Johns Hopkins Press, 1955)

Khan, L. Ali and Ramadan, Hisham M., Contemporary *Ijtihad* (Edinburgh U. Press, 2011)

Krämer, Gudrun et al. (eds), Encyclopaedia of Islam, 3rd ed. (Brill, 2010)

Lambton, Ann K. S., State and Government in Medieval Islam (Oxford U. Press, 1981)

Langer, Lorenz, Religious Offence and Human Rights : The Implications of Defamation of Religions (Cambridge U. Press, 2014)

Lapidus, Ira M., A History of Islamic Societies, 2nd ed. (Cambridge U. Press, 2002)

Lapidus, Ira M., Islamic Societies to the Nineteenth Century: A Global History (Cambridge U. Press, 2012

Maudidi, Abul A'la, Human Rights in Islam, 2nd ed. (Islamic Publications Ltd., 1995)

Maududi, Abul A'la, Jihad in Islam (Holy Koran Publishing House, 2006)

Mayer, Ann Elizabeth, Islam and Human Rights: Tradition and Politics (Westview, 2007)

Moeckli, Daniel et al. (eds), International Human Rights Law, 2nd ed. (Oxford U Press, 2014)

Murray, Rachel, The African Commission on Human and People's Rights and International Law (Hart Publishing, 2000)

Nasr, Seyyed Vali Reza, Mawdudi and the Making of Islamic Revivalism (Oxford U. Press, 1996)

Picken, Gavin N. (ed), Islamic Law: Critical Concepts in Islamic Studies, Volume IV: Islamic Law in the Modern World (Routledge, 2011)

Ramadan, Hisham M., Understanding Islamic Law: From Classical to Contemporary (AltaMira Press, 2006)

Reinhart, Kevin and Gleave, Robert (eds), Islamic Law in Theory: Studies on Jurisprudence in Honor of Bernard Weiss (Brill, 2014)

Sachedina, Abdulaziz, Islam and the Challenge of Human Rights (Oxford U Press, 2009)

Saeed, Abdullah (ed), Islam and Human Rights (Vol. I): Key Issues in the Debates (Edward Elgar, 2012)

Shahin, Emad El-Din (ed), The Oxford Encyclopedia of Islam and Politics (Oxford U. Press, 2014)

Soroush, Abdolkarim, Reason, Freedom, and Democracy in Islam: Essential Writings of Abdolkarim Soroush, (Sadri, Mahmoud and Sadri, Ahmad trs, eds, Oxford U. Press, 2000)

Tamimi, Azzam S., Rachid Ghannouchi: A Democrat within Islamism (Oxford U. Press, 2001).

Vogt, Kari, et al. (eds), New Directions in Islamic Thought: Exploring Reform and Muslim Tradition (I.B. Tauris, 2009)

Waardenburg, Jacques, Islam: Historical, Social and Political Perspectives (De Gruyter, 2002)

Weeramantry, C.G., Islamic Jurisprudence: An International Perspective (Macmillan, 1988)

Zaman, Muhammad Qasim, The Ulama in Contemporary Islam: Custodians of Change (Princeton U. Press, 2002)

Zubaida, Sami, Law and Power in the Islamic World (I.B. Taurus, 2003)

Articles

Mohamed Abdelaal, *Religious Constitutionalism in Egypt: A Case Study*, 37 Fletcher Forum of World Affairs 1 (Winter 2013), 35-51

Khaled Abou El Fadl, *Islam and the Challenge of Democratic Commitment*, 27 Fordham Int'l L.J. (2003-04) 4-71

Dawood Ahmed & Tom Ginsburg, *Constitutional Islamization and Human Rights: The Surprising Origin and Spread of Islamic Supremacy in Constitutions*, U. of Chicago Public Law & Legal Theory Working Paper No. 477 (2014)

Mohamed Elewa Badar, *Ius in Bello under Islamic International Law*, 13 Intl Crim L Rev 593-625

Mashood A. Baderin, *A Macroscopic Analysis of the Practice of Muslim State Parties to International Human Rights Treaties: Conflict or Congruence?*, 1 Human Rts L Rev 2 (2001) 265-303

