Human Rights Commitments of Islamic States

Sharia, Treaties and Consensus

STUDIES IN INTERNATIONAL LAW

Paul McDonough

HUMAN RIGHTS COMMITMENTS OF ISLAMIC STATES

This book examines the legal nature of Islamic states and the human rights they have committed to uphold. It begins with an overview of the political history of Islam, and of Islamic law, focusing primarily on key developments of the first two centuries of Islam. Building on this foundation, the book studies Islamic constitutions, first mapping the relationship between Sharia and the state in terms of institutions of governance. It then assesses the place of Islamic law in the national legal order of all of today's Islamic states, before proceeding to a comprehensive analysis of those states' adherences to the UN human rights treaties, and finally, a set of international human rights declarations made jointly by Islamic states.

Throughout, the focus remains on human rights. Having examined Islamic law first in isolation, then as it reflects into state structures and national constitutional orders, the book provides the background necessary to understand how an Islamic state's treaty commitments reflect into national law. In this endeavour, the book unites three strands of analysis: the compatibility of Sharia with the human rights enunciated in UN treaties; the patterns of adherence of Islamic states to those treaties; and the compatibility of international Islamic human rights declarations with UN standards. By exploring the international human rights commitments of all Islamic states within a single analytical framework, this book will appeal to international human rights and constitutional scholars with an interest in Islamic law and states. It will also be useful to readers with a general interest in the relationships between Sharia, Islamic states, and internationally recognised human rights.

Volume 79 in the series Studies in International Law

Studies in International Law

Recent titles in this series

Revisiting the Concept of Defence in the Jus ad Bellum:
The Dual Face of Defence
Johanna Friman

The International Legal Protection of Persons in Humanitarian Crises
Dug Cubie

The International Committee of the Red Cross and its Mandate
to Protect and Assist: Law and Practice
Christy Shucksmith

The Impact of Investment Treaty Law on Host States:
Enabling Good Governance
Mavluda Sattorova

Allocating International Responsibility Between Member States and International Organisations
Nikolaos Voulgaris

Predictability and Flexibility in the Law of Maritime Delimitation, 2nd edition
Yoshifumi Tanaka

Feminist Engagement with International Criminal Law: Norm Transfer,
Complementarity, Rape and Consent
Eithne Dowds

Asylum Control and Access to Protection: Admission, Readmission
and Human Rights
Mariagiulia Giuffré

Intertemporal Linguistics in International Law: Beyond Contemporaneous
and Evolutionary Treaty Interpretation
Julian Wyatt

The Responsibility to Protect and the Failures of the United Nations Security Council
P M Butchard

The Role of Multilateral Environmental Agreements: A Reconciliatory
Approach to Environmental Protection in Armed Conflict
Britta Sjostedt

Prosecutorial Discretion at the International Criminal Court
Anni Pues

Judicial Deference in International Adjudication: A Comparative Analysis
Johannes Hendrik Fahner

For a complete list of titles in this series, see
www.bloomsburyprofessional.com/uk/series/studies-in-international-law

Human Rights Commitments of Islamic States

Sharia, Treaties and Consensus

Paul McDonough

• HART •
OXFORD • LONDON • NEW YORK • NEW DELHI • SYDNEY

HART PUBLISHING

Bloomsbury Publishing Plc

Kemp House, Chawley Park, Cumnor Hill, Oxford, OX2 9PH, UK

1385 Broadway, New York, NY 10018, USA

HART PUBLISHING, the Hart/Stag logo, BLOOMSBURY and the Diana logo are trademarks of Bloomsbury Publishing Plc

First published in Great Britain 2020

A catalogue record for this book is available from the British Library.

Library of Congress Cataloging-in-Publication data

Names: McDonough, Paul, author.

Title: Human rights commitments of Islamic states : Sharia, treaties, and consensus / Paul McDonough.

Description: Oxford, UK ; New York, NY : Hart Publishing, an imprint of Bloomsbury Publishing, 2020. | Series: Studies in international law ; volume 79 | Includes bibliographical references and index.

Identifiers: LCCN 2020035604 (print) | LCCN 2020035605 (ebook) | ISBN 9781509919703 (hardback) | ISBN 9781509943104 (paperback) | ISBN 9781509919710 (Epub) | ISBN 9781509919727 (pdf)

Subjects: LCSH: Human rights—Islamic countries. | Civil rights (Islamic law) | Human rights—Religious aspects—Islam. | Constitutional law (Islamic law) | International law (Islamic law) | International law and human rights. | United Nations.

Classification: LCC KBP2460 .M43 2020 (print) | LCC KBP2460 (ebook) | DDC 342/.167085—dc23

LC record available at https://lccn.loc.gov/2020035604

LC ebook record available at https://lccn.loc.gov/2020035605

ISBN: HB: 978-1-50991-970-3
ePDF: 978-1-50991-972-7
ePub: 978-1-50991-971-0

Typeset by Compuscript Ltd, Shannon

To find out more about our authors and books visit www.hartpublishing.co.uk. Here you will find extracts, author information, details of forthcoming events and the option to sign up for our newsletters.

To my parents and to my brother.

Acknowledgements

This book would not have been possible without the advice, mentorship, love and support of teachers, colleagues, friends and family, over a period of years. I am amazed and grateful for all the knowledge gladly imparted and all the help freely given.

The manuscript that became this book benefitted from the diligent research assistance of Sophie Gawi, who also provided valuable review and feedback on its chapters, as did Michelle Bendall (Deakin University), Dr Kim Bouwer (University of Exeter) and David L Caster. Thanks are also due to Professor Gábor Halmai, my research supervisor during the Max Weber programme at the European University Institute, and to the thematic working groups he, Professor Richard Bellamy (University College, London) and Professor Ann Thomson led there, who critiqued early drafts of research papers that eventually emerged, much improved, into this book. My PhD supervisors, Professor Rosemary Byrne (New York University, Abu Dhabi) and then Professor Neville Cox (Trinity College, Dublin), enabled me to begin this project, which Professor Cox guided through its early stages. I may now at last have begun to address the questions he first asked.

Finally, very warm thanks to Sinead Moloney and the team at Hart Publishing, for their steady, friendly support and nearly infinite patience.

The constitutions cited in this book were downloaded from the Constitute Project. UN materials are from the online UN archives. All errors, omissions and unclear statements are my responsibility alone. One error is left deliberately uncorrected, in honour of the Navajo Nation.

Contents

Introduction

In western political discourse, the phrase 'Islamic human rights' seems incongruous and 'Islamic state' evokes images of medieval brutality. Yet 26 Islamic states are now seated at the United Nations (UN) and subscribe to an emergent set of human rights norms that closely resemble the UN framework. This is visible in patterns of treaty adherence; in a set of specifically Islamic international instruments; and in Sharia itself. It may seem surprising to claim that, today, Islamic states subscribe to human rights standards that resemble global norms. Yet, given their shared roots in Judeo-Christian traditions, it might be more surprising if Islamic law and international human rights law did not also share core values such as the importance of human dignity and justice.

In the twenty-first century, constitutional reform is in process, or recently complete, in much of the territory that formed the classical Islamic empires. One key question in these debates is the degree to which constitutions should incorporate Islamic law; another is the adoption of international human rights standards. Citizens want their governments to rule according to Sharia, and to uphold the Universal Declaration of Human Rights (UDHR).[1] There is no inconsistency here. Far from associating Sharia with harsh or absolutist rule, the public mind links it with social justice and the rule of law. In principle at least, there is considerable overlap between the objectives of organisations such as the Muslim Brotherhood and those of secular democratic reformers. Islamic constitutions reflect this: the more a constitution invokes Islam, the more clauses it tends to contain that protect individual rights and liberties.[2] This book proposes a way to interpret human rights guarantees of Islamic states through a developing regional system of law that both influences and is influenced by international human rights law (as expressed in UN treaties). An Islamic state's promise to protect any internationally recognised right must be interpreted compatibly with Islamic law, international law and this Islamic international law.

To support its contention that the human rights commitments Islamic states make are largely compatible with international standards, this book reviews the constitutions and treaty commitments of those states. It isolates points where treaty adherences, reservations and objections indicate tension between

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

[2] Dawood I Ahmed and Tom Ginsburg, 'Constitutional Islamization and Human Rights: The Surprising Origin and Spread of Islamic Supremacy in Constitutions' (2014) 54 *Virginia Journal of International Law* 615.

Islamic law and international human rights law. It demonstrates that at least in terms of formal law, some of these are illusory. On some other points, more precisely stating the rules that are said to conflict might show that there is no actual conflict. A key insight is that because both international law and Islamic law incorporate some doctrinal flexibility, at a given point of tension, one might be able to bend to accommodate the other. Another is that if applying a rule of Sharia or an international norm would yield the same substantive result, then any tension is merely nominal. The 26 constitutions that proclaim an Islamic state or Islam as the state religion,[3] and these states' adherences to UN human rights treaties,[4] supply the book's main data set. The principal areas of tension that emerge upon analysis concern civil equality between men and women, especially regarding divorce, and the Islamic strictures against apostasy (the act of renouncing one's religion). Conflict between Islamic and international standards is not inevitable in these areas, but devising rules that satisfy both may require some effort.

I. BACKGROUND

By linking idealised examples of pre-modern governance, such as the caliphate, and interpretations of classical jurists to modern constitutions and international instruments, this book aims to establish how Islamic states can reconcile their Islamic duties with their participation in a basically secular international human rights regime. This presents several analytical challenges. First, both Sharia and (to an extent) international human rights law claim supremacy over any other law – if they collide, in principle neither can yield. Second, Sharia incorporates an intricate, ancient set of rules that can be understood as a human rights system – it is necessary to determine whether this system and international norms are mutually compatible. Third, Sharia was revealed, and political Islam developed, long before states existed in the modern sense – this raises the question of how Sharia affects an Islamic state's external relations and its ability to participate in an international system where all states are sovereign and, in principle, equal. Finally, since this book argues that a defining feature of an Islamic state is that it governs in accordance with Sharia, it becomes necessary to assess how Sharia enters the law of Islamic states.

Examination of these issues establishes a foundation for the main analysis of how Islamic states undertake to follow both Sharia and international human

[3] Afghanistan, Algeria, Bahrain, Brunei-Darussalam, the Comoros, Djibouti, Egypt, Iran, Iraq, Jordan, Kuwait, Libya, Malaysia, the Maldives, Mauritania, Morocco, Oman, Pakistan, Palestine, Qatar, Saudi Arabia, Somalia, Syria, Tunisia, United Arab Emirates, Yemen. This book takes no position regarding whether Palestine is a state.

[4] These include the main UN human rights treaties and the Cairo Declaration on Human Rights in Islam. The Universal Islamic Declaration of Human Rights (UIDHR) and the UDHR are also included, as aspirational documents reflecting widely agreed views of international law.

rights law. The book addresses the human rights commitments of Islamic states with reference to the Quran and the instructions of the Prophet Muhammad (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 to the present; and the constitutions, laws and treaty commitments of the Member States of the Organisation of Islamic Cooperation (OIC).[5] It proposes that three layers of human rights law bind modern Islamic states: Sharia, international treaty commitments, and a modern Islamic consensus, the latter evidenced for example by the Universal Islamic Declaration of Human Rights (UIDHR), the OIC's Cairo Declaration on Human Rights in Islam and the Arab League's Arab Charter on Human Rights. Analysing the commitments of Islamic states under the UN human rights treaties, including reservations they have entered and their treaty partners' objections thereto, the book concludes that, through a combination of Islamic law and international law, Islamic states commit to uphold a set of rights that nearly, but not completely, reflect international standards as envisaged in the UDHR.

Some observers assert that 'Islamic' states do not, maybe cannot, uphold democracy and human rights. There is evidence for such views: some governments that operate under avowedly Islamic constitutions have engaged in serious human rights abuses. 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 that do not attract criminal sanction in most countries, or disparate rights accorded to men and women, or to Muslims and non-Muslims. Yet the first of these lines of argument questionably assumes that 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 thus not possible to categorically state that either 'international law' or 'Islamic law' is incompatible with the other regarding human rights. In a particular state, both may operate simultaneously, and it may not be immediately clear which displaces the other if they conflict. Only by analysing the interactions between three paradigms of law that apply to an Islamic state – Sharia, international law and the state's own constitution and laws – is it possible to see how to resolve a specific conflict between a state act and an individual right.

Although this book is a work of international and comparative law, it aims to acknowledge and accommodate Islamic law. If international lawyers do not engage with the basic reference frame of their Islamic counterparts, no meaningful dialogue is likely. This book therefore presumes the truth of the basic Islamic narrative: God exists, the Quran is His literal Word, and the Prophet

[5] Originally the Organization of the Islamic Conference, founded in 1969, re-launched and renamed in 2008.

Muhammad (peace be upon him) was the last Messenger of God, who received ongoing revelation and divine guidance that has not been available to any person since. Sharia, the way of God, is comprehensive and infallible. Islamic law, by contrast, is a best attempt of humans to understand Sharia and apply it to life on earth. This book aims 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).[6]

A. Methodology

This book investigates how Islamic and international law shape the commitments of modern Islamic states to democracy and human rights. This requires a hybrid approach to 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 apply values, vocabulary and reasoning that would seem familiar to an Islamic jurist. The focus is as much as possible on positive legal obligations, drawn for example from constitutions, treaties, legislation, the Quran and the *sunna* (the acts and teachings of the Prophet Muhammad). Nevertheless, in searching for compatibility between fields of law that proceed from divergent first principles (the supremacy of God's Word versus the sovereignty of states), it is also necessary to engage with Islamic texts and analytical methods, and occasionally with philosophical or theological justifications of law.

Some authors seeking to bridge the gap between traditionalist Islam and modern international human rights standards propose revisiting the basic assumptions of Islam, essentially recasting the religion on a philosophical rather than a textual basis, as a set of principles to be interpreted and applied to each generation. Instead, this book takes the words of the Quran and the Prophet's *sunna*, as contained in reports known as *ahadith*, literally, as sources of law.[7] Adopting these assumptions and applying classical Sunni doctrine and methodologies, the book uses the interpretive flexibility offered by both Islamic law and international human rights law to seek mutually compatible substantive rules. It examines the human rights commitments of 'an' Islamic state, balancing

[6] 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.

[7] 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.

theories and examples of ideal states with analysis of the constitutions, laws and treaty commitments of modern states. It rests on three views of Islamic states: the examples of pre-modern Islamic governance, such as the caliphate; the commitments to Islamic values and human rights visible in the constitutions of modern Islamic states; and the international undertakings of those 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 similar values in modern constitutions and international instruments.

Research at the intersection of 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 – the Quran and the *sunna* of the Prophet – have gained such respect that their commentaries are for practical purposes if not sources, then unassailably correct restatements of 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* (external relations), the rulings he reported quickly became the orthodox understanding of this sub-field. Similarly his teacher, Abu Hanifa, the ascribed founder of the oldest of the four main Sunni schools of jurisprudence, became seen even in his own lifetime as in effect a source as well as an expositor of law. In the twentieth 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. The result is somewhat analogous to the authority afforded to statements of eminent jurists in international law,[8] but there is no equivalent in international law to the degree of authority afforded the opinions of the most revered Islamic jurists. As a result, especially with source materials relating to Islamic law, this book at times treats 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, implied in the Prophet's statement that a judge is rewarded for faithfully seeking a correct ruling, and rewarded twice for reaching a correct ruling.[9] This effectively means 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 who is correct: in this sense, no *mufti* is mistaken.[10] The resulting pluralism emerges into the Islamic law of states and human rights in two ways. First, beyond the revealed texts and a relatively few universally agreed rules, opinions regarding the content of Islamic law tend to cluster around the teachings and

[8] Statute of the International Court of Justice art 38(1)(d).

[9] Kamali (n 7) 320 (quoting a *hadith* recorded by Abu Dawud, book 24, no 3567 in the English translation). In general, a 'ruling' simply means, an answer to a question of Islamic law.

