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SHARIA AND LAW IN THE AGE OF CONSTITUTIONALISM

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Abstract

Muslim societies now have embraced, more or less, the ideas and institutions of constitutionalism. It may be said that the rule of law, public consent to the political authority, and basic citizens' entitlements are among the main constituent elements of constitutionalism. Modern law holds a particular status among those elements. It is, *inter alia*, state-made and amoral, and functions as a unifying thread in the fabric of constitutionalism, which in turn regulates a nation (i.e., a pluralistic society). Muslims always have insisted that the law should comply with or at least not contradict Sharia. They have in fact conceived modern law as a form, which can and ought to be instantiated with the substance of Sharia. This substance (Sharia) is, however, supposed to be, *inter alia*, jurist-made and moral. Could such a substance accommodate the public consent orientation and the amoral nature of legal rules that regulate the public life of a pluralistic society, and secure the rights of its members? If the answer is in the negative, what could be the way out?

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INTRODUCTION

It goes without saying that over the last one and a half centuries, modern ideas and institutions, and in particular, constitutionalism with its extended ramifications, have found their way into traditional Muslim societies in one way or another. [1] The adoption or implementation of constitutional ideas and institutions in those societies, however, has not been an easy task; and the process has not yet reached its culmination point.[2] It is difficult to locate a Muslim society that can genuinely assert that it has managed to establish and develop, in a proper sense, constitutional concepts and institutions such as the rule of law, individual liberty and democracy.[3]

Constitutionalism, as an ideal, which soon will be explored in more detail, has suffered various setbacks in Muslim polities. The setbacks may be classified into two main categories of theoretical and practical, as they may also be divided into political, cultural, social and economic.[4] This Article concentrates on one of the theoretical or cultural hindrances to the adoption of constitutionalism by Muslim societies. That is to say, Muslims seem to have misconceived one of the most significant elements (if not the most important element) of modern life, namely the "law." Hence, they have apparently been unable or unwilling to bring about and benefit from a rather legitimate and functioning political system on the basis of the rule of law.[5] In consequence, they have deprived themselves of a healthy economic, social and cultural environment that is usually based, *inter alia*, on a robust legal system.[6]

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[1] *See* Said Amir Arjomand, *Introduction* to CONSTITUTIONAL POLITICS IN THE MIDDLE EAST: WITH SPECIAL REFERENCE TO TURKEY, IRAQ, IRAN, AND AFGHANISTAN 1–3 (Said Amir Arjomand ed., 2008).

[2] *See id*. at 1–10 (tracing the difficulties that the Islamic world has experienced in creating constitutional democracies).

[3] *See, e.g., id*. at 5, 67–70.

[4] *See* Mohammad Hashim Kamali, *Constitutionalism in Islamic Countries: A Contemporary Perspective of Islamic Law*, *in* CONSTITUTIONALISM IN ISLAMIC COUNTRIES: BETWEEN UPHEAVAL AND CONTINUITY 19, 19–32 (Rainer Grote & Tilmann J. Roder, eds., 2012); *see also* Ebrahim Afsah, *Contested Universalities of Internal Law: Islam's Struggle with Modernity*, 10 J. HIST. INT'L L. 259, 268–69 (2008).

[5] Hossein Esmaeili, *The Nature and Development of Law in Islam and the Rule of Law Challenge in the Middle East and the Muslim World*, 26 CONN. J. INT'L L. 329, 331 (2010).

[6] *See* WILL KYMLICKA, MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY OF MINORITY RIGHTS 26 (1995) [hereinafter MULTICULTURAL CITIZENSHIP]; Strobe Talbott, *Forward* to KENNETH, W. DAM, THE LAW-GROWTH NEXUS: THE RULE OF LAW AND ECONOMIC DEVELOPMENT, 14 (2006) (discussing the importance of institutions to creating a strong economy); Stephen Haggard & Lydia Tiede, *The Rule of Law and Economic Growth: Where Are We?*, 39 WORLD DEV. 673, 681 (2011); Will Kymlicka, *The Rise and Fall of Multiculturalism? New Debates on Inclusion and Accommodation in Diverse Societies*, 61

In what follows, first, this Article briefly explains the main pillars of constitutionalism. Second, the characteristic features of the law as a unifying element of these pillars are examined. Third, the concept of Sharia is explored. Fourth, and in the light of the discussions in the previous two sections, the conundrum with which Muslims have been confronted in the age of constitutionalism is illustrated. Finally, this Article concludes by making a few remarks on the likely ways out of the problem.

I. CONSTITUTIONALISM

Constitutionalism is indeed a broad title for various values and institutions that are supposed to limit the powers of the government.[7] It may be said, however, that the basic and original value is that of limiting the government to law.[8] Even those constraining values that are really complementary to the law, such as the public consent to the political authority and the basic entitlements of the people, ought to be eventually actualized by the law otherwise they merely remain at a rhetorical level with no practical impact.[9] It should be added that the limitation imposed by law defines both the range of powers and legitimacy of the government.[10] On the other hand, putting aside the possibility that governments can limit themselves willingly, the idea of constitution has been put forward in order to entrench the said constraints in such a way that power-holders may not readily remove them.[11]

Accordingly, the first pillar of constitutionalism is the idea and institution of the rule of law.[12] The core idea of the rule of law refers to the substitution of the rule of man by the rule of law.[13] That is to say, the rule of law has been constantly believed to be, and is indeed, among other things, the best way of countering the problem of the arbitrary rule of a man or a group of men over other members of a

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INT'L SOC. SCI. J. 97, 106–08 (2010) (explaining how instability causes fear and suppression of minorities, whereas when nations feel secure they are more likely to treat their minorities fairly).

[7] *See* Larry Alexander, *Introduction* to CONSTITUTIONALISM: PHILOSOPHICAL FOUNDATIONS 2–3 (Larry Alexander ed., reprt. 1999) (1998) (discussing the concept of constitutionalism as meta-rules that are composed of agreed upon norms).

[8] *See* N.W. BARBER, THE CONSTITUTIONAL STATE, 78 (2010); CHARLES HOWARD MCILWAIN, CONSTITUTIONALISM: ANCIENT AND MODERN 21 (rev. ed. 1947) (1940); BRIAN TAMANAHA, ON THE RULE OF LAW: HISTORY, POLITICS, THEORY 114 (2004).

[9] *See* M.J.C. VILE, CONSTITUTIONALISM AND THE SEPARATION OF POWERS 1 (1967).