Maysaa S. Bazna and Tarek A. Hatab, *Disability in the Qur'an: The Islamic Alternative to Defining, Viewing, and Relating to Disability*, 9 Journal of Religion, Disability & Health 1 (2005) 5-27

Labeeb Ahmed Bsoul, *Historical Evolution of Islamic Law of Nations/Siyar: Between Memory and Desire*, 17 Digest of Middle East Studies 1 (Spring 2008) 48-67

James Cockayne, *Islam and International Humanitarian Law: From a Clash to a Conversation between Civilizations*, 84 Intl Review of the Red Cross 847 (September 2002) 597-625

Bradley J. Cook, *Islamic versus Western Conceptions of Education: Reflections on Egypt*, 45 International Review of Education 3/4 (1999) 339-57

Neville Cox, *The Clash of Unprovable Universalisms—International Human Rights and Islamic Law*, 2 Oxford J Law and Religion 2 (2013) 307-29

Jack Donnelly, *Human Rights and Human Dignity: An Analytic Critique of Non-Western Conceptions of Human Rights*, 76 American Poli Sci Review 2 (June, 1982) 303-16

Christopher A. Ford, *Siyar-ization and its Discontents: International Law and Islam's Constitutional Crisis*, 30 Texas Intl L J 499-533 (1995)

Ryan Goodman, *Human Rights Treaties, Invalid Reservations, and State Consent*, 96 American J Intl L (2002) 531-60

Wael B. Hallaq, *Was the Gate of Ijtihad Closed?*, 16 Intl. J. Middle East Studies 1 (March, 1984) 3-41

Haider Ala Hamoudi, *Repugnancy in the Arab World*, 48 Willamette L. Rev. (Nov. 2012) 427-50

Farooq A. Hassan, *The Sources of Islamic Law*, 76 Am. Socy. Intl. L. Proc. (1982) 65-75

Enid Hill, *Al-Sanhuri and Islamic Law: The Place and Significance of Islamic Law in the Life and Work of 'Abd al-Razzag Ahmad al-Sanhuri, Egyptian Jurist and Scholar, 1895-1971 (Part II)*, 3 Arab L. Quarterly 2 (May, 1988) 182-218

Sherman A. Jackson, *Shari'ah, Democracy and the Modern Nation-State: Some Reflections on Islam, Popular Rule and pluralism*, 27 Fordham Int'l L.J. (2003-04) 88-107

Mohammad Hashim Kamali, *Source, Nature and Objectives of Shari'ah*, 33 Islamic Quarterly (1989) 215-34

Majid Khadduri, *Nature and Sources of Islamic Law*, 22 Geo. Wash. L. Rev. (1953-1954) 3-23

Hamid M. Khan, *Nothing is Written: Fundamentalism, Revivalism, Reformism and the Fate of Islamic Law*, 24 Michigan J. Int'l L. (Fall 2002) (student Note) 273-345

Clark B. Lombardi, *Constitutional Provisions Making Sharia "A" or "The" Chief Source of Legislation: Where did they come from? What do they mean? Do they matter?*, 28 Am. U. Int'l L. Rev. 3, 733-74

Clark B. Lombardi, *Islamic Law in the Jurisprudence of the International Court of Justice: An Analysis*, 8 Chicago J Intl L 1 (Summer 2007) 85-118

Clark B. Lombardi & Nathan J. Brown, *Do Constitutions Requiring Adherence to* Shari'a *Threaten Human Rights? How Egypt's Constitutional Court Reconciles Islamic Law with the Liberal Rule of Law*, 21 Am. U. Int'l L. Rev. 3 (2006), 379-435

Tiyanjana Maluwa, *Ratification of African Union Treaties by Member States: Law, Policy and Practice*, 13 Melbourne J Intl L (2012) 1-49

Mohamed Y. Mattar, *Article 43 of the Arab Charter on Human Rights: Reconciling National, Regional, and International Standards*, 26 Harvard Hum Rts J (2013) 91-147

Ebrahim Moosa, *The Dilemma of Islamic Rights Schemes*, XV Journal of Law & Religion 1/2 (2001) 185-215