[10] A significant responsibility of governing authorities in an Islamic state is to develop institutional structures to ensure consistency in the application of rulings that apply to public law.

methods of leading ancient scholars. *Muftis* are free to follow any correctly-derived past ruling, or to devise their own, but less qualified jurists usually must follow the rulings of a particular school of jurisprudence. Disagreement is still possible even within a school, in which case a decision maker must choose which rulings best fit the case at hand. Second, as Sharia provides 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* (the community of Muslims), on the state's application of the law. This book takes an eclectic approach to Islamic law, raising points from the proofs as well as from among principles and rulings of diverse schools of jurists. It discusses Islamic law from a Sunni point of view,[11] but also sometimes cites scholars from the Shia tradition.

The Member States of the OIC whose constitutions declare an Islamic state or Islam as the state religion, are the study set for this book. The remaining OIC states are not studied in detail, as they do not present 'Islamic' constitutions in this sense. Out of the 57 OIC constitutions (including the draft constitutions of Libya, Somalia and Yemen), 25 proclaim a secular state or otherwise explicitly disavow any state religion.[12] A further five do not address the point.[13]

[11] Jurisprudence is ornate and highly developed in both Shia and Sunni Islam, but they are analytically quite distinct. It might be possible to build an approach to human rights law around both traditions simultaneously, but that would need an exploration of theology and legal philosophy that is well beyond the scope of this book.

[12] 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); Constitution of Bangladesh (2014) art 8(1) (secularism is a fundamental principle of the state); Constitution of Benin (1990) (art 23 on freedom of religion refers to 'the secularity of the state'); Constitution of Burkina Faso (1991, amended 2015) art 31 ('secular State'); Constitution of Cameroon (1972, amended 2008) art 1(2) (secular state); Constitution of Chad (2018) art 1 (secular state); Constitution of Cote d'Ivoire (2016) art 49 (secular state); Constitution of Gabon (1991, amended 2011) art 2 (secular state); Constitution of The Gambia (1996, amended 2018) art 100(2)(b) (forbidding the National Assembly from passing a bill to establish a state religion) (a similar provision appears in the 2019 Draft Constitution as art 151(2)(b)); Constitution of Guinea (2010) art 1 (secular state); Constitution of Guinea-Bissau (1984, amended 1996) art 1 (secular state); Constitution of Guyana (1980, amended 2016) art 1 (secular state); Constitution of Kazakhstan (1995, amended 2017) art 1(1) (secular state); Constitution of Kyrgyzstan (2010, amended 2016) art 1 (secular state); Constitution of Mali (1992) art 25 (secular state); Constitution of Mozambique (2004, amended 2007) art 12(2) ('The lay nature of the State rests on the separation between the State and religious denominations'); Constitution of Niger (2010, amended 2017) art 3 (Niger's 'fundamental principles' include 'the separation of the State and of religion'); Constitution of Nigeria (1999, amended 2011) art 10 (state religion forbidden at federal or state level); Constitution of Senegal (2001, amended 2016) art 1 ('The Republic of Senegal is secular'); Constitution of Tajikistan (1994, amended 2016) art 1 (secular state); Constitution of Togo (1992, amended 2007) art 1 (secular state); Constitution of Turkey (1982, amended 2017) art 2 (declaring a 'secular and social state'); Constitution of Turkmenistan (2008, amended 2016) art 1 (declaring a 'secular state'); Constitution of Uganda (1995, amended 2017) art 7 ('Uganda shall not adopt a State religion').

[13] Lebanon, Sierra Leone, Sudan, Suriname and Uzbekistan. Sudan's 2005 constitution described the country as 'multi-religious', Interim National Constitution of Sudan (2005) art 1(1), but the current 2019 Constitution is a specifically transitional document that does not address questions of Islamic governance.

Indonesia's constitution declares that monotheism is a basis of the state.[14] The remaining 26 constitutions formalise Islam as the state religion or a governing principle.[15] Of these, 15 are in North Africa (including Mauritania), the Horn of Africa and the Arabian Peninsula. Most of the rest lie within a constitutionally diverse but overwhelmingly Islamic super-region, stretching 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, in this book the terms generally refer simply to these states and their constitutions.

The constitutions of Islamic states describe how their international commitments enter the national legal order. Those commitments are spelled out in UN and regional human rights treaties and in declarative instruments such as the UDHR, the UIDHR and the Cairo Declaration, a 1990 statement of the OIC's Conference of Foreign Ministers. This book analyses the adherence of Islamic states to the UN human rights treaties, especially the reservations they have entered against those treaties, and the objections of treaty partners thereto. The declarative instruments are discussed as aspirational documents reflecting widely held views of human rights law. A regional treaty, the Arab

[14] Constitution of Indonesia (1945, amended 2002) art 29(1).

[15] Constitution of Afghanistan (2004) art 1 (declaring an 'Islamic Republic'), art 2 (Islam is the state religion); Constitution of Algeria (1989, amended 2016) art 2 (Islam is the state religion); Constitution of Bahrain (2002, amended 2017) art 1a (declaring an 'Islamic Arab State'), art 2 (Islam is the state religion); Constitution of Brunei-Darussalam (Brunei) (1959, amended 2006) art 3(1) (Islam is the 'official religion'); Constitution of the Comoros (2018) art 97 ('Islam is the State religion'); Constitution of Djibouti (1992, amended 2010) art 1 (Islam is the state religion); Constitution of Egypt (2014, amended 2019) art 2 (Islam is the state religion); Constitution of Iran (1979, amended 1989) art 1 (declaring an 'Islamic Republic'), art 12 (Islam is the 'official religion'); Constitution of Iraq (2005) art 2 First (Islam is the state religion); Constitution of Jordan (1952, amended 2016) art 2 (Islam is the state religion); Constitution of Kuwait (1962) art 2 (Islam is the state religion); Draft Constitution of Libya (2016) art 8 (Islam is the state religion); Constitution of Malaysia (1957, amended 2010) art 3 (Islam is the state religion); Constitution of the Maldives (2008, amended 2018) art 2 (the Maldives is 'based on the principles of Islam'), art 10(a) (Islam is the state religion); Constitution of Mauritania (1991, amended 2017) art 1 (declaring an Islamic Republic), art 5 (Islam is the state religion); Constitution of Morocco (2011) art 3 (Islam is the state religion); Basic Statute of Oman (1996, amended 2011) art 2 (Islam is the state religion); Constitution of Pakistan (1973, amended 2018) art 1(1) ('the Islamic Republic of Pakistan'), art 2 (Islam is the state religion); Basic Law of Palestine (2003, amended 2005) art 4(1) ('Islam is the official religion'); Constitution of Qatar (2003) art 1 (Islam is the state religion); Basic Law of Saudi Arabia (1992, amended 2013) (Islam is the state religion; the Quran and the Prophet's sunna are the constitution); Draft Constitution of Somalia (2012) art 2 ('Islam is the religion of the State'); Constitution of Syria (2012) art 3 ('The religion of the President of the Republic is Islam'); Constitution of Tunisia (2014) art 1 (Islam is the state religion); Constitution of the United Arab Emirates (UAE) (1971, amended 2009) art 7 ('Islam is the official religion'); Draft Constitution of Yemen (2015) art 2 ('Islam is the religion of the State'). Although the Constitution of Bangladesh designates Islam as the state religion, it also states that secularism is a fundamental principle of the state and contains no provisions to incorporate Islamic law into national law or state structures. Constitution of Bangladesh (2014) arts 2A, 8(1). Constitutional amendments relating to how to structure the parliament and its relationship to the executive have been under consideration in Somalia since 2016, but have not yet been formally proposed for enactment. Syria's draft constitution of 2017 does not establish an Islamic state, nor Islam as the state religion. Due in part to uncertainty over whether this draft constitution will take effect, the 2012 Constitution is analysed here instead, and Syria is treated as an Islamic state.

Charter on Human Rights, further illustrates an Islamic understanding of human rights. These instruments are especially important in understanding the human rights commitments of Islamic states that are not party to all the UN human rights treaties. The UIDHR and the Cairo Declaration 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 declarations are read from the point of view of Islamic rather than international legal principles, they can reach substantive rules that closely resemble international norms. The result is to enable analysis via a three-layer system of law that regulates the human rights commitments of Islamic states, in varying degrees depending on the state's constitution: Sharia, treaties and consensus among Islamic states.

B. Plan of Chapters

This book is arranged around two main themes: how Islamic states integrate Islamic law and international law into their national legal orders, and how those states bind themselves in law to uphold internationally recognised human rights. This requires a foundation of history, law and political theory. The next three chapters present the history of the first Islamic state, from the Prophet's governance to the end of the caliphate; Islamic law and its relationship with international law, particularly human rights law; and the development of Islamic state theory during and since the Abbasid caliphate. The rest of the book analyses the legal regimes that determine the obligations Islamic states incur when they commit to uphold specific rights. Chapters four and five explore how Islamic constitutions apply Sharia in structuring institutions of government, and in integrating Islamic law into legislation and court systems. Chapter six details Islamic states' engagement with the UN human rights system, in terms of adherences to treaties, reservations entered against those treaties, and treaty partners' objections to those reservations. Finally, chapter seven examines the international Islamic instruments that complete the system of law that governs the human rights commitments of Islamic states, and applies the components of that system – Sharia, treaties and international Islamic consensus – in tandem to suggest ways to resolve apparent incongruities between Islamic and international understandings of human rights.

Chapter one tells the history of the first Islamic state, from the first revelations of Sharia to the Prophet until the end of the last caliphate in 1924. It first outlines the development of the Islamic polity from its genesis in the revelations the Prophet received in Mecca to the end of the Prophet's life, emphasising the transition from an underground sect to the status of a new, theocentric regional power. The second part of the chapter examines the establishment of the caliphate under the leadership of the first four, Rashidun (rightly guided) caliphs: the Prophet's Companions Abu Bakr, Umar, Uthman and Ali. The Rashidun

caliphate is the archetype of Islamic governance. These caliphs' devotion to Sharia and the Prophet's legacy was beyond question. They demonstrated how to apply Sharia to governance, and built an undeniable world power. The last part of the chapter relates the history of the imperial, hereditary caliphate that followed. Caliphs from the Umayyad, Abbasid and Ottoman families reigned for more than a millennium. During periods of calm between ongoing civil strife, the Umayyad caliphs integrated the Islamic religion and sophisticated bureaucratic models taken from the Byzantine and Sasanian empires into the structures of the state. The examples and expectations their governance set grounded the theories of Islamic rule that began to evolve during the early Abbasid caliphate and that continue to develop today.

Chapter two introduces Islamic law, characterises its relationship to international law and relates these to human rights. The chapter first presents an overview of the core proofs and principles needed to understand how Islamic law is constructed and develops. It focuses on how the law emerges from the Quran and the ways (*sunna*) of the Prophet, then on the interpretive methodologies of the *ulama* (scholar-jurists), which form the basic toolkit of Sunni jurisprudence (*fiqh*), and some of the principles the *ulama* developed to guide their rulings. The foremost such guide is the *maqasid al-Sharia*, the purposes of the law: protection of life, religion, family, intellect and property; when faced with alternative possible rulings, a jurist should choose the one that best serves these ends. After introducing *fiqh*, the chapter turns to the relationships between Islamic law, international law and human rights. It examines the international aspects of Islamic law itself, starting with *siyar*, the classical Islamic law of external relations. *Siyar* influences human rights, predominantly through regulation of *jihad* and of the treatment of individual non-Muslims. The chapter gives a short overview of the UN human rights treaty regime, then compares how human rights are understood in Islamic law and in international law.[16] It finds considerable compatibility both in the rights themselves and in underlying principles of human dignity, equality and freedom.

Chapter three explores the ideology of Islamic governance. It focuses on Islamic state theory, from the jurists of the classical caliphate through modern Islamists until the emergence of Islamic constitutions and the participation of Islamic states in the international system, particularly UN human rights treaties. The first part presents legal theories that developed in the Abbasid era to justify rule by the caliph, or in the caliph's name, and that balanced the authority of the government against the role of the *ulama* as the keepers of the law. The second part of the chapter discusses the ideas of political Islam that grew as the Ottoman caliphate waned, and developed into a competition of ideas

[16] The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families and the International Convention for the Protection of All Persons from Enforced Disappearance are not discussed, because no states party have entered reservations that refer to Islamic law.

among Islamic reformers that pits revivalists advocating governance according to the original Islamic texts versus modernists who would recast Islamic governance in terms of broad social principles. The part then briefly outlines the post-colonial proliferation of Islamic states, highlighting how their constitutions adapted the ideas of Islamic jurists and political theorists. In its final part, the chapter shows how the classical Islamic law of external relations, *siyar*, and the examples set by the Prophet and the Rashidun caliphs laid the conceptual groundwork for Islamic states to participate in the international system of states, which presents an opportunity to re-establish a common understanding of Islam and human rights across the territories of the former caliphates.

Against the background presented in the first half of the book, the next two chapters analyse the integration of Islamic law into national legal orders. Chapter four relates the ideals of Islamic governance, derived from the proofs of law and the writings of theorists, to constitutional distributions of powers across branches of government and to the rights of citizens to select leaders and participate in their own government. The chapter first summarises the principles of Islamic governance that derive from classical jurisprudence and historical examples, the most important of which are rule by consent, just rule and rule in consultation with the people. The second part confronts constitutionalism – how can a constitution be supreme, when Sharia is supreme? – and means of choosing political leaders, arguing that Islamic law can accommodate written constitutions and modern democratic forms. The third part addresses a more challenging issue, dividing the governing power. Beyond splitting religious from temporal authority or delegating executive power, classical jurists did not contemplate separation of powers or creating law through legislation rather than by edict. In its final part, the chapter assesses the role of courts and similar review bodies in policing separations of powers and guarding constitutions and Islamic law against incursions by the legislature or the executive. Although in a new form, this reprises the role of the *ulama* in ensuring the caliph's or sultan's fealty to Sharia in their administration of public law.

Chapter five studies how the constitutions of Islamic states constrain national law to adhere to Sharia, through constitutional clauses or code provisions that assign Islamic law a place in the legal order. This entails requiring legislatures to take Sharia into account when enacting laws, or instructing courts to apply Islamic law directly under specified conditions. The chapter first analyses how states accomplish this through clauses that require legislation to be grounded in Islamic law, or not to transgress its bounds. The second main part of the chapter examines how some Islamic states assign to the judiciary a similar competence, either requiring courts to apply Islamic law in the absence of on-point legislation, or assigning certain areas of law exclusively to Sharia courts. This provides the basis to discuss how Islamic states can use laws and courts in tandem to establish Sharia in their legal order. The third part argues that while constraining lawmaking through constitutions and enabling courts to rule according to Islamic law may risk creating tension between branches of

government, for the most part the approaches are complementary. Particularly in the context of international human rights agreements and inter-state Islamic understandings of human rights, using constitutional means to fuse Sharia into what are now predominantly hybrid legal orders can serve both to preserve a state's cohesion as an Islamic state, and to provide tools to safeguard the rights of its citizens.

The last two chapters of the book address the commitments made by Islamic states under the UN human rights treaties and via international declarations of Islamic human rights standards. These represent the main substance of the rights that Islamic states have agreed to implement via their national legal machinery. The aim of these chapters is to demarcate the areas of contention between Islamic states and the international community regarding human rights, and to identify possible ways to resolve their disagreements. Chapter six details the ratification status by Islamic states of UN human rights treaties, focusing on treaty provisions where Islamic states place reservations stating in some way that Islamic law takes precedence over a provision in the treaty. It first addresses the International Convention on Civil and Political Rights (ICCPR), analysing points where international partners object to reservations Islamic states entered in favour of Islamic law, and shows that once analysed according to international treaty law, some reservations or corresponding objections have no substantive effect. The second part of the chapter details the adherences of Islamic states to the remaining UN human rights treaties, and identifies and analyses the relatively few points of disagreement that concern the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the Convention on the Rights of Persons with Disabilities. The third and fourth parts carry out a similar exercise regarding the more extensive controversies (reflected in reservations and objections) regarding the Convention on the Elimination of all Forms of Discrimination Against Women and the Convention on the Rights of the Child. The chapter concludes that the main disagreements across the UN treaties, taken together, concern divorce and marital property rights, apostasy, inheritance of estates, and to a lesser extent adoption, corporal punishment and the inheritance of paternal citizenship. It argues that international partners might be more willing to sanction derogations in the name of Sharia if reservations focus on specific points and state which rules of law would prevail over the treaty.