[10] *See* Tom Ginsburg, *Constitutionalism: East Asian Antecedents*, 88 CHI.-KENT L. REV. 11, 12–13 (2010).

[11] Larry Alexander, *What are Constitutions, and What Should (and Can) They Do?* 28 SOC. PHIL. & POL'Y 1, 3–4 (2011).

[12] ALEXANDER, *supra* note 7, at 4–5.

[13] Joseph Raz, *The Rule of Law and Its Virtue*, 93 L. Q. REV. 195, 196 (1977).

society, due to which most of the misfortunes of social life arise.[14]

The second pillar of constitutionalism is the system of separation of powers.[15] The necessities of an efficient management of public affairs, and also the idea of the imposition of limits on this management have led to a division of labor among the holders of public powers—a mechanism that was later called the separation of powers of the government (i.e., the separation of the legislature, the judiciary and the executive).[16] Also, in order for the division of powers and responsibilities not to undermine the rule of law, it is required to be a balanced separation.[17] The government must be balanced in the sense that none of the three powers should hold so much power and discretion that outweighs the other two. Hence, any imbalance means one branch is able to interfere with and exert influence on another branch's proper functioning, thus leading to an arbitrary method of governance.[18]

The third pillar of constitutionalism, public consent, took shape when endeavors were made to find an answer to the question raised against the wide range of powers and responsibilities held by the government at the early modern era.[19] In other words, public governance reached a point in its history where the divine and natural models of, and justifications for, an extended and hugely powerful political and administrative authority were no longer considered to be a matter of fact.[20] There was indeed a strong demand for some kind of explanation and justification for that authority.[21] A theory of public consent was first put forth by certain scholars like Thomas Hobbes,[22] and then developed into a social contract framework by others such as Jean-Jacque Rousseau.[23] On this basis, only those governing

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[14] *See id*. at 202–03, 205.

[15] VILE, *supra* note 9, at 1–2.

[16] *See id*.; *see also*; ERIC BARENDT, AN INTRODUCTION TO CONSTITUTIONAL LAW 14–17 (1998); Torsten Persson et al., *Separation of Powers and Accountability*, 112 Q. J. ECON. 1163, 1164, 1166–68, 1198–99 (1997).

[17] *See* EOIN CAROLAN, THE NEW SEPARATION OF POWERS: A THEORY FOR THE MODERN STATE 183–84 (2009); JAMES W. CEASER, *In Defense of Separation of Powers*, *in* SEPARATION OF POWERS: DOES IT STILL WORK? 168, 179–81, 186 (Robert A. Goldwin & Art Kaufman, eds., 1986)*; see also* D. Brooks Smith, *Promoting the Rule of Law and Respecting the Separation of Powers: The Legitimate Role of the American Judiciary Abroad*, 7 AVE MARIA L. REV. 1, 18–19 (2008).

[18] *See* VILE, *supra* note 9, at 2.

[19] *See* Bruce P. Frohnen, *A Problem of Power: The Impact of Modern Sovereignty on the Rule of Law in Comparative and Historical Perspective*, 20 TRANSNAT'L L. & CONTEMP. PROBS. 599, 605–06 (2012).

[20] MARTIN LOUGHLIN, THE IDEA OF PUBLIC LAW 13–14 (2003).

[21] *See id.* at 13.

[22] THOMAS HOBBES, LEVIATHAN 126, 133, 135 (Oxford Univ. Press 1909) (1651).

[23] *See* Jean-Jacques Rousseau, *The Social Contract and Discourses*, *in* EVERYMAN'S LIBRARY: PHILOSOPHY AND THEOLOGY 14–15 (Ernest Rhys ed., G. D. H. Cole trans., J.M.

arrangements and powers that had been consented to by the public were legitimate.[24]

The fourth pillar, namely rights in modern terms, took its roots in the European mindset much earlier than many other pillars of constitutionalism.[25] Religious disagreements and developments at the end of the medieval ages, the rivalry among three European political axes (i.e. the church, the feudal system and the monarchy), and new philosophical thoughts (such as nominalism) had already given rise to a distinction between two meanings of *jus*, which today is referred to as the subjective and objective concepts of rights.[26] Later social and political movements took this theme seriously.[27] Rights were in fact secured spheres within which the individual had the sole authority to make a decision, regardless of its moral content.[28]

The last pillar of constitutionalism, namely the checks and balances system, has indeed developed in parallel with the other four.[29] Moreover, the new concept of the rule of law (that is, a "check of power by power")[30] may not have emerged unless a well-balanced order of supervision over the entirety of the constitutional system was already in place.[31] This system enables the populace to tackle the abuses of the public power, and to make sure that all the rules and principles of a constitution are being implemented.[32] Judicial review, as the most important element of the checks and balances system, has been established and well in practice since *Marbury v. Madison* was decided in the United States in 1803.[33]

It is worth mentioning that the aforesaid pillars developed in tandem with the formation of the modern state (i.e., the nation-

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Dent & Sons Ltd. 1923) (1913) (describing the contract that citizens voluntarily form with society).

[24] *See* JOHN DUNN, *Contractualism*, *in* THE HISTORY OF POLITICAL THEORY AND OTHER ESSAYS 39, 52, 55–56 (1996); RUSSELL HARDIN, LIBERALISM, CONSTITUTIONALISM, AND DEMOCRACY 141, 146–47, 149 (1999).

[25] *See* BRIAN TIERNEY, THE IDEA OF NATURAL RIGHTS: STUDIES ON NATURAL RIGHTS, NATURAL LAW AND CHURCH LAW 1150–1625, at 93, 104–05, 108–09, 117 (1997) [hereinafter THE IDEA OF NATURAL RIGHTS: STUDIES].

[26] *Id.*; *see also* Brian Tierney, *The Idea of Natural Rights–Origins and Persistence*, 2 NW. J. INT'L HUM. RTS. 5–7 (2004) [hereinafter *The Idea of Natural Rights–Origins*].

[27] *See* THE IDEA OF NATURAL RIGHTS: STUDIES, *supra* note 25, at 109, 117.

[28] *See* HILLEL STEINER, AN ESSAY ON RIGHTS 55 (1994).

[29] *See* VILE, *supra* note 9, at 132–33.

[30] *See* MARTIN LOUGHLIN, SWORD AND SCALES: AN EXAMINATION OF THE RELATIONSHIP BETWEEN LAW AND POLITICS 180–85 (2000).