Jason Morgan-Foster, *Third Generation Rights: What Islamic Law Can Teach the International Human Rights Movement*, 8 Yale Hum Rts & Development L J (2005) 67-116

Muhammad Munir, *Islamic International Law (*Siyar*): An Introduction*, 40 Hamdard Islamicus 4 (October-December 2012) 37-60

Muhammad Munir, *Public International Law and Islamic International Law: Identical Expressions of World Order*, 1 Islamabad L Rev 3 & 4 369-430

Makau wa Mutua, *The Ideology of Human Rights*, 36 Virginia J Intl L (1996) 589-657

Emilia Justyna Powell, *Islamic law states and the International Court of Justice*, 50 J Peace Research 2 (March 2013) 203-17

Intisar A. Rabb, *"We the Jurists": Islamic Constitutionalism in Iraq*, 10 U. Pa. J. Const'l L. 3, 527-79

Jeffrey A. Redding, *Constitutionalizing Islam: Theory and Pakistan*, 44 Virginia J. Int'l L. 3, 759-827

Nabil Saleh, *Civil Codes of Arab Countries: The Sanhuri Codes*, 8 Arab L. Quarterly 2 (1993), 161-67

Amr Shalakany, *Between Identity and Redistribution: Sanhuri, Genealogy and the Will to Islamise*, 8 Islamic L. and Society 2 (2001), 201-44

Edward T. Swaine, *Reserving*, 31 Yale J Intl L (2006) 307-66

Susan Waltz, *Universal Human Rights: The Contribution of Muslim States*, 26 Hum Rts Quarterly 4 (November 2004) 799-844

Reports

International Law Association, London Conference (2000), final report of the Committee on Formation of Customary (General) International Law

Islamic Solidarity Fund for Development, 4th Annual Report, Annex II (25 November 2011)

Pew Forum on Religion & Public Life, The World's Muslims: Religion, Politics and Society (30 April 2013)

International instruments

Arab Charter on Human Rights

ASEAN Human Rights Declaration

Cairo Declaration on Human Rights in Islam

Charter of the Organisation of Islamic Cooperation (amended 2008)

European Convention for the Protection of Human Rights and Fundamental Freedoms

International Covenant on Civil and Political Rights

International Covenant on Economic, Social and Cultural Rights

Statute of the International Court of Justice

Statute of the OIC Independent Permanent Human Rights Commission

Universal Islamic Declaration of Human Rights

Vienna Convention on the Law of Treaties

United Nations documents

United Nations Conference on the Law of Treaties, First session, 28th meeting of the Committee of the Whole (18 April 1968, A/CONF/39/C.1/SR.28)

Universal Declaration of Human Rights

UN Depositary Notification C.N.590.2011.TREATIES-40

UN General Assembly, document No. A/41/896 of 20 November 1986

UN General Assembly resolution 60/251 (15 March 2006)

Yearbook of the United Nations 1948-1949

European Union documents

Council of the European Union, Council conclusions on Pakistan, 3016th Foreign Affairs Council meeting, Brussels, 18 July 2011

Council Regulation (EC) No 732/2008, OJ L 211/1-39

Statutes

Civil Code of Algeria (1975)

Bahrain Civil and Commercial Procedures Act (1971)

Civil Code of Egypt

Civil Code of Iraq (1951)

Civil Code of Kuwait (1980)

Mauritanian Ordonnance 89-126 du 14 septembre 1986 portant Code des Obligations et des Contrats, modifié par la loi 2001-31 du 7 février 2001

Ottoman Courts Manual

Pakistan: Federal Shariat Court (Procedure) Rules, 1981

Pakistan: Qanun-e-Shahadat Order , 1984

Pakistan: West Pakistan Muslim Personal Law (Shariat) Application Act, 1962

Supplementary Fundamental Law of Persia (1907)

Qatar: Law No. 10 of 2003 Promulgating the Law on Judicial Authority

Cases

Court of Cassation of Qatar, ruling on Petition No. 64/2012

Mian Abdur Razzaq Aamir and others v Federation of Pakistan and others, Federal Shariat Court of Pakistan, petitions 01/I of 2007, 03/I of 2007 and 01/I of 2010, 22 December 2010