Chapter seven completes the description of the three layers of law that govern human rights in Islamic states, and demonstrates how they interact. Its first part presents the international Islamic human rights instruments, which serve as an additional layer of law defining Islamic states' human rights obligations, buttressing their treaty commitments and the human rights defined by Sharia. The second part of the chapter discusses the interaction of these three regimes. It studies the use of Sharia in Islamic states' treaty reservations, and in the interpretive guidance the Islamic international instruments provide. Finally,

it examines the sets of rights defined in the latter instruments and in the international bill of rights against each other. It identifies some incongruities between the two sets of documents, but then studies the right to free association as a case where an Islamic document's presentation of a right, if analysed from the point of view of Islamic law, turns out to be similar in substance to that right as understood in international law. The last main part of the chapter looks at the main points where international and Islamic understandings of rights diverge significantly in substance. It reviews interpretive techniques of Islamic law that can develop alternative, yet still Sharia-compliant rulings on points of public law, then discusses their potential application to disputed areas such as apostasy, divorce and inheritance.

The last part of chapter seven concludes the book. It argues that viewing references to Islamic law in treaties or other international instruments in light of each Islamic state's particular means of incorporating Sharia into its national legal order, as discussed earlier in the book, can clarify their scope. The constitution and laws of each Islamic state describe how national law integrates Sharia, and which principles of Islamic law legislation and courts should follow. This amounts to a toolkit to demarcate areas of disagreement over human rights. Substantive rights promised in constitutions and treaty commitments, and derogations indicated from states' obligations to protect those rights, present targets for that toolkit.

1

The History of the Caliphates

Understanding how Islamic states relate to international law requires familiarity with names, precedents and terminology. Historical examples are crucial for applying Islamic law to governance, constitutionalism and interactions with non-Muslim communities. The events of the early decades of Islam were crucial in this regard, by supplying the social context in which Sharia was revealed, and proving through the Prophet and the early caliphs how to apply it to society.[1] Because Sharia plays out differently in public law as societies evolve, it must be deduced in large part via the actions of enlightened leaders, starting with the Prophet. It later became necessary to consider how the ways shown by the Prophet apply to the government of a large, diverse empire, then in a world of multiple independent Islamic states.

This chapter traces the development and demise of the first Islamic state. It does not attempt a comprehensive or analytical history of Islam. That history is complex and, especially regarding the early centuries, still subject to much debate. Rather, the chapter presents the generally received Sunni narrative of early Islam, then the more thoroughly documented history of the caliphates. It begins with a brief synopsis of the significance of the caliphate, and of the questions that arise in studying it. Section II traces the evolution of the community the Prophet led, from the first revelations of Sharia in Mecca in 610, through the migration to Medina and the conquest of Mecca, until his passing in 632. Section III details how the Prophet's first four political successors, who became known as the Rashidun (pious, or rightly guided) caliphs, established the Islamic state both institutionally and as an international power (632–661). The final part examines the hereditary caliphates that followed the age of the Prophet and his Companions. It focuses predominantly on the pivotal Umayyad caliphate (661–750), which set most of the main institutional precedents that informed the Islamic law of governance, before concluding with a sketch of the Abbasid (750–1258) and Ottoman (1362–1924) caliphates.

[1] Jonathan P Berkey, *The Formation of Islam: Religion and Society in the Near East, 600–1800* (Cambridge University Press, 2003) 58 ('For most if not all Muslims, the personalities and events in question provide the symbolic vocabulary of continuing and contemporary debate').

I. THE FIRST ISLAMIC STATE

The Quran was revealed to the Prophet Muhammad beginning in the year 610 AD, when he lived in Mecca. In 622, he and his followers decamped to Yathrib (now called Medina),[2] whose clans had invited him to mediate their conflicts. A treaty now known as the Constitution of Medina formalised his political and religious leadership. Until his passing in 632, the Prophet through his words and actions transmitted Sharia, which operated as a social compact as well as a religion. His successors in authority, the caliphs, lacked his divine guidance but still had to decide how to govern a rapidly expanding polity. In the Sunni tradition, the first four caliphs – Abu Bakr, Umar, Uthman and Ali, all senior Companions of the Prophet – are generally held to have provided model rule, in accordance with Sharia. Their era ended in *fitnah* – civil war or strife – and dynastic rule, with Mu'awiya (also a senior Companion) taking power in 661 and his son Yazid succeeding him as caliph in 680. The Shia, followers of Ali's descendants, were deprived of political power,[3] while the Sunni caliphate soon became one of history's largest empires.

In form, the first government of the Muslims was an alliance of clans under an agreed leader, which became a city-state, then with stunning speed, a vast empire. It 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'.[4] The Prophet led the nascent polity, operationally along traditional Arab lines as essentially an arbitrator and judge, and socially as the unquestioned Messenger of God. After he passed, the community expanded, geographically beyond the Arabian Peninsula and culturally by absorbing large non-Arab populations with their own traditions. 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'.[5] With the conquest of large swathes of the multicultural Byzantine and Sasanian empires, the caliphate inherited a complex bureaucratic structure,[6] which facilitated these innovations but also irretrievably changed its nature.

[2] Medina means 'the city' (of the Prophet).

[3] Berkey (n 1) 125 (the 'political authority' of the Shia Imams 'proved completely chimerical (at least until the rise of the Fatimids in the tenth century)').

[4] Fred M Donner, 'Introduction' in Fred M Donner (ed), *The Articulation of Early Islamic State Structures* (Ashgate Publishing Ltd, 2012) 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.

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

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

The history of this first Islamic state presents challenges in terms of sources and interpretation. The traditions may not have been committed to writing until the later Umayyad years, and the earliest surviving written sources date to the Abbasid caliphate.[7] The first sources discussing the Prophet's era, assembled at least a century and a half after the events they described, were 'used by Muslims to settle later controversies and … reflect more what later Muslims wanted to remember than what was necessarily historically accurate'.[8] Umayyad history is also somewhat obscure, as it was largely transmitted by scholars who opposed the Umayyads; what has survived was written during the caliphate of the Abbasids, who had overthrown the Umayyads.[9] It is still difficult for historians to discern to what degree authors projected their desires and viewpoints onto events of the past.

Early Islam presents three reference models of government. The first is the Prophet's rule. With his unique understanding and connection to the Word of God, his decisions and instructions demonstrated correct governance under Sharia. The second model is the caliphate of the Prophet's first successors: the Rashidun caliphs Abu Bakr, Umar, Uthman and Ali. During their rule, administrative and military structures developed, the empire became multicultural, and the idea of a caliph became established. This began the institutional evolution of Islamic governance and set precedents for future rulers to refer to. The third model, the classical caliphate, saw the caliphate morph into a hereditary monarchy governed largely along imperial lines, which Islamic scholars and religious leaders cloaked in legal theory to retain the idea of the supremacy of Islamic law. During this era, Islamic law took on its durable structural form, including integration into governance, and the Muslim community established its distinct identity in contrast to outsiders, both foreign subjects and members of non-Muslim communities within the Muslim lands. After an interregnum, the Ottoman Empire reprised and refined this model of a hereditary imperial caliphate.

II. RULE BY THE PROPHET

The traditional history of Islam begins with the Quran, the recitations through which God revealed Sharia to the Prophet Muhammad over a period of about 23 years, from 610 until his passing in 632. In 622, the Prophet left Mecca with his followers, having accepted an invitation to lead the tribes of Medina,

[7] GR Hawting, *The First Dynasty of Islam: The Umayyad Caliphate AD 661–750*, 2nd edn (Routledge, 2000) 15–16.

[8] Berkey (n 1) 39–40.

[9] Hawting (n 7) 16–17. A further complication was the Abbasid jurists' need to establish continuity of the caliphate, which prevented them from entirely dismissing the Umayyads as illegitimate, lest they embolden Shi'ite claims (at 18).

under an agreement now known as the Constitution of Medina. This began the history of Islamic states. The agreement was not a modern constitution. It declared an alliance, with the Prophet as arbitrator or judge of disputes, as well as the Messenger of God. Sharia operated in part as an unwritten constitution, establishing rules and norms of social behaviour. In his leadership the Prophet demonstrated governance according to Sharia. His actions, and those of his Companions, set precedents. The Prophet's city-state of Medina is thus a first reference model for future Islamic states.

A. The Emergence of Islam

God revealed the Quran to the Prophet Muhammad through the voice of the angel Gabriel. Gabriel enjoined the Prophet to recite, memorise and propagate verses, building during the rest of the Prophet's life to the text now known as the Quran ('Quran' means recitation). The Prophet was a member of the Banu Hashim, a relatively small clan of the Quraysh, Mecca's leading tribe. An orphan, he grew up under the protection and tutelage of his uncle Abu Talib, the widely-respected leader of the Banu Hashim. As a young man, he established himself as a successful merchant in the caravan trades that passed through Mecca, with a reputation for scrupulous honesty and wise judgment as an arbitrator. Khadija, one of Mecca's wealthiest traders, first employed him to manage her caravans, then later proposed marriage, which he accepted. Some years later, when the Prophet told her of his visions and recited the words he had learned, Khadija encouraged him to believe. As the Prophet's young cousin Ali (son of Abu Talib) and then others heard the Quran and believed, the Muslims became a new, monotheistic sect in polytheistic Mecca.[10] Among the earliest converts was the Prophet's close friend Abu Bakr, who soon persuaded Uthman, of the powerful Quraysh clan Banu Umayya, to convert as well.

Islam means 'submission' (to God) and Sharia means 'the way' (in the sense of a path to water in the desert). The Prophet called for a return to piety and monotheistic worship of the God of the Old Testament, and for social inclusion as equals before God. This clashed with practices in Arabia, where the idea of one God was understood, but worship focused more on diffuse 'local tribal deities', many represented by icons in the Kaaba, the central shrine at Mecca.[11] The Prophet preached repentance and obedience to God 'for the final judgment was near'.[12] He asserted a religious duty of the rich to aid 'the poor and the oppressed', and 'denounced false contracts, usury and the neglect and

[10] Exactly when a distinct religion emerged remains subject to considerable debate. Here, the term 'Muslim' simply indicates the community of believers who followed the Prophet Muhammad.

[11] John L Esposito, *Islam: The Straight Path*, 3rd edn (Oxford University Press, 2005) 3.

[12] *Ibid* 7–8 (citing Quran 22:49–50).

exploitation of orphans and widows'.[13] The Quran was revealed piecewise, often in response to situations facing the Muslims, when the Prophet prayed for and received guidance. This situational aspect is reflected in an evolutionary character to the text, and a different tenor between the verses revealed in Mecca, to a group of believers living as a minority in a sceptical society, and later Medinan verses, revealed to a politically sovereign community.

Political authority in Mecca lay with a polytheistic oligarchy of merchants and leaders of the Quraysh tribe. At the intersection of major trade routes, the city was a regional centre for commerce and worship. The Prophet proselytised with some success, but with the idols at the Kaaba being central to public life, many Meccans, particularly the elites, disapproved. Nevertheless, the protection of his widely-respected uncle and, later, the adherence of Umar to the nascent Muslim community secured the Prophet's safety. Umar, a leader of the Banu Adi clan of the Quraysh, was one of the most prominent citizens of Mecca and had opposed the Prophet until, influenced by his sister, he pledged to follow the Prophet, 'a great step forward for the Islamic community'.[14] This brought the new sect to prominence, enabling its members to openly practice Islam. But the Prophet's proselytising still threatened the polytheists, particularly the Banu Umayya and Banu Makhzum, the two most powerful Meccan clans, in religious, political and economic terms, the latter as a consequence of 'the considerable revenues that accrued from the annual pilgrimage' to the Kaaba.[15] They grew increasingly resistant and even physically hostile to the Prophet's message.[16] When his uncle and Khadija passed in 619, the Prophet's position began to become untenable.[17] In 622, he led the Muslims to Medina, whose tribes had invited him to mediate their conflicts and provide leadership as a traditional arbitrator.

B. The City-State of Medina

In Medina, the Prophet's situation and his mission changed. There was no more question of being able to practice Islam openly, nor open political rivalry within the city. But Mecca remained the dominant regional power, and tensions among the Medinans were in abeyance, not resolved. To survive and grow, the new community needed a unifying structure and the capacity to develop economically. The Prophet supplied these via a written agreement supplemented by tribal traditions, and by recognising the need to confront Mecca and displace its trade dominance. Over its first five years, under the deft leadership of the Prophet, the

[13] *Ibid* 7.
[14] W Montgomery Watt, *Muhammad at Mecca* (Oxford University Press, 1953) 91.
[15] Esposito (n 11) 7.
[16] Berkey (n 1) 67.
[17] Esposito (n 11) 7.

new polity subdued Mecca and co-opted the Quraysh to its cause. Theological differences with the Jewish tribes proved harder to resolve, and the state soon became in essence exclusively Islamic. In his last years, the Prophet's diplomatic and military efforts founded a pan-Arabian polity under the banners of Islam and left a lasting legacy of a new Book, a new world religion and a new system of law.

The Prophet accepted the allegiance of Medina in two stages. A first delegation recognised the new religion and a second established a political entity, in both cases with the Prophet at the head.[18] The 'Constitution of Medina', a set of agreements between the Prophet's followers from Mecca (eventually known as the *Muhajirun*, ie Emigrants) and the people of Medina (the Muslims among whom became known as the *Ansar*, ie Helpers), formalised an alliance of clans. This led for the first time in Arabia to a 'supra tribal system'.[19] The agreement seems to have been updated several times,[20] but kept its original basic form. The tribes agreed that God and the Prophet would judge their disputes. The Prophet was acknowledged as the recipient of religious revelations, but otherwise at first functioned as the leader of the *Muhajirun*, among the clan leaders who jointly governed Medina; only later, after his external military and political successes, did he become the unquestioned general ruler.[21] The tribes formed a community, *umma*, united by a bond that 'transcends any bonds or agreements between them and the pagans' and obliged them to collectively avenge any Muslim killed fighting for God.[22] Jewish clans partook in the mutual defence aspects, but kept their own religion.[23] This comity did not last long, but still arguably set a precedent for the later caliphates' relative tolerance of non-Muslims.

Three battles, known as Badr, Uhud and the Trench, established Medina's parity with Mecca. In 623, Medina was a small city in an agricultural oasis. The Prophet had a larger vision. Mecca and the nearby city of Ta'if overshadowed Medina. To establish itself regionally, the *umma* had to confront Mecca's power and its monopoly on trade. The Prophet led the *Muhajirun* in raids on Meccan caravans passing to and from Syria – raiding caravans being a common economic activity at the time. Eventually deaths resulted, making Meccan retribution certain. In 624, at Badr on the route from Medina to Mecca, a force of about 80 *Muhajirun* and 270 *Ansar* decisively defeated nearly three times

[18] Azzam S Tamimi, *Rachid Ghannouchi: A Democrat Within Islamism* (Oxford University Press, 2001) 94–95.

[19] 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, 17.

[20] W Montgomery Watt, *Muhammad: Prophet and Statesman* (Oxford University Press, 1961) 93–94.

[21] *Ibid* 95–96.

[22] Hugh Kennedy, *The Prophet and the Age of the Caliphates: The Islamic Near East from the Sixth to the Eleventh Century* (Longman, 1986) 34.

[23] *Ibid*.

as many Meccans, including cavalry (which the Muslims lacked). The Meccan commander, Abu Jahl of the Banu Makhzum, and other prominent Quraysh leaders died in the fighting.[24] The victory evidenced God's favour,[25] electrifying the morale of the *umma* and forming a beacon to new converts, and showed the Prophet's ability as a commander. Over time, having fought at Badr became the highest proof of service to the *umma*.