[31] *See* LOUGHLIN, *supra* note 20, at 17–18 (discussing different modes of government and how they were present at the birth of the modern state).

[32] *See* Raz, *supra* note 13, at 203–04.

[33] *See* Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L. J. 217, 301–02 (1994); Marbury v. Madison, 5 U.S. (1 Cranch) 137, 174 (1803).

state).[34] The Peace of Westphalia treaties (1648) are usually mentioned as the departure point in this process.[35] Historical facts aside, European political history took such a course that the monarchical systems overwhelmed the feudal and Christian poles of power.[36] Political units have since gradually consisted of nations with distinct geographical boundaries.[37] None have ever consisted of a homogeneous population in terms of religion, race, color, etc.[38] On the other hand, thanks to the legacy created to a large extent by the power struggle within the Catholic Church establishment and the relevant legal and political principles drawn from the Roman legal tradition, the state was recognized as an artificial person—a body separate from its constituent individual members.[39]

Given this, it could be said that elements of constitutionalism may not be understood well until and unless they are seen against the background of the nation-state as an artificial entity or person.[40] This very fact has had a profound impact on the concept of the law (in modern terms) as the unifying element of constitutionalism.[41] The next section explores the concept of law in the modern sense.

II. LAW

It is worth mentioning, at the beginning of this section, a point on the general nature of law. That is, law is in fact the official normative dimension of a political unit (i.e., a polity).[42] In this regard, pre-modern and modern laws are similar to each other.[43] At any given time and place, there are two elements that mainly determine the exact character and function of law in a particular society. They are the reality of the existing power structure, on one hand, and the

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[34] *See* VILE, *supra* note 9, at 2–3.

[35] *See* MARTIN VAN CREVELD, THE RISE AND DECLINE OF THE STATE 127, 415 (1999).

[36] *Id*. at 128–29.

[37] *See id*. at 143–44.

[38] *See id*.

[39] *See* BRIAN TIERNEY, RELIGION, LAW, AND THE GROWTH OF CONSTITUTIONAL THOUGHT 1150–1650, at 80, 84–88, 92–93, 96–97 (1982) (tracing the developments of the Church in the early modern era and the effects on the development of the state).

[40] *See, e.g.*, David Gauthier, *Thomas Hobbes and the Contractarian Theory of Law, in* HOBBES ON LAW 63, 69–70 (Claire Finkelstein ed., 2005) (explaining the Hobbesian concept of the sovereign as an artificial person).

[41] *See* Eric Enlow, *The Corporate Conception of the State and the Origins of Limited Constitutional Government*, 6 WASH. UNIV. J. L. & POL'Y 1, 28 (2001).

[42] *See* Thomas Cottier & Maya Hertig, *The Prospects of 21st Century Constitutionalism*, 7 MAX PLANCK Y.B. UNITED NATIONS L. 261, 279–80 (2003). Some philosophers of law consider law as simply the legitimization of political power. *See, e.g.*, RONALD DWORKIN, LAW'S EMPIRE 95–96, 380 (1986).

[43] *See* Cottier & Hertig, *supra* note 42, at 279–81; Vivian Hamilton, *Principles of U.S. Family Law*, 75 FORDHAM L. REV. 31, 33 (2006) (demonstrating that notions of normative natural law existed prior to modern times).

prevailing conception of an ideal power structure on the other.[44] Put differently, in order to grasp a better understanding of law at any given time and place, it is necessary to set it in the context of the contemporary political power in which it exists and compare it with the widely accepted theory of power prevalent in a particular society (i.e., the established political philosophy).[45] A theory of power in its turn reflects the philosophical, social, and normative wealth of any polity.[46]

On this basis, it should be said that constitutionalism and modern law are, in a sense, products of modern political and social systems.[47] In particular, modern law has come into existence and evolved within the context of the nation-state.[48] In this context, the state is considered to have an "artificial" identity. That is, it evolved on the basis of a *universitas* (corporation) model of personality.[49] The artificial person (i.e., the state) derives from and belongs to the whole nation and represents its interests and responsibilities at a macro and a micro level—both the public interests of the whole nation, and that of the private interests of its individual members.[50]

Therefore, law in the modern age has been made "by" the state "for" the regulation and benefit of a heterogeneous society.[51] It has not been possible to regulate such a society by a specific collection of moral norms belonging exclusively to one of its constituent parts.[52] Such norms may not have been acceptable to other groups and, hence, no law and order would have been established in the first place. Therefore, any law made by the state was inevitably based on a common denominator of the existing competing moral systems in the

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[44] *See* Cottier & Hertig, *supra* note 42, at 279–81.

[45] *See id*.

[46] *See id*. It should be noted, however, that the mentioned point does not imply a one-way relationship from the reality and standards of power to law. Law stands in a somehow mutual relationship with the above mentioned elements, which does not have a significant impact on the analysis set-forth.

[47] *See generally* Martin Loughlin, *The Constitutional Imagination*, 78 MOD. L. REV. 3, 5, 12–13 (2015) (tracing the philosophies of Hobbes, Locke, and Rousseau and the affect these philosophers had on modern constitutional thought).

[48] *See generally* HAROLD J. BERMAN, LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION 17–20 (1983) (tracing the formation of the Western legal tradition through the modern revolutions that shaped nations and law).

[49] *See* LOUGHLIN, *supra* note 20, at 75–76; *see also* HOBBES, *supra* note 22, at 177–78.

[50] *See* LOUGHLIN, *supra* note 20, at 83–85.

[51] MULTICULTURAL CITIZENSHIP, *supra* note 6, at 26–31 (explaining how most democracies must work with a diverse group of people).