Mecca had to respond to this threat to its prestige and influence. Abu Sufyan, the head of Banu Umayya, had 'opposed the decision taken by other leading Meccans to engage the Muslims [at Badr] and consequently after the defeat he alone was able to preserve some prestige', becoming 'the director' of Meccan opposition to the Prophet and Islam.[26] In 625 he led a large force to the outskirts of Medina. The battle, by a hill named Uhud, ended indecisively. After hard fighting, Khalid ibn al-Walid's cavalry drove the Muslims from the field, but the Meccans lacked the strength to follow up and returned home. The battle exposed the strains that persisted within Medina, as some factions including the Jewish tribes had declined to join the Prophet's expedition,[27] but the Meccans had also failed to dislodge the Prophet. After two further years of 'alliances, raids and bribery', Abu Sufyan besieged Medina with 'an impressive coalition of some 10,000 men'.[28] The Muslims unexpectedly dug a large ditch across the Meccan cavalry's only realistic attack route, and after some weeks of skirmishing the coalition dissipated.[29] The Battle of the Trench 'show[ed] that neither the Muslims nor the Meccans were in a position to overcome their opponents by military force and that Muhamad would not be removed by internal dissension in Medina'.[30]

The *umma* finally conquered Mecca through robust diplomacy and timely compromise. After the Trench, the Prophet established relations with nearby tribes, trading or even forming alliances.[31] In 628, he led about 1,500 men to Mecca, for the lesser pilgrimage.[32] The ensuing stand-off was resolved at Hudaybiyyah by agreeing the Muslims would depart, but that the next year the Meccans would evacuate for three days so the Muslims could perform the pilgrimage.[33] By the next year, the Meccans were divided, with for example Abu Sufyan favouring compromise and Khalid ibn al-Walid and Amr ibn al-As joining the Muslims outright.[34] In 630, asserting a treaty violation, the Prophet led

[24] Watt (n 20) 122.
[25] See Watt (n 20) 125.
[26] Hawting (n 7) 22–23.
[27] Kennedy (n 22) 37.
[28] Kennedy (n 22) 39.
[29] Kennedy (n 22) 39.
[30] Kennedy (n 22) 40.
[31] See Watt (n 20) 177, 180.
[32] Watt (n 20) 182.
[33] Watt (n 20) 183.
[34] Kennedy (n 22) 42.

10,000 Muslims and allies to Mecca, which soon capitulated, giving a settlement in return for amnesty.[35] Then at Hunayn the Muslims defeated a large bedouin army led by the Thaqif, the leading clan of Mecca's rival city Ta'if, which in turn soon fell.[36] The 'ruling clans of the Thaqif' alongside the Quraysh joined the political leadership.[37] The Prophet assigned Abu Sufyan to positions of authority in Yemen and Ta'if,[38] and Khalid ibn al-Walid and Amr ibn al-As became prominent military commanders. Over the next two years, the Prophet consolidated his leadership of Arabia, defeating recalcitrant bedouins but more importantly, through agreements with tribes and coalitions.[39] Some of the tribes fully joined the *umma* and paid the alms tax.[40] By the end of the Prophet's life, the Muslim state had dominion over most of the Arabian Peninsula and had begun to rival the Persian Empire as a regional power.

The Prophet built the governance of the *umma* around piety, unity and consultation. Starting in 623 with the caravan raids, the Muslims fought as one, adding to their conflicts a religious aspect, which evolved toward an idea of *jihad*.[41] The Prophet led in consultation with his first followers, who became known as the Companions. The most senior among them were the leading *Muhajirun*. Abu Bakr and Umar became the Prophet's most trusted advisors: a *hadith* (a verbal record of the Prophet's acts) reports the Prophet saying that if Abu Bakr and Umar agreed on a matter, then he would not overrule them. Abu Bakr was a particularly effective administrator, and when the Prophet prayed for guidance, the subsequent revelation so often matched Umar's prior advice that it became the source of some humour among the Muslims. The Prophet had in 623 married Abu Bakr's daughter Aisha, who became his favourite wife. After Badr, the leadership was further '[bound] together … by marriage agreements', as for example the Prophet's daughters Fatimah and Umm-Kulthum married Ali and Uthman respectively.[42] To this close and capable early leadership, the absorption of the Quraysh and Thaqif added 'expertise, experience and contacts [that proved] vital for the expansion and administration of the Muslim territories'.[43]

Almost as soon as the Constitution of Medina took effect, rifts emerged between the *umma* and the Jewish tribes. It became impossible to ignore the theological and political implications of parts of the *umma* denying the Prophet's prophethood. This ideological break crystallised in 624, when a revelation told

[35] Esposito (n 11) 10.
[36] Kennedy (n 22) 43.
[37] Kennedy (n 22) 43.
[38] Hawting (n 7) 23.
[39] Esposito (n 11) 10.
[40] Kennedy (n 22) 44.
[41] Watt (n 20) 108.
[42] Watt (n 20) 131.
[43] Kennedy (n 22) 48.

the Prophet to change the direction of prayer to Mecca rather than Jerusalem.[44] Later that year, after Badr, and following a confrontation in the market that left two tribal members dead, one Jewish and one Muslim, the Jewish Banu Qaynuqa clan was expelled from Medina.[45] The an-Nadir clan was expelled in 625, after a dispute over contributing to blood money to be paid on behalf of the *umma*.[46] The remaining Jewish clan, the Qurayzah, was annihilated after the Battle of the Trench (men executed, women and children enslaved), having apparently entered into discussions with the Meccans about launching a separate attack on the Muslims during the battle. Alliances, client and other relationships would continue to develop with non-Muslim groups and individuals, but the original associations with the Jewish tribes had ended.

In Medina the Prophet 'came to think of his message as one that carried with it the Law of God'.[47] Rather than eclipsing existing law entirely, however, the Prophet brought a reform. Early Islam enjoyed a dynamic relationship to other traditions, particularly Judaism and Christianity, with which it co-evolved as peoples and ideas interacted around the Arabian Peninsula and nearby.[48] During early disputations with the Jewish tribes, the Muslims cast their religion as a return to a pre-Jewish Abrahamic monotheism. The Quran affirms the Torah and the Gospels, and enjoins each community to adhere to its own revealed law.[49] Although not yet incorporated into a formal legal framework, the Prophet's *sunna*, in the sense of his practices and his way of comporting himself, probably became influential immediately as a model to emulate.[50] The Prophet's actions in governance and diplomacy demonstrated correct behaviour in those areas, just as with devotional duties and other aspects of Islam. In many matters, the Prophet judged according to pre-existing Arab practices.[51] As the *umma* expanded, it amalgamated new communities with their own local traditions. When the Prophet continued to tolerate or require activities according to these traditions, he gave them the sanction of his *sunna*.

In 632, the Prophet made the great pilgrimage to Mecca, the *hajj*,[52] then later in the year fell ill and passed away in Aisha's house in Medina. Although Islam may not yet have coalesced as a distinct religion, this ended the era of

[44] Watt (n 20) 112–14.
[45] Kennedy (n 22) 36–37.
[46] Watt (n 20) 149–51.
[47] Wael B Hallaq, *A History of Islamic Legal Theories: An Introduction to Sunni Usul al-Fiqh* (Cambridge University Press, 1997) 4. Now 'all events befalling the nascent Muslim community were henceforth to be adjudicated according to God's law' (at 6). See also Moshe Sharon, *Black Banners from the East: The Establishment of the 'Abbãsid State – Incubation of a Revolt* (Brill, 1983) 32 ('once he resolved on establishing himself in Madînah as a political leader, the Prophet stressed the divine origin of his authority more and more').
[48] See, eg, Berkey (n 1) 62–65.
[49] Hallaq (n 47) 4–5.
[50] Hallaq (n 47) 11–12.
[51] Hallaq (n 47) 6.
[52] Kennedy (n 22) 46.

prophecy. The Prophet left the *umma* united around a universalist religion and a new paradigm of governing. In his farewell sermon, the Prophet had addressed the *umma* as a single community that should willingly support one another.[53] The Quran had demonstrated the resilience of its message by its applicability to a new society from where it was first revealed.[54] With this new entity arose a new elite: beyond 'traditional tribal criteria for choosing chiefs', service to Islam now helped to determine status and leadership.[55] This hybrid nature of influence persisted into the Rashidun caliphate, when many new Muslims joined the *umma* upon conversion of their clan leaders, rather than as an individual decision.

The early acts of the Prophet and his Companions do not reveal a desire to establish a state, and the Prophet repeatedly declined to assume leadership of Mecca in return for abandoning his new religion.[56] A political entity may be merely a means to organise and protect the *umma* so it can propagate the Islamic call, the *da'wah*. But a state-like authority is arguably inherent in prescriptions such as *hadd* punishments and *zakat* taxation, and evidenced in the fact that as the *da'wah* progressed, a supporting state structure developed.[57] The Prophet had left a compelling religion, law and a *Pax Islamica*, with the raiding energy of the Arabs directed outwards, not at fellow Muslims. It now fell to the Companions to determine how the religion and the polity should proceed.

III. THE RASHIDUN CALIPHATE

After the Prophet passed, his Companions chose one of their number, the Prophet's closest friend Abu Bakr, as caliph (successor).[58] The Prophet had led the Muslim community not only as its prophet, but as a political and military leader and an arbitrator as well. A successor was necessary in the latter roles. Abu Bakr (632–634), Umar (634–644) and Uthman (644–656) assumed the leadership, by consensus, followed by Ali (656–661) in a contested succession. Since the Prophet, only the government of these caliphs is universally regarded as implementing correct Islamic rule.[59] During these years, the caliphate grew

[53] Esposito (n 11) 11 (quoting the Prophet: 'It is not legitimate for any one of you, therefore, to appropriate unto himself anything that belongs to his brother unless it is willingly given him by that brother').

[54] Watt (n 20) 100–101.

[55] Kennedy (n 22) 47.

[56] Mohammed Abed al-Jabri, *Democracy, Human Rights and Law in Islamic Thought* (IB Tauris, 2009) 34.

[57] *Ibid*.

[58] According to Shia tradition however, the Prophet had earlier designated Ali as his successor, at a place called Ghadir Khumm.

[59] In orthodox Sunni doctrine, by the tenth century it was 'indisputable' that the true, perfect caliphate ended after 30 years – the first four caliphs. Ann KS Lambton, *State and Government in Medieval Islam* (Oxford University Press, 1981) 17 ('Only this caliphate was held to fulfil completely

from two tenuously connected cities into a world power, defeating the Byzantine and Sasanian empires in wars and expanding across the Middle East, Iran and Egypt. An unwritten constitution began to develop, as for example Abu Bakr initiated the office of caliph based on an exchange of promises with the people; he and Umar applied the Prophet's words and deeds as sources of law; Uthman agreed to treat their acts as setting binding precedents; administrative structures formed; and the polity absorbed new communities under explicit compacts. Islam became ensconced as the state religion, its expression found in the Quran and the Prophet's *sunna*.

The first political task facing Abu Bakr was to hold the community together. Some of the tribes that had accepted the Prophet as leader considered that their compact had been with him personally and ended upon his passing. Abu Bakr's defeat of their rebellion, the 'wars of *ridda*' ('going out' or 'apostasy'), marked in Sunni tradition 'a defining moment … preserving a unitary state, and cementing the identification of Islam with the Arabs'.[60] The caliphate quickly expanded, motivated both to spread the new religion and to gain revenues. Forces led by Amr ibn al-As and Khalid ibn al-Walid annihilated the army of the Byzantine governor of Palestine near Jerusalem in 634, 'opening all of Palestine to the Muslims'.[61] Muslim armies took Damascus in 635 and Jerusalem in 636. Umar's decision to allow the former rebels of the apostasy wars to rejoin the community facilitated further military victories in Iraq and the conquest of the Sasanian Empire by 642, a year that also saw Muslim armies conquer Egypt, including the Byzantine Empire's second city, Alexandria.[62] As these conquests progressed, Muslim armies established garrison towns nearby but separate from local population centres, to keep the forces concentrated and for their easy administration, as well as to preserve them as Muslim communities.[63] Under Uthman, the caliphate consolidated control over Iran, subdued Cyprus and Rhodes, and continued its expansion along the North African coast and into the Caucasus. This growth virtually ceased during the latter half of Uthman's term and throughout Ali's caliphate, due to internal divisions that grew into the civil war that eventually ended the Rashidun caliphate.

Despite its brevity, Abu Bakr's caliphate was crucial to the establishment of the first Islamic state. His succession was a watershed, as the Companions set

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, Lena Larsen and Christian Moe (eds), *New Directions in Islamic Thought* (IB Taurus & Co, 2009) 187–205, 193–94 (the highly traditionalist Ibn Taymiyyah concurred in this view). There is disagreement on exactly which caliphs were rightly guided. Shia tradition holds that Ali was the sole successor to the Prophet and thus only his line are the true Imams. The term 'rightly guided' is also sometimes applied to Mu'awiya and the eighth Umayyad caliph, Umar II.

[60] Berkey (n 1) 71.

[61] William Ochsenwald and Sydney Nettleton Fisher, *The Middle East: A History*, 6th edn (McGraw-Hill, 2004) 39.

[62] *Ibid* 40–41.

[63] Kennedy (n 22) 68 (the new cities included Basra and Kufa in Iraq and Fustat in Egypt).

the precedent of selecting a leader through consultation and consensus. Abu Bakr stated the terms of the constitutional bargain in his speech upon assuming the leadership: oversight of the caliph by the people; truthfulness; justice for the weak over the strong; holy war as a community duty; and obedience to the caliph only so long as he obeys God and the Prophet.[64] As the Prophet's closest Companions, Abu Bakr and Umar were relatively easy consensus choices (although Ali had a claim too, as the Prophet's cousin, husband of his daughter Fatimah, and the first Muslim after Khadija and the Prophet himself). Umar formalised consultation to determine succession when, upon his assassination (by a personal enemy), he designated six senior Companions who had accompanied the Prophet from Mecca to convene a *shura* (council) to choose his successor from amongst themselves. The *shura* settled on Uthman, 'probably on the basis of seniority and a pledge to follow the policies and practices of Umar', over Ali, who had the support of leading Medina families.[65] Eliciting this pledge began to establish caliphs as an institution, rather than a series of individual rulers.

The Islamic religion itself came to comprise much of the constitution of the emerging state. Sharon argues it was crucial to the future development of Islam as an outward-looking religion associated with governance that the *Muhajirun* (Meccans), not the *Ansar* (Medinans), assumed leadership after the Prophet.[66] Politically and administratively enabled by close association with the Quraysh, Islam could now evolve into public law, as well as a set of devotional duties. Subsequently, Abu Bakr and Umar cited the *sunna* of the Prophet as setting legal norms, establishing the status of that proof of law,[67] in matters public as well as personal. This settling-in of the *sunna* helped the unwritten constitution to form, as for example pre-Islamic customs the Prophet had enforced acquired durable legal status by sanctification as his *sunna*.[68] Similarly, through the agency of the Prophet, Islam assimilated Arab traditions of social justice and support for the poor,[69] which the Rashidun caliphs institutionalised as *zakat*, the

[64] Ibn Hisham, *Sira*, ii 661, in Bernard Lewis (ed, translator), *Islam from the Prophet Muhammad to the Capture of Constantinople, Vol I: Politics and War* (Oxford University Press, 1974) 5–6 ('If I do well, help me, and if I do ill, correct me. Truth is loyalty and falsehood is treachery; the weak among you is strong in my eyes until I get justice for him, please God, and the strong among you is weak in my eyes until I exact justice from him, please God. If any people holds back from fighting the holy war for God, God strikes them with degradation. If weakness spreads among a people, God brings disaster upon all of them. Obey me as long as I obey God and His Prophet. And if I disobey God and His Prophet, you do not owe me obedience').

[65] Ochsenwald and Fisher (n 61) 44.

[66] Sharon (n 47) 37 ('What developed consequently was an Islam influenced by the Meccan breadth of outlook which had its roots in Mecca's international commerce; the Madinians could have easily reduced Islam to a local oasis-found religion').

[67] Hallaq (n 47) 11–12.

[68] Hallaq (n 47) 12–13 (later jurists agreed that the Prophet's application of the traditional law of *qasama*, whereby oaths of innocence and ignorance could absolve a community of sanction beyond blood money for a murder discovered in their territory, proved that that particular pre-Islamic law is binding as the law of God).

[69] Hallaq (n 47) 13.

alms tax. Uthman helped to unify the Muslims when he compiled the canonical Quran, still in use today, by having the records collected by Abu Bakr and Umar transcribed and disseminated, and ordering variant versions destroyed.[70] To inspire the factions in his new capital of Kufa against Mu'awiya's threat to his caliphate, Ali emphasised the religious role of the caliph as Imam and 'the equality of believers', asserting a duty of an Islamic government to maintain a 'truly Islamic community' and to address 'the problems of underprivileged Muslims'.[71] Thus, collectively, the first four caliphs set the outlines, and some of the institutions, of Islamic governance. Although Mu'awiya fundamentally changed the nature of the selection of the caliph, the state he assumed control of was inarguably an Islamic state, its ruler beholden to Islamic duties.

Umar and Uthman drove the administrative development of the early caliphate. With their actions in office assuming the status of durable precedent, their decisions developed the parameters of correct Islamic rule. The Prophet and Abu Bakr had ruled a relatively small and homogeneous polity, needing only basic institutions suited to traditional tribal governance. This became impractical as the caliphate expanded. Umar and Uthman recast the new state as an empire, structurally similar to other empires but resting on distinctly Islamic principles. Byzantine and Sasanian bureaucrats largely continued in office under new governors (*amirs*), and soldiers took prisoners and booty, but 'land and taxes from conquest belonged to the whole Muslim community, and one-fifth of all income from conquered territory was to be forwarded to Medina'.[72]

The first new norm of the caliphate, attributed to Abu Bakr and, according to Madelung, lacking a basis in the Quran,[73] was leadership by the Quraysh.[74] Umar retained this policy but also 'undertook to strengthen the Islamic character of the state by implementing Qur'anic principles and [curbing] the excessive power of the pre-Islamic Mekkan aristocracy'.[75] He re-based governance on *shura* (consultation) and *sabiqa* (seniority in Islam). Madelung illustrates Umar's use of *shura* by example of an expedition to Syria during a plague: he first asked the *Muhajirun*, then the *Ansar*; when neither group could agree amongst themselves, he turned to the Quraysh leaders who had joined the Muslims after the

[70] Al-Bukhari, *Sahih*, iii 392–94, in Bernard Lewis (ed, translator) *Islam from the Prophet Muhammad to the Capture of Constantinople, Vol II: Religion and Society* (Oxford University Press, 1974) 1–2 (Zayd ibn Thabit collected the verses under instruction of Abu Bakr and Umar. Umar's daughter Hafsa kept custody of the collection until Uthman ordered their copying, which Zayd ibn Thabit led 'according to the language of Quraysh, for it is in their language that the Qur'an was revealed'. The original collection was then returned to Hafsa, and the copies distributed 'in all directions').

[71] Kennedy (n 22) 77–78.

[72] Ochsenwald and Fisher (n 61) 43.

[73] Wilferd Madelung, *The Succession to Muhammad: A Study of the Early Caliphate* (Cambridge University Press, 1997) 57.

[74] See eg, Sharon (n 47) 37–38. The reasons proffered included the nobility and centrality of the Quaraysh to pre-Islamic Arab society; the Islamic seniority (ie early conversion) of Quraysh members; and their kinship to the Prophet (at 38).

[75] Madelung (n 73) 58.

conquest of Mecca, and followed their recommendation to retreat.[76] *Sabiqa* manifested in institutions such as Umar's *diwan*, a register listing the Muslims according to when they had begun to fight for the Prophet and 'the sum each was to receive annually from the public treasury'.[77] Another innovation was tolerance of the religious practices of non-Muslim communities, which (alongside a lower tax burden) aided considerably in securing acquiescence to Muslim rule, particularly in formerly Byzantine lands.[78] Umar's caliphate became 'firmly established' as an Arab state, driven by his 'deep commitment to Qurayshite and Arab solidarity' and 'even deeper commitment to Islam', naturally attributing its successes to the religion and to 'divine favour'.[79]

Uthman holds an ambivalent place in Islamic history. Sunni tradition locates him unambiguously among the Rashidun caliphs. He was an early and close Companion of the Prophet, and as caliph standardised the Quran to establish a single state religion, albeit with regional variants, rather than a scattering of sects.[80] But he was also a prominent member of the powerful Umayyad family that had opposed the Prophet until the conquest of Mecca. The early written sources are highly critical of Uthman's rule, particularly by contrast with the revered Umar. Madelung's careful analysis describes a caliph whose governance – influenced by his relatives, especially the future caliph Marwan – stood at odds with fundamental precepts of Islam and created lasting divisions in the community. This may or may not accurately reflect events: the sources were written in the first Abbasid decades, after the overthrow of the hereditary Umayyad caliphate. Nevertheless, it seems clear that Uthman greatly increased the authority of the government in Medina,[81] and that he disproportionately placed his relatives in positions of power.[82] Centralisation was arguably necessary for political unity and fiscal viability after the rapid growth of the caliphate.[83] Uthman 'saw that the Umayyad clan had the experience and ability

[76] Madelung (n 73) 59.

[77] Ochsenwald and Fisher (n 61) 43. 'The list included male and female Muslims of all ranks', with extra sums for members of the Prophet's family, *ibid*.

[78] Ochsenwald and Fisher (n 61) 42.

[79] Madelung (n 73) 75.

[80] Kennedy (n 22) 70–71.

[81] See, eg, Kennedy (n 22) 70 ('governors were to be chosen and dismissed by the caliph and both political and the all-important financial affairs of the provinces were to be decided not by local leaders, but in Medina').

[82] Most prominently, Uthman expanded Mu'awiya's governorate of Damascus to encompass all of Syria, and made Abd Allah Governor of Egypt. Ochsenwald and Fisher (n 61) 44.

[83] Ochsenwald and Fisher (n 61) 43 ('As … wealth and opportunity grew, Umar had more and more difficulty with his provincial governors and their administrations. Since he had little power to enforce his will, the governors were nearly independent. Consequently, the required income from conquered lands was not always forthcoming; Syria, in fact, never sent any. Among the leaders of Islam, Umar was only first among equals. This was especially true in the camp cities of Kufah and Basra, inhabited by many nomad warriors who were proud, hardy, political Muslims, resentful of Quraish rule').

to' establish central control,[84] 'but he failed to make allowances for the interests of others who had different but equally strong claims to enjoy the fruits of the conquests'.[85] In effect, he restored the Meccan elites, to the detriment of lesser Quraysh clans such as those of Abu Bakr, Umar and the Prophet himself, and correspondingly diminished principles such as *shura* and *sabiqa*.[86] This led to effective administration, but also to resentment and eventually revolt triggered by Uthman's appointments, especially when they displaced early Muslims who had led the conquests of Iraq and Egypt, and by the redirection of revenues to Medina.[87] When rebels from Kufa and Egypt surrounded Uthman's palace, he lacked support from leading non-Umayyad Quraysh and from the *Ansar*, and rebels eventually entered the palace and killed him.[88]

After Uthman, Ali was proclaimed caliph.[89] But he had no time to establish his rule. The events that led to what became known as the first *fitnah* were well under way. Ali had not participated in the rebellion, although he must have known of the conspiracies.[90] There is evidence that he had tried to mediate between Uthman and the rebels, but according to Madelung the interventions of Marwan nullified Ali's efforts to convince the caliph to apologise and atone for his actions.[91] After Uthman's demise, Ali faced challenges to his rule by a coalition of senior Muslims led by al-Zubayr and Talha, Companions who had participated in the *shura* that chose Uthman, and Aisha, then far more seriously, by Mu'awiya, Uthman's nearest surviving relative and the powerful Governor of Syria. Ali defeated al-Zubayr at the Battle of the Camel, the first serious combat between Muslims, but to do so had to relocate his capital to Kufa. The *fitnah*

[84] Even after accepting Islam, Uthman 'retained his links with his clan and he benefited from the experience in practical affairs which his upbringing as a Meccan merchant had given him'. Kennedy (n 22) 70.

[85] Kennedy (n 22) 75.

[86] Kennedy (n 22) 70 (Uthman 'became caliph with a definite political programme, to ensure that the Muslim empire … remained under the control of the Quraysh, a policy the origins of which went back to the practice of the Prophet himself. In some ways he reacted against 'Umar's attempts to build a new Islamic elite based on sabiqa, and turned back to the well-tried methods of clan government'). According to Madelung, Quraysh and senior Companions at first tolerated this because Uthman was more permissive than Umar, for example allowing them to freely travel outside the Hijaz, and gave generous gifts from his personal wealth. Madelung (n 73) 87.

[87] Kennedy (n 22) 73–74.

[88] Kennedy (n 22) 75 (Talha and al-Zubayr, both members of the *shura* that had elected Uthman, 'were hostile, while others, like Sa'd b. Abi Waqqas [also a member of that *shura*], the conqueror of Iraq and 'Umar's son 'Abd Allah remained neutral. Nor were the Ansar any more helpful'. When Uthman 'appointed [his cousin and Marwan's brother] Harith to take charge of the market the Ansar felt that they had lost control, not just in the empire as a whole, but even in their own town').

[89] After Uthman's murder, Talha and Ali were 'potential candidates for the succession'. Ali quickly gained support from the Iraqi factions that had abstained from violence as well as from the *Ansar*. Madelung (n 73) 141.

[90] Madelung (n 73) 108.

[91] Madelung (n 73) 111 ('His kinship ties made 'Ali a natural mediator between the opposition and 'Uthman').

quickly came to resemble a civil war between the regions of Syria and Iraq. With few of his original senior supporters still alive, Ali had to rely on members of the Kufan faction that had overthrown Uthman, which rendered the dispute with Mu'awiya intractable.[92] Mu'awiya would not recognise Ali as caliph until the killers of Uthman were punished, but Ali relied on the leaders of that faction as his main commanders.[93] The trouble came to a head at Siffin in northern Syria in 657, where negotiations alternated with battle until Ali's force faltered at fighting fellow Muslims when some of Mu'awiya's troops raised pages from the Quran on their spears. Both sides agreed to arbitration, which was inconclusive. Some of Ali's allies, known later as Kharijites (those who seceded) rebelled at their caliph having agreed to arbitration. Ali defeated them in 658, but one of the rebels assassinated him in 661, whereupon his first son Hasan was proclaimed caliph in Kufa while Mu'awiya was acclaimed in Damascus. Hasan quickly agreed to abdicate, and Mu'awiya became the uncontested caliph, inaugurating dynastic rule and ending the 'consensual era of the caliphate'.[94]

Each of the first four caliphs left an indelible mark on Islamic governance. Abu Bakr maintained the political unity of the *umma*, which after the Prophet's passing was no sure thing, by persuasion and by force. He, Umar and Abu Ubaydah also quickly 'quashed the demand of the Ansar in Madinah for a share in the leadership', establishing the norm of continued rule by the pre-Islamic Meccan nobility, embodied in the Quraysh clans.[95] Umar, called the second founder of Islam, cemented the identity of the caliphate as not just an empire, but as an undeniably Islamic state.[96] Uthman, notwithstanding the understandable criticisms of his favouring relatives and restoring pre-Islamic Meccan elites at the expense of Quranic principles of equality and inclusive rule, standardised the state religion and brought an unprecedented degree of centralisation without resorting to the oppressive methods used by older empires to maintain control over multicultural and multiconfessional populations. Even Ali, constantly beset by rebellion, was able to reaffirm the role of a caliph as a spiritual leader, and the duties of an Islamic ruler to exude piety and to attend to social justice.

Despite its undeniable successes, the Rashidun caliphate could not overcome its internal contradictions. The project of Islam to restore faith in the supremacy of one God and equality among believers lay at odds with a system built on family and clan loyalties, and, arguably, with human nature. These tensions became a main driver of the *fitnah*, but had existed throughout the prior history of Islam. The Prophet's presence, followed by the political and military skills,

[92] Kennedy (n 22) 77.
[93] Kennedy (n 22) 78.
[94] Ochsenwald and Fisher (n 61) 47.
[95] Sharon (n 47) 37.
[96] See, eg, Ochsenwald and Fisher (n 61) 43 (Umar's establishment of the Muslim calendar based on lunar years since the *Hijrah* arguably 'best showed the belief that a new state and community had been born').

and sheer willpower, of Umar had prevented them from coming to the fore and splitting the Muslim community. But with no institutionalised regulatory or dispute management systems, splits appear inevitable in hindsight. Even allegiance to the Prophet's family could not likely have prevented this, given the scepticism of most Quraysh clans toward reunifying prophethood and the caliphate in the Prophet's family, the Banu Hashim.[97] In the event, the first *fitnah* led to permanent schisms and a juristic principle of quietude, the idea that even unjust order is preferable to chaos. This arguably saved the caliphate, but at the cost of impeding its ability to reach its full potential as an Islamic state. The strength of Mu'awiya's rule and the cohesion of a shared ideology suppressed the divisions for a while, but their causes lurked underneath and made the restoration of Islamic rule along Umar's model unlikely.

At the end of his reign, Uthman wrote to the factions besieging his palace. His protestations reveal the prevailing view of how a caliph should govern. He had, he wrote, provided for the recitation of the Quran and imposition of the punishments it prescribes; allowed exiles to return; collected the required taxes, provided sustenance for the deprived and 'spent abundantly so that good practice (*sunna hasana*) [was] followed'; appointed strong and honourable governors; redressed grievances brought to him; and consulted the Prophet's wives and acceded to their wishes.[98] Although for most of the future of the caliphate these principles would be realised, if at all, through autocratic governments, Umar's use of *shura* and prioritisation of 'religious merit' over social standing may indicate 'an exemplary basis for restoring a proper democratic form of the caliphate or other Islamic government'.[99] Applying the values espoused by Uthman through the principles of governance demonstrated by Umar holds considerable promise for use in modern Islamic states.

IV. THE DYNASTIC CALIPHATES

The Umayyads, the powerful old Meccan clan of Uthman and Mu'awiya, ruled from 661 to 750. During this time the caliphate took its long term institutional form, established a large scale administration and a professional army, began to integrate Islam as the state religion, and reached its greatest geographic extent. After the Abbasid revolution and a period of stabilisation, these trends continued, except geographically. As in the Rashidun era, progress was rapid whenever the caliphate was internally at peace. But the early caliphs faced near-constant

[97] Madelung (n 73) 65–68.

[98] Madelung (n 73) 129–30. Uthman finally promised to revise his approach and return to governing by consultation, specifically, according to the advice of the Prophet's wives and 'the men of sound opinion among' the Muslims, but the rebels rejected this attempt at compromise. Madelung (n 73) 135.

[99] Madelung (n 73) 76.

dissent and resistance, from unrest between Arab tribes to regional rebellions to ideological opposition such as from Kharijites and Shi'ites, escalating at times to general civil war. By the middle of the ninth century, the caliphate had sustained serious fractures. It remained divided for most of the rest of its history. After its final fall in 1258, and a century of interregnum, the Ottoman sultans proclaimed themselves caliphs. The Ottoman caliphate established itself as an Islamic empire, and held its place as a world power for more than three centuries. The Umayyad, Abbasid and Ottoman caliphates each added to the development of the classical model of governance according to Islamic law.

In 750, at its peak (from Iberia into India and China), a rebellion in the name of equality among Muslims and government by the Quran and *sunna* overthrew the Umayyad caliphate and installed the Abbasids, a different branch of the Prophet's tribe, the Quraysh. The temporal power of the caliph had become absolute under the early Umayyads, but quickly waned except for a brief revival under the first Abbasid caliphs, and essentially vanished in the mid-tenth century. The Abbasid caliphate saw a cultural golden age, alongside political fraying and disintegration. For most of the later Abbasid centuries, regional military rulers governed in the name of the caliph, whose remit was restricted de facto to ceremonial religious authority. Arising after the interregnum, the Ottoman Empire stayed internally stable and remained at its cultural and political peak much longer than the Abbasid caliphate had. Nonetheless it too fell, due more to decadence and debts and geopolitical pressures than to internal strife as with the Umayyads and Abbasids.