[52] *See* LOUGHLIN, *supra* note 20, at 33 (presenting a historical and theoretical perspective of formulation of government based on conflict). *See generally* Charles Taylor, *The Diversity of Goods, in* UTILITARIANISM AND BEYOND 129 (Amartya Sen & Bernard Williams eds., 1982) (presenting the Utilitarian perspective that, scientifically, societal good should be based on what satisfies the most people).

society.[53]

What might that common denominator be? In this regard, it is primarily the idea of rights and the theory of a social contract. These two very important justifications for the basis of the nation-state are indeed the foundation upon which modern law is built.[54]

Rights were put forward and developed in the sociopolitical history of the European polities exactly due to a belief in the dignity and autonomy of individuals and groups.[55] No one was willing to live a life dictated by another person.[56] This attitude, embodied by a natural rights theory, played a profound role in the American and French Revolutions of the eighteenth century.[57] Therefore, although new constitutions and laws were passed by the state, they in fact reflected and had to remain within the boundaries of the predominant conception of power and politics of the age—a main ingredient of which was individual rights.[58]

On the other hand, the theory of public consent to the continuously broadening political authority and powers was put forward so as to counter the crisis of political legitimacy.[59] This line of thought was taken seriously and eventually presented as a "social contract" framework for the explanation and justification of the political authority and state institutions.[60] The social contract approach to politics was indeed representing the idea of public participation in determining the public destiny, rather than being decided by a particular individual or group.[61] This obviously constitutes the core of the idea of democracy.[62] Nevertheless, given that the governing of public affairs should be made in accordance with laws (rather than with the whims of individuals and groups), it could be said that democracy ought to be established and maintained through law (otherwise, it leads to populism and sheer

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[53] *See* JÜRGEN HABERMAS, THE INCLUSION OF THE OTHER: STUDIES IN POLITICAL THEORY 13–16 (Ciaran Cronin & Pablo De Greiff eds., 1998) (explaining how people form their beliefs and how governments use those beliefs to compel compliance).

[54] *See id*. at 14–15.

[55] *See* VILE, *supra* note 9, at 132–33.

[56] *See id*.

[57] *The Idea of Natural Rights—Origins*, *supra* note 26, at 11.

[58] *See* VILE, *supra* note 9, at 132–33; Martin Loughlin, *Constitutional Law: The Third Order of the Political*, *in* PUBLIC LAW IN A MULTI-LAYERED CONSTITUTION 27, 30–31 (Nicholas Bamforth & Peter Leyland eds., 2003) (explaining the differing concepts of party politics as being primarily concerned with either governing or conflict).

[59] LOUGHLIN, *supra* note 20, at 13–14.

[60] *See* TAMANAHA, *supra* note 8, at 32.

[61] *Id*.

[62] DAVID BENTHAM, HUMAN RIGHTS AND DEMOCRACY: A MULTI-FACETED RELATIONSHIP 90–91 (1999). *See generally* CHARLES TILLY, DEMOCRACY 13–14 (2007).

demagoguery).[63] On the other hand, in order for laws to be legitimate, they ought to be enacted either directly by the nation, if possible, or indirectly by its representatives.[64]

It is worth mentioning that this depicts the interplay among the law, the political power, and the prevalent theory of a legitimate power.[65] That is, in a constitutional system, it is the state that has the authority to make the law; however, the state belongs to all members of the polity. Hence, the state as a singular entity has a responsibility somehow to represent all its members.[66] In contrast, public participation in public affairs should be actualized by the law. Thus, only that part of the state which is formed directly or indirectly by the public may justifiably enact laws.[67] Laws also, in their turn, need to incorporate certain fundamental rights of the citizens.

Therefore, in the context of modern society and its manifestation as the contemporary nation-state, the law ought to embody certain rights of citizens, irrespective of their religion, race, color, sex, class, etc., and be approved by representatives of the nation making laws in the name of the state. In this way, state-made law cannot be anything but amoral.[68] That is, on the one hand, the law should not embody the substance of one of the existing systems of morality held by only a part of the nation.[69] If it does then every other part of the nation, other than the one whose system of morality is embodied by the law, may rightly object that its system of morality is unjustifiably excluded. Such a subgroup may be inclined to disobey the law—as the inherent discrimination is antithetical to the fundamentals of a pluralistic society in the first place.[70]

On the other hand, in order for the law to provide for and maintain the public order in a peaceful manner, nation-states ought to enact legislation that enables its citizens to practice their own specific moral system while obeying national law.[71] In this way people would

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[63] *See* Jürgen Habermas, *On the Internal Relation Between the Rule of Law and Democracy*, 3 EUR. J. PHIL. 12, 13 (1995). Some scholars have gone so far as to argue for an internal relationship between democracy and the rule of law. *E.g., id.*

[64] *See* TAMANAHA, *supra* note 8, at 32–36 (describing the proper procedures that must be followed for the creation of legitimate laws in a democracy).

[65] *See id.*

[66] *See id.*

[67] *See* Habermas, *supra* note 63, at 13.

[68] *See* MULTICULTURAL CITIZENSHIP, *supra* note 6, at 76–82 (expressing the concept of how the shared identity of culture works to express values and beliefs).

[69] *See id.*

[70] *Id.*

[71] *See, e.g.*, Jonathan Jackson et al., *Why Do People Comply with the Law? Legitimacy and Influence of Legal Institutions*, 52 BRIT. J. CRIMINOLOGY 1051, 1054, 1062–63 (2012) (explaining how legitimacy is established when citizens feel morally aligned with authority based on a study with police officers in the United Kingdom, even if their personal moral

consider the legal system as a legitimate one, and at the same time would find the opportunity to strike a balance between being a member of a nation while keeping other kinds of identity in their social and individual lives.[72] Having said this, it has become clear that law is of a different normative nature.[73] When the law seeks to accommodate almost all moral systems within a nation then it must be morally neutral (i.e., an amoral, normative system).[74]

From another perspective, the main tenets of modern law may be explained in four major respects. Firstly, in respect of the aim of law, it is in place to bring about public order, provide for certain basic individual rights, and maintain them.[75] In a word, the law in modern society in principle provides for a setting within which individuals and groups thrive. The content of decisions is left to any individual or group to choose for themselves according to their divergent moral, ideological and religious beliefs.[76] That is why every modern constitution grants people of all walks of life a broad range of rights.[77]

Secondly, in respect of the authority to enact the law, it is enacted by representatives of the people—the legislative branch of the political power.[78] Members of the legislature are qualified to make law since they are elected by the people through a free and fair election.[79] They are assumed to represent the will and wishes of the nation.

Thirdly, in respect to sources of legislation, no specific source is given preference.[80] Any source, including history, society, culture, religion, principles of rationality, economics, and politics, may be employed in the legislative process.[81] No doubt members of the legislature may disagree on the appropriate sources to be used for passing a law. There may be a theoretical disagreement that goes deep

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beliefs are not completely in line with the officers). *See generally* TOM R. TYLER, WHY PEOPLE OBEY LAW 4 (1990) (discussing the various reasons people choose to comply with laws).

[72] *See* J. M. KELLY, A SHORT HISTORY OF WESTERN LEGAL THEORY 426–28 (reprt. 1993) (1992) (describing the balance struck between people's individual rights and the interaction with the collective, social rights).

[73] *See id*.