During the caliphates, Islam matured and solidified as the state religion. As Islamic rulers, the caliphs had to govern by Sharia. Lacking the Companions' moral and religious authority, they relied in part on an evolving community of jurists, the *ulama*, to affirm their legitimacy. The Umayyad caliphs adopted Islam as their ideology, and institutionalised Islamic law by involving *ulama* in the courts and the civil bureaucracy and applying their rulings in state administration. Islamic theology settled into its main long term forms in the early Abbasid years, alongside a flowering of jurisprudence that continued for centuries. A new age of scholars applied the methods of the early masters to develop theories of constitutionalism and Islamic public law, and continued to influence public institutions. After reviving the caliphate, the Ottoman sultans closely integrated Islamic law and learning into administration and society. A state-run system of Islamic education produced at its highest levels Islamic scholars and the sultanate's judges, and the supervisory office of *Shaykh ul-Islam* was established, to certify that royal decrees complied with Sharia (among other duties). Throughout the caliphates, the ideals of law often lay uneasily alongside the realities of power. Part of the jurists' task was to adapt the law to these realities, to continue to justify the caliph as an Islamic ruler even under adverse circumstances.

A. Umayyad Rule

Despite its brevity compared to the subsequent five-century Abbasid era, the Umayyad caliphate was pivotal in establishing Islam as a religion, and the caliphate as an Islamic state. It also saw the caliphate reach its greatest geographic extent. The era was marked by tensions and schisms that emerged once there was a religious and political establishment to oppose. The first large civil conflict, the second *fitnah*, centred on Mu'awiya's succession. It pitted the Syria-based caliphate against several senior Muslims, of whom Ibn al-Zubayr, son of a prominent Companion, who found his main support in the Hijaz and Iraq, posed the severest threat. Tensions ran between east and west; between the hereditary caliphate and proponents of rule by consensus and according to the *sunna*, and with Ali's followers as well; and perhaps most significant politically, between Arab Muslims and non-Arab converts (*mawali*).

Mu'awiya ruled until 680, followed by his son Yazid and, briefly, by his grandson Mu'awiya II. In 684 his Sufyanid line gave way to the family of Marwan, who lived for less than a year as caliph. The last ten Umayyad caliphs were Marwan's descendants. The first, his son Abd al-Malik, during his 20 years as caliph (685–705), reunited the realm and instigated its transformation into a fully imperial state. Four sons of Abd al-Malik next held the caliphate in succession, except for their cousin Umar II's stint from 717–720. Umar II had an impact disproportionate to the brevity of his reign, by for example re-centring the government on Islamic principles and promoting equality among Muslims (rather than Arab pre-eminence). After Abd al-Malik's son Hisham (724–743), only the last Umayyad caliph, Marwan II (744–750; Marwan's grandson), spent more than a year in office. In an atmosphere of unrest and after a serious revolt in Iraq, a coalition of forces formed in Persia and moved west, finally defeating Marwan II in northern Syria and proclaiming a new caliph, Abu al-Abbas (who took the caliphal name al-Saffah) from the Abbasid family.

The rapid expansion of the caliphate continued in the early Umayyad years. Mu'awiya moved the government to Damascus, his power centre, and resumed hostilities against the Byzantine Empire. His caliphate eventually incorporated the central regions of North Africa and extended east into modern Pakistan, but could not overcome Constantinople, finally making a peace treaty in 679. Renewed civil war triggered by the succession of Yazid in 680 interrupted the expansion. The caliphate re-stabilised only under Abd al-Malik. It reached its peak under his sons, mostly during the caliphate of the eldest son Walid (705–715), adding Iberia in the West and in the East encompassing most of central Asia and reaching the borders of modern China and India. Sulayman (715–717) tried again to take Constantinople, an effort Umar II abandoned, and by the middle of Hisham's reign the caliphate was suffering significant military reverses on its frontiers. As Marwan II seized the caliphate from Abd al-Malik's heirs in 744, his largest challenge was internal unrest, not external foes.

The Umayyads also Islamicised the empire. When Mu'awiya took power, the caliphate was not yet firmly established as an institution, nor as a clearly Islamic polity. Conflicts between his successors and rebels and rival caliphs continued until nearly the end of the century, during which time 'the nature of caliphal authority itself [remained] vague and untested', and its institutional structure undefined[100]. Abd al-Malik's caliphate saw political reunification (Berkey considers it significant that the early jurists referred to 692, the end of Ibn al-Zubayr's rebellion, as 'the year of unity'); the introduction of coinage that displayed words from the Quran instead of Byzantine depictions of the emperor or Jesus Christ; and the construction of the Dome of the Rock in Jerusalem.[101] Although the significance of the latter building is not entirely clear, it unambiguously asserted the prominence of Islam, including the earliest known Quranic inscriptions and 'the first certain evidence of Islam as the name of the religion of the Arabs'.[102] Umar II initiated an effort to gather *ahadith* of the Prophet, and instructed that public administration should accord with the Prophet's *sunna*, eschewing subsequent innovations.[103] He also sought judges who would decide according to the nascent methodologies of *ijtihad*, analytical reasoning that relied first on the words of the texts, rather than their own best opinion, *ra'y*.[104]

The era also saw the growth of an administrative state. Abd al-Malik and his son and successor Walid, and al-Hajjaj, who ruled Iraq and the eastern regions on their behalf, drove considerable centralisation of government. Mu'awiya started the process, but the caliphate saw its main administrative maturation under Abd al-Malik. Governance under Mu'awiya resembled the Rashidun caliphate, with provincial governors ruling on behalf of the caliph and Arab tribal leaders, the *ashraf*, acting as their intermediaries to the tribes.[105] Outside Arabia, civil administration continued via the bureaucracies that had served the Byzantine and Sasanian empires. Mu'awiya institutionalised the caliph's court, installing judges to hear petitions brought to the caliph, and established three *diwans* (government departments), for taxation and for writing and sealing documents.[106] Under Abd al-Malik and Walid, the *ashraf* gave way to appointed officials, who reported to the governor or to the caliph directly.[107] Abd al-Malik also instituted 'something like a standing army', with forces sent from Syria to join campaigns or keep order, and governors typically appointed from the

[100] Berkey (n 1) 76–77.
[101] Berkey (n 1) 80–81.
[102] Hawting (n 7) 61.
[103] Hallaq (n 47) 14–15.
[104] Hallaq (n 47) 15.
[105] Hawting (n 7) 36.
[106] Hawting (n 7) 63.
[107] Hawting (n 7) 61–62 (noting this is unsurprising, considering the role of the *ashraf* in the recently concluded civil war).

military instead of based on their tribal standing, as had been the practice under Mu'awiya.[108]

As well as imprinting Islam on the new state, the Umayyad caliphs built a specifically Arab state. The conquering Arab tribes continued the early practice of establishing garrison towns separate from the local populations, who were subject to land and poll taxes and did not participate in military campaigns. *Mawali*, local converts to Islam, could join this society, but only through an Arab sponsor (necessary to fit into the system of families and tribes).[109] During Abd al-Malik's caliphate, Arabic became the official language of the *diwan*, with formerly Byzantine or Sasanian administrators adopting the new language.[110] Arabic also quickly became the lingua franca across the empire, displacing, for example, Coptic and Syriac as the everyday tongue even of non-Muslim communities.[111] At the same time, the state was evolving under the influence of the cultures and governments it assimilated, visible in for example bureaucratic structures, and in the newfound splendour of the caliphal court itself.

Rebellion and strife marked most of the Umayyad era. Mu'awiya's sons spent their brief caliphates in armed conflict with internal rivals. This second *fitnah* lasted well into Abd al-Malik's caliphate. First, upon Yazid's accession, Ali and Fatimah's second son Husayn made a bid for the caliphate his elder brother had abdicated to Mu'awiya. This ended quickly at Karbala in 680. The anniversary of Husayn's martyrdom there later became the Shi'ites' greatest annual festival.[112] From 685 to 687, al-Mukhtar led a revolt from Kufa in the name of another son of Ali, Muhammad bin al-Hanafiyya, directed primarily against Ibn al-Zubayr, who had by then taken control of Iraq.[113] Ibn al-Zubayr's rebellion lasted the longest, from 681 until 692. Based in the Hijaz, his rival caliphate grew to include 'Egypt, Iraq and probably Iran as well'.[114] Abd al-Malik reclaimed the caliphate, but in the process Mecca was besieged twice and the Kaaba seriously damaged, and Medina was sacked. These events contributed greatly to the disapproval of the Umayyad caliphs in later tradition.[115] Nonetheless, the caliphate then finally remained relatively stable, for about a quarter of a century.

The Umayyad caliphate was riven by rifts. One source of unrest was the development of factions, often centred around military commanders and associated with tribes or groups of tribes. Although often referred to by tribal names and made up predominantly of tribesmen, the factions were more politically

[108] Hawting (n 7) 62.
[109] Berkey (n 1) 77.
[110] Hawting (n 7) 64.
[111] Berkey (n 1) 98.
[112] Hawting (n 7) 50.
[113] Hawting (n 7) 51.
[114] Berkey (n 1) 76.
[115] Hawting (n 7) 48.

than tribally oriented.[116] The main divisions ran between 'northern' and 'southern' tribes (referring to their ancestral regions on the Arabian Peninsula). These emerged during the second *fitnah*, driven by factors such as changing tribal balances in Syria and Iraq due to migration, and the entanglement of tribal identity with high politics, as contenders for the caliphate or governorates called on tribes for support.[117] With Syria being the seat of the caliphate, Syrian Arabs tended to predominate in the ruling ranks of the military and government. This led to friction between regions, considerably exacerbated by factional rivalries among the Syrians themselves. One of these, between 'southern' Yemenis and 'northern' Qays, 'finally consumed the Umayyad state itself', as Marwan II led a movement of Qays to avenge the death of Walid II at the hands of a group of Yemenis.[118]

Yet another dimension of friction ran between members of Arab tribes born into Islam, and non-Arab *mawali*. The *mawali* first exercised political and military influence in their support of al-Mukhtar's failed rebellion.[119] At that point, *mawali* were predominantly former prisoners of war or their descendants;[120] later they would also consist of immigrants and societies integrated into the caliphate by agreement. There was an obvious tension between the universal call of Islam and this system of differential rights and duties depending on Arab identity. Umar II, the only Marwanid caliph from a 'southern' tribe, tried to resolve this by decreeing equality among all Muslims. However, the caliphate's finances depended on tribute from non-Muslims, and the resulting enthusiasm for conversion quickly diminished the coffers, as booty from conquests could not compensate for the lost tax revenue. Beyond fiscal issues, the Arabs held a higher social status. Clan-based social systems, such as rights to property or liability for harms, required that conquered nations could only be incorporated as dependent clients of the Arab tribes that had conquered them. This, alongside factors such as physical separation in garrison towns, and the sense of superiority stemming from the fact of conquest, led to a stratified society.[121] Ultimately, the *mawali* proved crucial in supporting the revolt that overthrew the Umayyads in 750 and established the Abbasid caliphate.

The Umayyad era also saw the evolution of rebel or dissident impulses into religious sectarianism. As the state deepened its identification with Islam, the populace also grew more self-consciously Muslim. This enabled the coalescence of political opposition around religious ideals, and as 'the ruling clan,

[116] Hawting (n 7) 48 ('Arabs not enrolled in the army were not involved in the factions, but non-Arabs in the army were').
[117] Hawting (n 7) 55.
[118] Berkey (n 1) 102.
[119] Hawting (n 7) 51–52.
[120] Hawting (n 7) 51.
[121] Charles Lindholm, *The Islamic Middle East: An Historical Anthropology* (Blackwell, 1996) 93.

[the Umayyads] became the target of the principled wrath of the pious'.[122] The first distinctive sect to emerge was the Kharijites, said to be rooted in the faction that had abandoned Ali during his dispute with Mu'awiya, a reminder of 'the centrality of the question of political leadership in the shaping of Islamic religious identity'.[123] The Kharijites denounced the Umayyads as insufficiently faithful to the religion; demanded governance according to the Quran; and opposed tribal distinctions 'so the caliph could be anyone willing to follow the will of God'.[124] Although early opposition coupled ascetic piety with criticism of the regime,[125] violent revolts arose as well. Kharijite influence contributed significantly to the rise of the Abbasid caliphate, concretely as Kharijite rebellions in Iraq 'pave[d] the way for the[ir] advance … from Iran', and ideologically 'by articulating a set of principles and expectations which made the religious message of the Koran the centerpiece of social and political thought'.[126]

The most lasting schism in the Muslim community lies between Sunni and Shi'ite. Supporters of the Rashidun caliphs and of their successors followed the Prophet's *sunna* (hence 'Sunni'), while Shi'ites (*shia* means 'party' or 'partisans', ie of Ali) followed his lineage, as descended from his daughter Fatimah's marriage to his cousin and son-in-law Ali. Although Ali had had supporters since the original dispute over the Prophet's succession, by the Umayyad period Shi'ism was a discernible political movement grounded in an evolving, distinct theology (although both the political and the religious aspects only matured later, during the Abbasid caliphate). The crux of the Shia beliefs is, politically, that the Prophet designated Ali as his successor, and theologically, that the Prophet had imparted to Ali *nass*, understandings of Islam unknown to any but the Imam.[127] Each generation had one infallible Imam, descended from Ali, until eventually the last Imam disappeared into occultation, to return for the day of judgment. Politically, after the revolts of Husayn and al-Mukhtar, the Imams and other Shi'ite leaders largely acquiesced in Umayyad rule, with Shi'ism developing a doctrine of *taqiyya*, whereby Shi'ites could deny their beliefs if necessary to protect their safety. This quiescence lasted until the third *fitnah*. Meanwhile,

[122] Berkey (n 1) 85. The early piety-based movements stemmed from diverse sources, such as the factions that had opposed and assassinated Uthman; partisans of the Prophet's relatives, particularly Ali; 'conservative Arab elements who had supported the counter-caliphate of Ibn al-Zubayr'; and non-Arab converts pressing for social inclusion as fully accepted Muslims (at 84–85).

[123] Berkey (n 1) 86.

[124] Berkey (n 1) 86. Kharijism was based on 'a demand for piety and religious excellence as the only necessary qualification for the Imam, and a rejection of the view that he should belong to the family of the Prophet, as the Shi'ites demanded, or to the tribe of the Prophet (Quraysh), as the Sunnis required'. Hawting (n 7) 3.

[125] Berkey (n 1) 85 (citing the career of the early eighth century 'preacher and scholar' Hasan al-Basri as an example of open, principled religious opposition).

[126] Berkey (n 1) 102.

[127] Lindholm (n 121) 171.

the Shi'ite community continued to grow, particularly around Basra and in Iran, until eventually contributing crucially to the rebellions that overthrew the Umayyads.

The third *fitnah* began the end of the Umayyad caliphate. Fighting over Walid II's succession ended in 744 with Marwan II accepting the *bay'ah* (acclamation) as caliph in Damascus. He relocated the caliphal administration to his military power centre, the city of Harran in Iraq (his base as governor of Mesopotamia), the first time since Mu'awiya's accession that Damascus was not the seat of a caliph.[128] Meanwhile, a Shi'ite rebellion had arisen in Kufa, led by Abdallah ibn Mu'awiya, and a major revolt of 'southern' tribes ensued in Syria in 745 as well.[129] Marwan II put down the Syrian revolt, then turned towards southern Iraq in support of the governor there, who had defeated the Shi'ite rebellion, whereupon his own Syrian troops revolted. Supported by the army from Iraq, Marwan II ended this threat in the summer of 746, but by then a major Kharijite revolt had broken out in Mesopotamia, which took until 747 to defeat.[130] Finally, Ibn Mu'awiya returned from southwestern Persia, where he had fled, with 'a conglomeration of disparate elements opposed to the Umayyad caliph', but was quickly defeated by the governor of Iraq. The caliphate had regained control of the core of the empire, Syria and Iraq.

The fatal blow came from Khurasan. Marwan II had been unable to heed the warnings of the governor there, who had requested Syrian reinforcements against what turned out to be a new type of revolt. A political movement called the Hashimiyya had arisen, instigated by opponents of the Umayyads from Kufa. In 747, about 2,200 fighters raised black banners of revolt in the city of Merv.[131] They made common cause with army factions already in rebellion, and in 748 ejected the Umayyad governor from Merv and from Khurasan.[132] The Hashimiyya were quickly joined by many factions discontented with Umayyad rule, *mawali* alongside Arabs, under a slogan for 'the Quran, the Prophet, and *al-rida min Muhammad*' (rule by 'a member of the house of' the Prophet, chosen by the community), and led by one Abu Muslim, a pseudonym that signified a disregard for tribal, national or other distinctions, and the unity of all Muslims.[133] This proved too much for Marwan II's weakened and overstretched forces. Abu al-Abbas was proclaimed caliph at Kufa in November 749 (to the surprise of the allied Shi'ites), Marwan II was defeated in January 750 near Mosul, and Damascus fell that April.[134] Marwan II retreated as far as upper Egypt, where he met his demise in August 750, his extended family largely

[128] Hawting (n 7) 97–98.
[129] Hawting (n 7) 98–99.
[130] Hawting (n 7) 100–101.
[131] Lindholm (n 121) 97.
[132] Hawting (n 7) 115–16.
[133] Lindholm (n 121) 97.
[134] Hawting (n 7) 117.

exterminated as well. Thus ended Umayyad rule, except for a dynasty in Spain established by a grandson of Hisham.[135]

Islamic tradition remembers the Umayyads as imperfect rulers, undeserving of the name caliph, except Umar II,[136] and possibly Mu'awiya and Yazid III. Yet it was the Umayyad caliphs, especially Abd al-Malik and Walid I, who built a state structure and integrated Islam into it, thus establishing the very standards for a caliph that later generations castigated them for failing to meet. The first charge, the Umayyad original sin, is *mulk*: ruling as dynastic kings rather than by the consensus of the community. This is the main criticism against Mu'awiya. Umar II and Yazid III stood out for their piety, and for their efforts to realise the ideal of equality among Muslims by enabling the *mawali* to enjoy similar status to Arab Muslims. Furthermore, their association with the 'southern' factions that had backed the Abbasids surely did their later reputations no harm.

Over about a century, the Umayyad caliphate essentially merged Islam into a medieval imperial structure, supported by residual bureaucracy of the older eras, against a background of Arab traditions. But it also sowed the seeds of its own demise. The blending of Arab and Persian cultures, societies and families enabled the caliphate to mature bureaucratically and economically, but also accelerated demands for civil equality. Expanding opportunities in non-martial occupations, and the difficulties of new conquests, rendered the 'Marwanid tactics of continual war' much less effective as a means to maintain order.[137] Members of the Umayyad family became associated with military factions, further destabilising the caliphate.[138] Marwan II's transfer of the capital to Harran eliminated the role of the Syrian aristocracy as unifying military commanders, effectively reducing the caliph's status to little more than that of the leader of the strongest faction, as in any other military-centred empire.

B. Post-Umayyad Caliphates

Under Umayyad rule, with the absorption of Byzantine and Persian administrations, the caliphate reached its long-term institutional form. Muslim society continued to evolve, but the changes were ever less related to Islam or the basic social contract between an Islamic ruler and the *umma*. The governing model remained that of a dynastic leader, acclaimed by the people but dependent on a military and bureaucratic supporting structure, professing and protecting the Islamic character of the state. '[A]dministrative, military and religious

[135] Hawting (n 7) 118.
[136] When the Abbasids occupied Syria, the graves of all Umayyad caliphs except Umar II were desecrated. Hawting (n 7) 118.
[137] Lindholm (n 121) 94–95.
[138] Hawting (n 7) 102–103.

establishments' increasingly vied for influence.[139] From the middle of the first Abbasid century until modern times, the ideas and practice of Islamic rule, with adaptations introduced via Persian and Turkish political cultures, persisted in much this way. Although it began to shrink geographically, the caliphate remained large and powerful. The ethnic composition of the ruling class, however, changed significantly. With the Abbasids, Arab supremacy partly gave way to accommodate Persian influence.[140] Both were eventually supplanted by the Turkish leadership of the Ottoman state.

Despite its troubled history, the end of the Umayyad dynasty was anything but inevitable. The Abbasid revolution was meticulously planned and executed. A group of about 30 opponents of the Umayyads coalesced in Kufa and, through decades of 'painstaking missionary work', built a widespread movement.[141] Unlike elsewhere in the caliphate, in Khurasan the Arabs had dispersed and integrated with the largely rural population, leading to a growing 'sense of solidarity between [them] and the Persians'.[142] The movement there raised 'many of the same grievances against the Umayyad government as their contemporaries in Iraq: rule by alien governors sent from Damascus, and attempts to secure financial contributions from the province',[143] and called for social equality, especially between Arabs and others. Although many of its adherents were Persian, including some leaders, 'the movement was oriented toward the restoration of an ideal society associated with the Arab prophet Muhammad, rather than any resurgence of Iranian culture and identity'.[144] There was also a widespread desire for an end to *fitnah*, in the form of the ongoing strife between 'southern' and 'northern' Arabs across the caliphate.[145] The rebellion attracted support from advocates of the family of Ali (who may not yet have considered the possibility that a more distant branch of the Prophet's family might claim his succession).[146] The Hashimiyya carefully did not name which member of the Prophet's family would assume the imamate, until Abu al-'Abbas, of the family of the Prophet's paternal uncle Abu Abbas, came forward in 749 to accept the *bay'ah* as the caliph al-Saffah.[147]

The Abbasids consolidated power quickly. Al-Saffah (749–754) installed relatives in office and as commanders, sidelining or simply executing other leaders of the movement.[148] His successors al-Mansur (754–775), al-Mahdi (775–785)

[139] Ochsenwald and Fisher (n 61) 131.
[140] Kennedy (n 22) 134.
[141] Berkey (n 1) 104.
[142] Sharon (n 47) 67–68.
[143] Kennedy (n 22) 126.
[144] Berkey (n 1) 105–106.
[145] Kennedy (n 22) 126. Arab and tribal identity remained stronger in the military class in Khurasan than among the general populace, resulting in fighting between clans within a largely disinterested society. Sharon (n 47) 68.
[146] Berkey (n 1) 104.
[147] Kennedy (n 22) 128.
[148] Ochsenwald and Fisher (n 61) 63–64.

and al-Rashid (786–809) restored, reinvigorated and also somewhat transformed the caliphate. Ali's partisans made their displeasure known through a series of rebellions, the most serious one in 762–763 by Muhammad 'the Pure Soul' and Ibrahim, great-grandsons of Ali's first son Hasan.[149] This revolt was the last major challenge to al-Mansur's succession; its end marked the establishment of the caliphate as an Abbasid institution, again supported by a professional army and an organised bureaucracy.[150] The defeat of a smaller Alid uprising in Medina in 786 scattered Ali's surviving relatives to distant provinces, where some became established as local rulers.[151] In 762 al-Mansur built a new capital city. Baghdad, centrally located astride the main north-south and east-west lines of communication, became the centre of one of history's great blossomings of learning, culture and commerce. The reign of al-Rashid became synonymous with the power and splendour of the caliphate. It also saw the centralisation of financial and political power, exercised via the Barmakid family of administrators on behalf of the caliph,[152] at the expense of the territorial governors. The Barmakids prototyped the role of the vizier, 'who became the alter ego of the caliph'.[153] They epitomised a powerful class of secretaries (*kuttab*) whose rise led to tensions with the military that destabilised the caliphate.[154]

Harun al-Rashid is remembered as the last great caliph. Nominally, Abbasid rule lasted five centuries, but the contested succession to al-Rashid triggered decades of civil war the caliphate never really recovered from. Despite sometimes extensive periods of stability and relative unity, for its last three centuries the Abbasid caliphate tended to fracture, as '[a] succession of Persian and Turkish military dynasties' exercised political control, establishing a model of Islamic rule where the caliph retained nominal religious supremacy while they governed in the caliph's name.[155] At the same time, the caliphs also found their religious authority eroding, constrained by the *ulama*, the Islamic scholar-jurists.[156] Scholars played a critical role in developing and formalising Islamic law, as *ahadith* were collected and published, legal theory developed, and schools of law coalesced.[157] The *mihna*, a doctrinal struggle between the caliphs and

[149] Berkey (n 1) 108 (the Abbasids broadened the idea of the Prophet's family to encompass the Banu Hashim, not only his descendants, which contributed to the construction of a specifically Sunni identity, in counterpoint to the Shi'ite focus on Ali).

[150] Hugh Kennedy, *The Court of the Caliphs: The Rise and Fall of Islam's Greatest Dynasty* (Weidenfeld & Nicolson, 2004) 26.

[151] Kennedy (n 22) 140–41.

[152] Kennedy (n 22) 141–42.

[153] Ochsenwald and Fisher (n 61) 67.

[154] Kennedy (n 22) 138–39.

[155] Sami Zubaida, *Law and Power in the Islamic World* (IB 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').

[156] Berkey (n 1) 129.

[157] Berkey (n 1) 114.

certain of the *ulama*, set the lasting parameters of their relationship. Nominally at issue was the createdness of the Quran – had God made it, or had it always existed? Starting in 833, the caliph al-Mamun required '*qadis* and other religious figures' to publicly attest that God had created it, while many *ulama*, including Ibn Hanbal, maintained the Quran is eternal and uncreated.[158] The caliphs al-Mutasim (833–842) and al-Wathiq (842–847) continued this policy, forcibly suppressing dissent. Ibn Hanbal was imprisoned and tortured, but his view had considerable support among the people of Baghdad. The caliph al-Mutawakkil abandoned the *mihna* soon after his accession in 847, implicitly affirming the *ulama*'s status as declarators of the law and their prerogative to interpret the Quran and *sunna*.[159]

The diminished Abbasid caliphate ended emphatically, with the sack of Baghdad by the Mongol Empire in 1258. An interregnum of claimants and pretenders ensued, during which society remained Muslim but, except for Shi'ites, lacked a leading figure. Dynasties such as the Umayyads in Spain or the Fatimids in Egypt had won regional recognition as caliphs, but when the Ottoman Sultan Murad I declared himself caliph in 1362, a new universal caliphate began to rise. In wealth, conquest, religion and culture, the Ottoman Empire restored the prior glory of the caliphate. When Mehmed II took Constantinople in 1453, a conquest no prior caliph had achieved, he could credibly claim to head the universal *umma*. Selim I (1512–1520) defeated Safavid Persia, the Ottomans' only major non-European rival, assumed the guardianship of the holy cities in Arabia, and added Egypt to the empire. Suleiman (1520–1566) expanded Ottoman territory, particularly in Europe, and served the faith, for example as he 'ceremonially discovered and restored the tomb of Abu Hanifa'.[160] He became known as 'the Lawgiver' for gathering, updating, codifying and republishing the edicts of the sultans.[161] By the end of the century, the sultanate ruled over Iraq and Syria, the Balkans and much of North Africa, and into the Caucuses, and was a major naval power.

The sultan ruled by God's will as 'head of the Islamic state, defender of the faith, protector of the pilgrimage to Arabia, executor of sacred law, and preserver of the holy relics associated with the prophet Muhammad'.[162] Administratively the sultanate resembled the classical caliphate, with financial, record keeping and secretarial *diwans* reporting to the Grand Vizier, and with treatment of non-Muslim religious communities also similar to the past. Islamic religious institutions were deeply integrated into state structures, with *ulama*, supported by *waqf* (charitable) endowments, leading mosques and operating

[158] Berkey (n 1) 126.
[159] Berkey (n 1) 127.
[160] Douglas A Howard, *A History of the Ottoman Empire* (Cambridge University Press, 2017) 91–92.
[161] Ochsenwald and Fisher (n 61) 209.
[162] Ochsenwald and Fisher (n 61) 191.

the state education system, and a civil service for developing and appointing judges.[163] The Ottoman Empire remained near its peak and a significant world power during the seventeenth and eighteenth centuries, then declined precipitously in the nineteenth century amid governmental stagnation, decadence and debt, surpassed by growing European power and technology. The empire's defeat in the First World War left most Muslim lands under European domination. The subsequent Turkish revolution put an end to the empire and, in 1924, to the caliphate.

[163] Ochsenwald and Fisher (n 61) 196–98.

2

Islamic Law, International Law and Human Rights

ISLAMIC LAW AND international human rights law supply the basic building blocks of the arguments in this book. The main focus is on their substantive conclusions, which often largely agree, but it is at times also important to understand their independent theoretical underpinnings. This chapter first gives an overview of classical Islamic law in the Sunni tradition as it developed during the caliphate,[1] discussing its sources and proofs and how jurists reach rulings. Its second part then outlines the international law of human rights, examines *siyar*, the classical law of relations with non-Muslims, and compares *siyar* to international law. Finally, the chapter presents the main principles, and some of the substantive conclusions, of traditional Islamic human rights law, and discusses the compatibility of Islamic law and international human rights law.

I. ISLAMIC LAW

Islamic law is highly developed, multifaceted and pluralistic. It is an aspect of Sharia ('the path', in the sense of a path to water in a desert). Because Sharia is perfect, immutable and complete, its legal prescriptions represent the law of God. Any perceived shortcomings reflect human misunderstanding. Since the Prophet Muhammad passed in 632, humans can understand Sharia only imperfectly and incompletely – although the Companions, who knew him personally, and Successors, who learned from the Companions, understood it better than most. The Muslim community, the *umma*, has the responsibility to interpret and apply Sharia in its collective 'capacity as the vicegerent of God', but sovereignty and the law itself are the province only of God.[2] This lends Islamic law

[1] Although this book reviews the constitutions and international undertakings of states that adhere to non-Sunni traditions, primarily Shi'ism, it engages only with the Sunni interpretive methodology. This should not be understood as indicating any preference, beyond the author's greater familiarity with Sunni doctrine.

[2] Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence* (Islamic Texts Society, 1991) 16–17.

a legitimacy that supersedes the will of the ruler, the desires of the people, a constitution or any other source of law.[3]

Islamic scholars disagree over exactly which source materials and methods to use to discover Sharia, but also concur on many basic points. Revelation ended with the Prophet. The Quran is the supreme legal text. When questions arise that the Quran does not explicitly address, the ways (*sunna*, singular *sunan*) of the Prophet and his Companions provide authoritative precedents. Since the classical period of Islam, most jurists agree on two further proofs that emerge from human reasoning, *ijma* (consensus) and *qiyas* (analogy).[4] These four proofs form the unchanging core of Sunni Islamic law.

A. Sources of Law

It is misleading to think of Islamic law as having sources in the sense of codes, legislation or court judgments. Its sole true source is the will of God. Kamali nonetheless accepts the Quran and the Prophet's *sunna* as 'sources' because they came to humans through divine revelation, while other materials used to discover the law are 'proofs'.[5] While jurists differ in the degree to which they permit the use of proofs other than the Quran and Prophet's *sunna* to reach judgments, all agree that these two sources supersede other proofs.

i. The Quran

As the verbatim Word of God, the authority of the Quran is beyond question. The verse 'We have neglected nothing in the Book' indicates that it presents a complete treatment of law and religion, albeit mostly as general principles that require elaboration to apply.[6] About 350 of its over 6,000 verses contain instructions capable of being understood as law.[7] These are the *nusus*, 'the definitive ordinances of the Qur'an which are expounded in positive legal terms'.[8]

[3] 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*, 2nd edn (translated by Majid Khadduri) (Islamic Texts Society, 1987) 43–44.

[4] 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', *Encylopaedia of Islam*, 3rd edn (Brill, 2009) 21.

[5] Kamali (n 2) 9. This book will generally use 'proofs' as including the sources as well.

[6] Kamali (n 2) 35 (quoting Quran 6:38).

[7] Mohammad Hashim Kamali, 'Source, Nature and Objectives of Shari'ah' (1989) 33 *Islamic Quarterly* 215, 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: An Introduction to Sunnī Uṣūl Al-Fiqh* (Cambridge University Press, 1997) 3–4.

[8] Kamali, *ibid* 217; See also Muhammad Asad, *The Principle of State and Government in Islam* (University of California Press, 1961) 13.