[74] STEINER, *supra* note 28, at 191.

[75] *See* KELLY, *supra* note 72, at 426–28.

[76] *See* Ozan O. Varol, *The Origins and Limits of Originalism: A Comparative Study*, 44 VAND. J. TRANSNAT'L L. 1239, 1258, 1267 (2011).

[77] *See, e.g., id.* at 1248, 1258, 1267.

[78] *See* DAVID M. OLSON, DEMOCRATIC LEGISLATIVE INSTITUTIONS: A COMPARATIVE VIEW 3–4 (1994).

[79] *See id.*

[80] *See id.* at 1–4.

[81] *See* Arthur H. Garrison, *The Traditions and History of the Meaning of the Rule of Law*, 12 GEO. J.L. & PUB. POL'Y 565, 568–69, 614–15 (2014) (discussing the theories of James Madison, Thomas Hobbes, John Locke, and other scholars on how legislation is created).

into the roots of competing conceptions of the law.[82] This disagreement, however, is usually and practically resolved by referring to higher-level principles or documents, such as a constitution.[83] The principles and documents contain those criteria that were acceptable by the nation in the process of constitution building.[84] The essential elements of a constitution were discussed previously when examining the common denominator for law, and also the aim of law.[85]

Fourthly, in respect of the logic of law or legal reasoning—given the discussions just put forth regarding the aim, the issuing authority and the sources of the law—it is a very broad logic that does not deprive itself from any rule or reasoning congruent with the aim and sources for the law. The aforementioned rule or reasoning is in its turn shaped by a particular legal theory.[86] In other words, legal reasoning neither is tied to a sacred text nor even to a watertight mathematical logic.[87]

It is instructive to turn now to the development of modern law in the Muslim context.

III. SHARIA

Over the last one and a half centuries, Muslim societies have adopted constitutionalism either in the wake of a constitutional revolution, independence from a colonial country, or due to a war.[88] Apart from the colonial/imperial spread of the nation-state model among Muslim societies, these societies used to suffer from various problems and shortcomings that gave them an incentive to import constitutional ideas and institutions.[89] As an example from many famous Iranian modernists of the late nineteenth and early twentieth centuries, Mirza Yusuf Khan Mustasharodawla used to be the Iranian Chargé d'affaires in Paris from 1867 to 1869.[90] During this period, he also

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[82] *See generally* KELLY, *supra* note 72, at 96, 312–14, 324–26, 436 (providing examples of various nations' developmental processes in creating law throughout history beginning with the Greeks and ending with a discussion of the development of law in the United States in the twentieth century).

[83] *See id.* at 277, 280–81 (advocating for the superiority of constitutions over individual legislative acts).

[84] JOHN RAWLS, A THEORY OF JUSTICE AND ITS CRITICS 47–48 (1990).

[85] *See supra* text accompanying notes 53-54, 75-77; *see also* Paul J. Larkin, *The Dynamic Incorporation of Foreign Law and the Constitutional Regulation of Federal Lawmaking*, 38 HARV. J.L. & PUB. POL'Y 337, 369–370, 392–395 (2015).

[86] *See* NEIL MACCORMICK, LEGAL REASONING AND LEGAL THEORY 179 (1978).

[87] *See* Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 465–66 (1897); *see also* Susan Haack, *On Logic in the Law: "Something, But Not All,"* 20 RATIO JURIS. 1 (2007).

[88] *See* Dawood I. Ahmed & Tom Ginsburg, *Constitutional Islamization and Human Rights: The Surprising Origin and Spread of Islamic Supremacy in Constitutions*, 54 VA. J. INT'L L. 615, 618–20 (2014).

[89] *See id.* at 619–620.

[90] HAMID ALGAR, MIZRA MALKUM KHAN: A BIOGRAPHICAL STUDY IN IRANIAN

visited London several times.[91] During the last months of his stay in Paris, he wrote an essay that was published a few years later in Iran under the title "The One Word" (1874).[92] Amazed with the developments in Europe, in particular France, he constantly pondered about the secret of achieving such developments.[93] He came up with an answer that explained the root cause for the material and intellectual progress in the European countries. The answer was embedded in one word—the "law."[94] Compared with a Muslim country like Iran, a country like France was developed because everyone, even the most senior official, obeyed the law.[95] Indeed, due to the rule of law, no one, including the head of the country, had any absolute and arbitrary power.[96] A few years before his death, Mirza Yusuf Khan wrote a letter to Crown Prince Mozaffaredin Mirza in which he criticized the despotic government, and the corrupt royal court.[97] He asked the prince to help create the rule of law, and to provide for liberty and equality in the country (which at that time used to be called Persia).[98] Mirza Yusuf Khan went so far as to warn the Qajar dynasty that if it did not voluntarily bring about a government that was subject to the rule of law, history would impose it upon the ruling elites very soon.[99]

The perception of people like Mirza Yusuf Khan was that the progress they observed in Europe was due to the rule of law, as against the arbitrary rule of the governing authorities.[100] Therefore, they took action to establish such a system by drafting a constitution on the model of the Western constitutions, such as the French one.[101] They had realized that the despotic system of government was one of the main root causes of various institutional problems, and the general

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MODERNISM 139–141 (1973).

91 *Id.* at 139.

92 *Id.*

93 *See id.* at 139–141.

94 *Id.* at 139.

95 *See* Ricardo Gosalbo-Bono, *The Significance of the Rule of Law and Its Implications for the European Union and the United States*, 72 U. PITT. L. REV. 229, 236, 285 (2010) (describing the difference between the Western, philosophical rule of law and the Muslim worldview).

96 *See* YUSUF KHAN MUSTASHARODAWLA TABRIZI, YEK KALAMEH, Introduction (Tehran: Ketabkhaneh Melli); s*ee also* Gosalbo-Bono, *supra* note 95, at 236, 239; *see also* Rainer Grote, *Chapter 13 the German Rechtsstaat in a Comparative Perspective*, 38 IUS Gentium 193, 201, 205 (2014) (describing the rule of law in France in the latter half of the nineteenth century).

97 TOURAJ ATABAKI, AZERBAIJAN: ETHNICITY AND THE STRUGGLE FOR POWER IN IRAN 21 (rev. ed. 2000).

98 *Id.*

99 *See id.* at 20–21; s*ee also* YUSUF KHAN MUSTASHARODAWLA TABRIZI, YEK KALAMEH WA YEK NAMEH 81–90 (S.M.S. Feyz ed., 2003).

100 *See* Gosalbo-Bono, *supra* note 95, at 261, 298.

101 *See* Ahmed & Ginsburg, *supra* note 88, at 631, 653.

backwardness of the country.[102] Accordingly, the very concept of "rule of law" was appealing to them.[103] In other words, they had a negative approach to law, rather than a positive one. That is, they advocated for the rule of the law because it could help them eliminate despotism.[104] The content of the law, which had to be determined by a positive approach, did not apparently seem important to them.[105] For instance, having concluded that European educational, cultural, social and political progress was due to the rule of law, Mirza Yusuf Khan went on to say that all the principles of law stated in European statutes already were proclaimed twelve hundred years earlier by the Prophet Mohammad (pbuh).[106] Therefore, he supported the idea of importing, in a sense, the idea of a written constitution and enacting corresponding statutes while instantiating them with the content of Sharia rulings—the content of the Prophet's commands and prohibitions.[107]

This opinion was in fact shared by almost all Muslims who attempted to establish constitutionalism and the rule of law in their respective countries.[108] On this basis, almost all Muslim constitutionalists made attempts to adopt the Western idea of the rule of law, and endeavored to instantiate constitutional principles and the statutes with the substance of Sharia.[109] Article 2 of the Supplement of the Constitution of Iran (1907), for instance, stated that, "[a]t no time must any legal enactment of the Sacred National Consultative Assembly . . . be at variance with the sacred rules of Islam . . . ."[110] This requirement was indeed part of the demands of those who believed that the political and administrative systems could be well regulated by Sharia rulings and, hence, constitutionalism should be called Shariatism (*Mashru`ya*).[111] Similarly, Article 64 of the Constitution of Afghanistan

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[102] *See id.* at 618–20; *see also* G.H. ZARGARINIJAD, RASA'IL MASHRUTIAYAT 17–18 (2d ed. 1998).

[103] *See* Esmaeili, *supra* note 5, at 329–30, 333.

[104] *See* Emad al-Ulama Khalkhali, *Resaleye Ma'na wa Fawa'ed Mashruteh*, *in* MAKTUBAT WA BAYANAT SIYASI WA EJTEMA'I 'OLAMAYE SHI'E 165 (M.H. Rajabi ed., 2011); F. Adamiyat, ANDISHEYE TARAQQI WA HOKUMATE QANUN 191–92 (2d ed. 1977); s*ee also* Ahmed & Ginsburg, *supra* note 88, at 619–20, 652.

[105] Esmaeili, *supra* note 5, at 348, 352–53.

[106] *Id.* at 330–31, 340–41, 351; *see also* MUSTASHARODAWLA, supra note 96, at 14–15. Naini, the most important constitutionalist theorist of Shia scholars, went so far as to assert that Europeans had adopted the principles of civilization and politics from Islamic sources. *See* MIRZA MOHAMMAD HUSSEIN NAINI, TANBIH AL-OMMAH WA TANZIH AL-MELLAH 35–36 (S.J. Wara'i ed., Qom: Bustan Ketab 2003) (1909).

[107] *Id.* at 342, 348.

[108] *Id.* at 336, 340–41.

[109] *See* ADBULLAHI AHMED AN-NA'IM, TOWARD AN ISLAMIC REFORMATION: CIVIL LIBERTIES, HUMAN RIGHTS, AND INTERNATIONAL LAW 69–70 (1990).

[110] THE SUPPLEMENTARY FUNDAMENTAL LAWS OF OCTOBER 7, 1907 [IRANIAN CONSTITUTION] 1906 art. 2, http://fis iran.org/en/resources/legaldoc/iranconstitution.

[111] *See* Ahmed & Ginsburg, *supra* note 88, at 620–21, 667.

(1964) also required that, "[t]here shall be no law repugnant to the basic principles of the sacred religion of Islam . . . ."[112] The subsequent 1980 Iranian and 2004 Afghan constitutions also embraced the same or stronger provisions.[113] Item (A) of Article 2 of the 2005 Iraqi constitution also states that, "[n]o law may be enacted that contradicts the established provisions of Islam."[114] This line always has been followed within the legislative stream of almost all Muslim countries, inclusive, however, of each nations own intricacies and controversies.[115] The requirement that the law align with Shari thus expressed in those constitutions is usually justified as the wish of the people.[116]

Given the characterization of modern law mentioned in the previous section, the question remains whether or not the substance of a constitution and laws adopted and enacted by Muslim polities can consist of a collection of rules already included in the corpus of Islamic law. Put differently, are a Sharia compliant constitution and Sharia compliant laws still instances of modern law? What would be the impact or consequences of Sharia compliant laws for a constitutional system?

In order to answer these questions, it is necessary to examine the main tenets of Sharia along the lines of the four major characteristic features of modern law.

First, in respect of the aim, Sharia is in place to set-out the rules designating the duties of believers towards God with the purpose of gaining happiness in the afterlife.[117] In this sense, Sharia and Islamic jurisprudence (i.e., fiqh) signify the same meaning; and therefore, they are interchangeable. It should be emphasized that the subject of Sharia/fiqh is the acts of the mukallafs (i.e., those who adhere to Islam while they are rational, and according to fiqh, have reached the age of majority). Such acts must fall within the limits determined by God.[118]

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[112] Assasi Qanun [CONSTITUTION] Oct. 1, 1964, art. 64 (Afg.).

[113] *See* THE CONSTITUTION OF THE ISLAMIC REPUBLIC OF AFGHANISTAN Jan. 3, 2004, pmbl., art. 3; QANUNI ASSASSI JUMHURII ISLAMAI IRAN [THE CONSTITUTION OF THE ISLAMIC REPUBLIC OF IRAN] 4 [1980].

[114] Article 2, Section 1, Dustūr Jumhūrīyat al-'Irāq [The Constitution of the Republic of Iraq] of 2005.

[115] *See* Matthew Gray, *Islam in the Iraqi and Afghan Constitutions: A Comparative Perspective*, 19 GLOBAL CHANGE, PEACE, & SECURITY 1, 29 (2007); Clark B. Lombardi, *Islamic Law As a Source of Constitutional Law in Egypt: The Constitutionalization of the Sharia in a Modern Arab State*, 37 COLUM. J. TRANSNAT'L L. 81, 87, 103, 111 (1998) (demonstrating this principle in Egypt).

[116] *See* Nimer Sultany, *Religion and Constitutionalism: Lessons from American and Islamic Constitutionalism*, 28 EMORY INT'L L. REV. 345, 368–69 (2014).

[117] *See* Sadiq Reza, *Islam's Fourth Amendment: Search and Seizure in Islamic Doctrine and Muslim Practice*, 40 GEO. J. INT'L L. 703, 710–711 (2009).

[118] *See, e.g.*, N. MAKARIM SHIRAZI, DA'IRAT AL-MA'ARIF FIQH MUQARIN 32–40 (2006); A. JAVADI AMOLI, WELAYAT FAQIH 56 (1999); M. GHAZALI, EHYA 'OLUM AL-DIN 288–94 (1981); ALI B. HUSSEIN MUHAQIQ KARAKI, 1 JAMI' AL-MAQASID FI SHARH AL-QAWA'ID 12 (2008).

Second, in terms of the authority to make rules, only those persons who are qualified enough to infer Sharia/fiqh rules from the relevant authenticated sources are authorized to do so.[119] The required qualification of course depends on the school of law, or madhhab.[120] The minimum qualification is that only those who have mastered the Arabic language, and have received extensive training in various Islamic studies, may be considered as appropriate lawmakers in this regard.[121] In any case, Sharia may be called a jurist made, or more precisely, a jurisprudent made law.[122]

Third, as far as the sources for deriving Sharia rulings are concerned, there are a limited number of authenticated sources. It may be said that all madhhabs (i.e., Islamic schools of law) agree on the Quran and Sunnah as being the primary sources of Sharia/fiqh.[123] They differ on the other sources, which include ijma', 'aql, qiyas, masalih mursalah, istihsan, etc. Although, in the absence of explicit rulings in the primary sources, or because of vague references, Muslim jurists resort to a certain rational or conventional reasoning, such as consensus or analogy in order to provide the individual or the society with the required ruling, such reasoning (i.e., resorting to extra scriptural sources and methods) may not contravene the basic principles and rules of the faith entrenched in the sacred texts (i.e., the Quran and Sunna). In other words, the sources of Sharia/fiqh are seriously limited and in principle textual.

Fourth, concerning the fiqh reasoning or the logic of Sharia—given the discussions put forward on the objective of this normative system, the fiqh sources, and the eligible persons who may issue the relevant rulings—it is evident that such reasoning or logic should be, and in fact is, a textual and faith oriented system of reasoning. A fully-fledged rational, secular method for amending the existing Sharia/fiqh rules or inferring new ones is inherently problematic.

IV. CONUNDRUM

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[119] *See* Asifa Quraishi-Landes, *Islamic Constitutionalism: Not Secular. Not Theocratic. Not Impossible*. 16 RUTGERS J. L. & RELIGION 553, 555, 557–58 (2015).

[120] *See, e.g.*, A. RIZWANI, USUL FIQH MUQARIN (2008); M.I. JANNATI, MANABI'I IJTIHAD AZ DIDGAHI MAZAHIB ISLAMI (1991); *see also* Ramin Moschtaghi, *The Relation Between International Law, Islamic Law and Constitutional Law of the Islamic Republic of Iran—A Multilayer System of Conflict?* 13 MAX PLANCK Y.B. UNITED NATIONS L. 375, 383, 385 (2009) (describing different madhhabs).

[121] *See* Liaquat Ali Khan, *Free Markets of Islamic Jurisprudence*, 2006 MICH. ST. L. REV. 1487, 1522, 1552–53, 1557–58 (2006).

[122] *See* NOEL J. COULSON, A HISTORY OF ISLAMIC LAW 1–3 (reprt. 2011) (1964).

[123] *See, e.g.*, W.B. HALLAQ, A HISTORY OF ISLAMIC LEGAL THEORIES 1–81 (1997); W.B. HALLAQ, THE ORIGINS AND EVOLUTION OF ISLAMIC LAW 29–78, 102–21 (2005). *Cf.* Delfina Serrano Ruano, Book Review, 15 J.L. & RELIGION 379, 379 (2000); Mohammad Hassan Khalil, Book Review, 69 J. NEAR E. STUD. 153, 153 (2010).

There are several types of problems that may arise if Sharia were to comply with modern law. In particular, the relationship of a Sharia compliant legal system with basic citizens' rights, on one hand, and with a democratic legislature, on the other.

The concept and institution of modern rights have actually been adopted and entrenched in the newly enacted constitutions of Muslim countries. For instance, Chapters 2 and 3 of the Afghan and Iranian constitutions, respectively, enumerate the rights of the people.[124] Nevertheless, almost all of the provisions stated in these chapters contain a restriction that requires the relevant right to be defined in a statute or stay within the limits of Islamic rules.[125] To be sure, under the ubiquitous compliance principle prevalent among most Muslim constitutionalists, any law passed by the legislature must not contravene Islamic standards or rulings.[126] Therefore, all rights and liberties entrenched in a constitution by default have to be limited to Sharia. It seems that Sharia/fiqh, which is intended to be a moral system, as the Prophet of Islam was appointed by God to complete the moral virtues among Muslims,[127] can hardly accommodate modern rights, which are amoral entities readily prone to be used in both moral and immoral ways.

As regards a democratic legislature (i.e., a parliament, which is usually called the Islamic national assembly in most Muslim countries), one should be reminded that such an institution must not be merely an assembly of people elected by a nation in a free and fair election, which is of course a necessary condition for its formation. A democratic legislature should also be able to enact any rule that it finds necessary in order to provide for and protect the individual rights and the public interests of the citizenry regardless of whether such rights or interests are mutually compatible or incompatible with an ideological extralegal standard. The Islamic national assemblies do not meet the latter characteristic, as their rulemaking function is limited by the compliance requirement.[128]

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[124] *See* THE CONSTITUTION OF THE ISLAMIC REPUBLIC OF AFGHANISTAN Jan. 3, 2004, arts. 22–70; QANUNI ASSASI JUMHURII ISLAMAI IRAN [THE CONSTITUTION OF THE ISLAMIC REPUBLIC OF IRAN] 3 [1980].

[125] *See* THE CONSTITUTION OF THE ISLAMIC REPUBLIC OF AFGHANISTAN] Jan. 3, 2004, arts. 35, 45, 54, 63; QANUNI ASSASI JUMHURII ISLAMAI IRAN 1–4 [THE CONSTITUTION OF THE ISLAMIC REPUBLIC OF IRAN] [1980].

[126] *See* 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 733, 734, 739 (2013) (explaining how the laws passed in Arab legislatures should comply with the standards set forth in Sharia law).

[127] *See id.* at 734, 739, 751, 753. The Prophet of Islam is reported to have said: "I am appointed to complete the moral virtues." AHMAD B. HUSSEIN BAYHAQI, 10 AL-SUNAN AL-KUBRA 323 (3d ed. 2003).

[128] *See* Clark B. Lombardi, *Designing Islamic Constitutions: Past Trends and Options for a Democratic Future*, 11 INT'L J. CONST. L. 625, 627, 640 (2013).

The limits that Sharia/fiqh rules and standards impose on the national laws and regulations inevitably impose all characteristic features of Sharia/fiqh upon them. These rules and standards are of a moral nature while legislative acts and constitutional rights are of an amoral nature. Moreover, the diverse wishes and aspirations of various groups and individuals within a pluralistic polity (including Muslim countries) may not be actualized or pursued unless a non-ideological/non-moral context or framework is provided for, within which those wishes and aspirations are able to co-exist.[129]

On this basis, if a Sharia/fiqh compliant legal system wishes to accommodate the basic rights of its citizens, and provide for a democratic legislature, it must be moral and amoral at the same time, which is of course impossible.[130] Nevertheless, it should be emphasized that no Muslim polity is willing to deny the necessity of providing for and protecting basic rights and democracy.[131] Therefore, what can be done to tackle the problem: a Sharia/fiqh compliant legal system that accommodates both Islamic and modern legal requirements?[132]

CONCLUSION

Various answers may be put forward to resolve this challenging conundrum. This Article concludes by examining three answers: a short one, a long one, and a longer one.

The short answer is that one needs to distinguish between two normative levels. At one level, the Sharia rules are viewed as "general values," and at another level, the national laws and regulations are viewed as "practical norms." One may say that the level of general values is the macro class and the level of practical norms is the micro class. The micro normative system is supposed to be the practical application of the macro normative system.[133] In this way, only general principles of Sharia/fiqh

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[129] *See* Lombardi, *supra* note 128, at 640.

[130] *See* Intisar A. Rabb, *"We the Jurists": Islamic Constitutionalism in Iraq*, 10 U. PA. J. CONST. L. 527, 528–529, 542–543, 548, 554 (2008) (demonstrating the difficulty of having a democracy in an Islamic culture).

[131] *See, e.g.*, Article 2, Section 1, Dustūr Jumhūrīyat al-'Irāq [The Constitution of the Republic of Iraq] of 2005 (explaining that the protection of rights and democracy is important regardless of how Sharia law is incorporated).

[132] Various attempts have been made to argue for either the possibility or impossibility of such an enterprise. *See, e.g.*, A.A. AN-NA'IM, ISLAM AND THE SECULAR STATE: NEGOTIATING THE FUTURE OF SHARI'A 1–45 (2008) (describing the possibility from a rights-based and democratic point of view); W.B. HALLAQ, THE IMPOSSIBLE STATE: ISLAM, POLITICS, AND MODERNITY'S MORAL PREDICAMENT (2013) (describing the impossibility from a postmodern perspective that seems to demonize the Western experience of modernity and nation-state, and to romanticize Islamic pre-modern history); *see also* Asifa Quraishi-Landes, *The Sharia Problem with Sharia Legislation*, 41 OHIO N.U. L. REV. 545, 554–56 (2014).

[133] *See* Will Rhee, *Law and Practice*, 9 LEGAL COMM. & RHETORIC: JALWD 273, 283–

are taken into consideration in the translation or actualization process, which gives the legislature and the judiciary some room to maneuver.[134] Nevertheless, the problem still remains, especially in certain important cases such as the basic right to freedom of expression, conscience or the right of all citizens (including non-Muslims) to be elected to a public office.

A long answer is that Sharia/fiqh should be interpreted in light of the fundamental rights and universal requirements of a modern democratic state; in particular, a democratic legislative system should be embraced.[135] This answer, however, creates many complicated problems for the faithful followers of Sharia/fiqh. That is, many traditional Sharia/fiqh rules, such as those confirming inequalities between jurisprudents and non-jurisprudents, men and women, Muslims and non-Muslims, etc. must be abandoned and replaced by modern legal and political norms.[136]

Alternatively, a longer answer is that an interpretation of Sharia/fiqh is put forward according to which Sharia/fiqh shrinks from dealing with "the political." No doubt, a part of "the political" consists of rights and democracy. This strategy in fact makes the boundaries of Sharia contract so much that it includes exclusively rules and commands relating to "the moral."[137] In order for these rules and commands to be practicable, they are in need of a legal and political framework that provides for the co-existence of different, even conflicting, moral systems.

Last but not least, the third answer, in its turn, gives rise to profound questions as to the nature of religion[138] and, in particular, its relationship with theories of justice, which need to be dealt with separately.

84, 303–04 (2012).

[134] *See* Lombardi, *supra* note 126, at 734–35 (discussing the different ways Islamic countries have incorporated Islamic norms in their constitutions, and how the United States worked hard to prevent Islam from being the "chief source" of legislation).

[135] *See, e.g.*, A.A. AN-NA'IM, TOWARD AN ISLAMIC REFORMATION: CIVIL LIBERTIES, HUMAN RIGHTS, AND INTERNATIONAL LAW 11, 184–87 (1990) (examining the possibilities and potentials of such a system); *see* also Shaheen Sarder Ali, *Exploring New Directions in the Islamic Legal Traditions: Re-Interpreting Shari'a from Within?*, 9 J. ISLAMIC ST. PRAC. INT'L L. 9, 13–14 (2013).

[136] *See id.* at 11–12.

[137] *See, e.g.*, M. HA'IRI YAZDI, HIKMAT WA HUKUMAT (1994) (establishing a novel approach from a distinctly Shia perspective); *see also* M. Ha'iri Yazdi, *Naqdi Bar Maqaleh "Siyri Dar Mabani Vilayat Faqih,"* 1 HUKUMATE ISLAMI 224–34 (1996); M. Ha'iri Yazdi, *Guftuguhayi Khiradmandane Dar Babe Hukume Islami*, 2 HUKUMATE ISLAMI 186-91 (1997).

[138] *See generally* IMMANUEL KANT, RELIGION WITHIN THE LIMITS OF REASON ALONE (Theodore M. Greene & Hoyt H. Hudson trans., Harper and Brothers 1960) (1793) (deconstructing the pragmatic moral and political implications inherent in the notions of evil, religion and the supernatural).