Authorities can enforce rules governing civil transactions, *mu'amalat*, 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'.[9]

Rules in the Quran fall into two sets of two categories: definitive (*qat'i*) or speculative (*zanni*), general (*'amm*) or particular (*khass*). Definitive rulings, for example that a husband takes half of the estate of his deceased wife if there are no children, are not open to interpretation.[10] Speculative rulings may require juristic effort (*ijtihad*) to interpret, which can lead to divergent conclusions. For example, most jurists understand the command for highway robbers to 'be banished from the earth' to mean exile, but jurists of the Hanafi school interpret it as imprisonment.[11] General statements in the Quran can include the particular, or evidence from the Quran or the Prophetic *sunna* can specify the particular. Al-Shafi'i demonstrates the former via Quran 49:13, which addresses first all people, then the 'God-fearing', a subset.[12] Further evidence can specify 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 repaid, specifying that bequests may not exceed one third and that debts take priority over both bequests and inheritance.[13]

Understanding the Quran as infallible and complete can require careful analysis. Out of many interpretive doctrines, three in particular inform this book: consideration of the circumstances of revelation, identification of the legal reason (*'illah*) behind a command and abrogation (*naskh*), whereby a later command can override an earlier one. Connecting the words of the Quran to events occurring at their revelation can resolve 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'.[14] Sometimes the Quran states a reason, such as sharing booty with the disadvantaged 'so that wealth does not merely circulate among the wealthy'.[15]

[9] Kamali (n 7) 217–18.

[10] Kamali (n 2) 28 (citing Quran 4:12).

[11] Kamali (n 2) 29 (citing Quran 5:33).

[12] Al-Shafi'i (n 3) 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').

[13] Al-Shafi'i (n 3) 104–105 (citing Quran 4:15).

[14] Sherman A Jackson, 'Jihad and the Modern World' in Mashood Baderin (ed), *International Law and Islamic Law* (Ashgate, 2008) 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 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' (at 248–49) (original emphasis).

[15] Kamali (n 2) 41 (quoting Quran 59:7).

Other rulings lack explicit justification, but most jurists seek the underlying reasons so that they can use them to further the objectives (*maqasid*) of Sharia in situations which lack a clear rule.[16] Finally, the Quran itself says a later text can displace earlier rulings (although not the earlier text itself, which being divine, was not in error).[17] Consideration of the circumstances can clarify the reason for an abrogation, as for example the *umma*'s conditions changed after the *Hijrah*,[18] when it became possible to form a state.

ii. Sunna *and* ahadith

The Quran enjoins obedience to the Prophet.[19] Because the Prophet was the Messenger of God, his actions and instructions could clarify Quranic verses and speak to points of law not directly addressed in the Quran. The Prophet taught, provided an example to live by, and gave judgment. His close Companions also issued rulings. The Prophet tolerated many customary practices, giving them the sanction of his *sunna*.[20]

As the Umayyad caliphate expanded, Islam reached regions with no experience of Arabian traditions or exposure to the Companions. Instructing the new Muslims required a means of transmitting the *sunna*. Over the first two centuries of Islam, observation gave way to *ahadith* (singular *hadith*), sayings of the Prophet or early Muslims that attest to a statement or an action. Eyewitnesses reported them to others, who passed them on. *Ahadith* 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'.[21]

Ahadith proliferated in the first century of Islam. Many were spurious.[22] Others were genuine, but had originated with Companions, Successors or in

[16] Kamali (n 2) 41–42.

[17] Wael B Hallaq, *Sharia: Theory, Practice, Transformations* (Cambridge University 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').

[18] Kamali (n 7) 223.

[19] See, eg, Quran 4:59 ('Obey God and obey the Messenger').

[20] The practice of following the behaviour, the *sunna*, of an enlightened individual as a model long predated Islam. Hallaq (n 7) 10–11.

[21] Ira M Lapidus, *Islamic Societies to the Nineteenth Century: A Global History* (Cambridge University Press, 2012) 160. The *ahadith*, however, are a form of transmission, not themselves constitutive of law. Wael B Hallaq, *The Origins and Evolution of Islamic Law* (Cambridge University Press, 2005) 200–01 (their rise 'was largely a matter of rationalization and authorization, [not] one of content or substance').

[22] The myriad false *ahadith* and the existence of local customs that did not readily fit the Islamic framework were an impetus to spread standardised Arab-Islamic norms in the form of *ahadith*. Hallaq (n 7) 17–18.

pre-Islamic traditions, retrospectively connected to the Prophet.[23] Establishing authenticity involved textual analysis, as well as assessing the chain of transmission (*isnad*). The most reliable *ahadith* were continuously reported by so many reliable witnesses from such a diverse geography as to be certainly true.[24] Less certain *ahadith* could also carry significant weight. From about the third Islamic century, written compilations became widespread.[25] Ultimately jurists gathered the most reliable *ahadith* into collections of some thousands. The collections of al-Bukhari, Muslim, Abu Dawud, al-Tirmidhi, Ibn Majah and al-Nasai became canonical references, 'the first two … occupy[ing] an almost sacred position for many Muslims'.[26]

B. Proofs – Reasoned Law

Three products of human endeavour complete the foundation of Islamic law. *Ijma*, a consensus of the community or of its scholars,[27] establishes a binding interpretation that future generations may not change. If a question cannot be answered by reference to the Quran, *sunna* or *ijma*, a jurist may reason by analogy (*qiyas*) from these.[28] *'Urf*, customary practice of the Muslims or of a particular community, can be a supplementary proof as long as it does not contradict the revealed sources or *ijma*. This is especially true of customs the Prophet or his Companions tolerated.

Ijma stems from the *hadith* 'my community shall never agree on an error'. If the *umma* agree on a rule for a situation the revealed sources do not address, then their interpretation must reflect Sharia. Agreement of the Companions on how the Prophet would have ruled sufficed to establish a point of law.[29] *Ijma* is the only universally binding proof of law that stems from human reason. Its main utility is to give authority to rules whose origin in the Quran or *sunna* is speculative.[30] How to demonstrate *ijma* is not agreed. The doctrine originated

[23] Hallaq (n 21) 102–03.

[24] Kamali (n 2) 70–71.

[25] Farooq A Hassan, 'The Sources of Islamic Law' (1982) 76 *American Society of International Law* 65, 70.

[26] *Ibid*. 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'.

[27] Hallaq (n 7) 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').

[28] Lapidus (n 21) 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').

[29] Kamali (n 2) 157.

[30] Kamali (n 2) 158 (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').

in Medina, whose jurists argued that their consensus reflected Sharia. Other jurists quickly adopted *ijma*,[31] but modified the formulation 'to include all the leading scholars'.[32] Al-Shafi'i held that *ijma* required consensus of the entire *umma*, not only the *ulama* (recognised senior scholar-jurists).[33] His follower al-Ghazali brought the Shafi'ite view closer to the mainstream by asserting that only 'fundamentals' needed community consensus, while scholarly consensus could establish *ijma* on doctrinal details.[34]

Ijma significantly influenced early jurisprudence,[35] sometimes even expanding on the law as revealed by the Prophet.[36] It has since receded, partly due to the maturation of Islamic law, as fewer questions arise that are straightforward enough to resolve by consensus, and partly for lack of a means to demonstrate agreement. In response to the practical difficulties posed by the growing size and diversity of the community, al-Ghazali argued 'that if a few scholars reached an agreement and no objection was raised by others (*ijma al-sukut*), or if the majority agreed and only a few raised an objection, agreement becomes binding'.[37] *Ijma* soon took on a regional aspect. According to Kamali, only the *ijma* of the Companions gained universal acceptance, 'partly due to their special status and not always due to their participation and consensus'.[38]

Qiyas means reasoning by analogy. As Muslim society developed it became clear that a legal system confined to the texts would leave wide discretion to individual *qadi*s (judges). Without a device like *qiyas* it is difficult to see how a system limited to the explicit rules of the Quran and *ahadith* could fulfil the all-encompassing aspirations of Sharia.[39] Eventually, permitting the application of

[31] 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. Hallaq (n 21) 111–12.

[32] Majid Khadduri, 'Nature and Sources of Islamic Law' (1953) 22 *George Washington Law Review* 3, 14. It was widely understood that consensus among the Companions could demonstrate a correct understanding of Sharia. The *ulama* claimed the role of interpreting Sharia after the passing of the Companions and the Successors, and with it the prerogative to declare consensus.

[33] Al-Shafi'i held that the mixing of communities had made following the civil customs of 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. Al-Shafi'i (n 3) 287.

[34] Khadduri (n 32) 3, 15.

[35] Kamali (n 2) 157.

[36] 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. Muhammad Saed Abdul-Rahman, *Islam: Questions and Answers – Jurisprudence and Islamic Rulings: Transactions – Part 8* (MSA Publication Ltd, 2007) 232–33. There is some disagreement among the *ulama* whether this rule required, or merely permitted, imposition of the increased punishment; the former reading would imply that *ijma* of the Companions could abrogate a prior rule of the revealed sources.

[37] Khadduri (n 32) 16.

[38] Kamali (n 2) 156.

[39] Hallaq (n 21) 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).

qiyas secured widespread agreement, even from followers of the strong textualists al-Shafi'i and Ibn Hanbal. From the textualist point of view, *qiyas* has the advantage that it is grounded in a methodology, rather than abstractions like equity or the public interest. If correctly applied, *qiyas* should reach the same result in similar situations, so can in effect bind future jurists. To resolve a novel question through *qiyas*, the jurist identifies a common effective cause (*'illah*) between the case at hand and a case addressed by the texts or *ijma*,[40] and may then apply the older ruling *mutatis mutandis*.[41]

Custom, *'urf*, can be binding in Islamic law when it does not contradict the main proofs and principles. As Islam spread, the Companions and Successors became reference points for its 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. A course of action can be deemed customary when it reflects widespread practice and is 'reasonable and acceptable to people of sound nature'.[42] *'Urf* can differ from place to place, and unlike *ijma* can change over time.

C. *Usul al-fiqh* – Methods of Discovering Islamic Law

Fiqh is Islamic law as discovered by jurists. An *'alim* (singular of *ulama*) 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'.[43] This encourages pluralism, as while *ulama* may certainly disagree and dispute, no diligent *'alim* can prove another is mistaken.

Too much pluralism invites chaos, but Sharia also suggests a structured approach. 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'.[44] This establishes the Quran and the Prophet's *sunna* as the highest sources of law, while obedience to 'those … in authority' validates *ijma* and referral of disputes

[40] Kamali (n 2) 158–83. The practice of developing analogies based on rules established by *ijma* remained somewhat controversial.

[41] *Mutatis mutandis* means, with the necessary changes made to apply the same concept to different facts.

[42] Kamali (n 2) 250–51 (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').

[43] Khaled Abou El Fadl, *And God Knows the Soldiers: The Authoritative and Authoritarian in Islamic Discourses* (University Press of America, 2001) 86. The Prophet 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'. Abu Dawud, *Sunan*, Book 24 (Hadith 3567).

[44] Quran 4:58.

to God and the Prophet sanctions *qiyas*,[45] as the only way to ascertain God's will after the Prophet passed. Based on these tools, late in the second Islamic century, al-Shafi'i proposed what became the main Sunni framework for discovering Sharia. Before this orthodoxy developed, jurists had devised ways to reason to a ruling. Masud employs two subdivisions, textual and purposive approaches, the former epitomised by the methodology of al-Shafi'i, and the latter by the *maqasid* (intention)-based system described centuries later by al-Shatibi.[46] They are best viewed here as paradigms. A purposive jurist takes the revealed sources into account, and even early traditionalists applied the principles on which al-Shatibi based his alternative approach.

i. Schools of Jurisprudence (Madhahib)

By the second century after the Prophet, *hadith* study had evolved toward a science of Sharia interpretation. In the mid-eighth century, Abu Hanifa led a group of jurists in Basra who advocated a rationalist approach to resolving questions not directly answered in the Quran. Their introduction of *qiyas* provided a structure to reach decisions through analysis. Some communities that had benefited from the 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 ways, Medinan practice reflected the *sunna* and was thus preferable to *qiyas* as a guide.[47]

Muhammad ibn Idras al-Shafi'i studied under Malik, then disputed with Abu Hanifa's senior pupils including Abu Yusuf and al-Shaybani. Dissatisfied with the approach of both nascent *maddhab*, al-Shafi'i advocated stricter adherence to the sources. Through close analysis of the Quran and *ahadith*, al-Shafi'i discovered a set of rules of interpretation. His system represented something of a synthesis of the Hanafi and Maliki approaches, and became the reference model of *usul al-fiqh*. The fourth main Sunni school follows the teaching of Ahmad ibn Hanbal, a pupil of 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 all 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 main schools, forbidding embellishment of the texts, but also the most permissive, because if the texts do not speak to a point, then in principle a Hanbali jurist should issue no ruling. Many other

[45] Kamali (n 2) 35.

[46] Muhammad Khalid Masud, 'The Changing Concepts of Caliphate – Social Construction of Shari'a and the Question of Ethics' in Kari Vogt, Lena Larsen and Christian Moe (eds), *New Directions in Islamic Thought*: *Exploring Reform and Muslim Tradition* (IB Tauris & Co Ltd, 2009) 203.

[47] Hallaq (n 21) 105–106.

madhahib arose in the early centuries, but these four – Hanafi, Maliki, Shafi'ite and Hanbali – eventually gained the adherence of nearly all Sunni *ulama*, and still thrive today.

ii. Reaching Rulings: Ra'y, Ijtihad, Taqlid

Islamic jurisprudence began with the Prophet's instructions to Mu'adh ibn Jamal upon sending him to Yemen. The Prophet asked how Mu'adh would judge. Mu'adh responded, by the Book of Allah (the Quran). The Prophet asked what if he did not find the answer there. Mu'adh answered, he would follow the *sunna* of the Prophet. Finally the Prophet asked what he would do if he still found no answer. Mu'adh responded, 'I will strive to form an opinion', and the Prophet praised God.[48] This empowers a *mufti* (jurist) or a *qadi* (judge) to use *ra'y* (the considered opinion of a diligent and pious jurist) to arrive at rulings.[49]

In the second Islamic century, *ra'y* receded in favour of *ijtihad*, structured reasoning from Islamic proofs and principles. The effort to gather, classify and propagate reliable *ahadith* yielded material that could support formal reasoning. Along with the methodological rigour offered by al-Shafi'i, and by those who advocated alternatives to his approach, this presented an opportunity to begin to standardise jurisprudence. Unlike *ra'y*, *ijtihad* has set rules. This made it less objectionable to the textualist view that human judgment should not interpret divine law. To perform *ijtihad*, a jurist must know the Quran and all legally significant *ahadith*, be proficient in *hadith* criticism and understand the doctrine of abrogation and which rules have been abrogated; 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'.[50] If the Quran, *sunna* and *ijma* do not yield an answer, the jurist 'may look for a similar case in which legal acts are different but legal facts are the same' and if still unsuccessful should employ *qiyas*.[51]

[48] *Sunan* Al-Tirmidhi, Book 6, 3:1327.

[49] Umar, the second caliph, appointed the first *qadi*s to exercise his delegated authority as judges, along with duties such as policing, tax collection, and leading community prayers. Lapidus (n 21) 160. Consulting experts as needed, *qadi*s applied rules that were demonstrable with certainty. If these did not cover 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. It then fell to the *qadi* to decide the case through *ra'y*.

[50] Hallaq (n 21) 146.

[51] Wael B Hallaq, 'Was the Gate of Ijtihad Closed?' (1984) 16 *International Journal of Middle East Studies* 3, 4–5 ('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 an "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').

Taqlid, imitation, is an alternative to *ijtihad*. Most questions of law that arise in daily life can be settled by reference to basic sources or prior jurisprudence and do not require the attention of a *mujtahid* (an '*alim* qualified to perform *ijtihad*). One, uncontroversial use of *taqlid* is by lower ranking jurists, *muqallid*s (who could be laypersons),[52] who could apply rulings of *mujtahidun* but could not exercise their own reasoning. Jurists applying *taqlid* generally follow their own school, but selecting a ruling from another school is not entirely forbidden.

Ijtihad held sway at least until the four main Sunni *madhahib* coalesced in about the tenth century, when according to many – but not all – historians and jurists, the juristic community came to a consensus that the law had been completely discovered and thenceforth jurists could only follow the canons of the *madhahib*.[53] Even if *ijtihad* is still permitted, its use is restricted to *mujtahidun*. Those who attempt *ijtihad* without proper preparation, it is claimed, risk leading the *umma* into error. Today, *ijtihad* and *taqlid* remain the two main approaches to *usul al-fiqh*.

D. Purposive Law

Devising new rulings or selecting among available rulings requires understanding why Sharia was revealed. The fourteenth century Maliki jurist al-Shatibi,

[52] Hallaq (n 21) 147.

[53] 'The closing of the door of *ijtihad*' is often associated with Joseph Schacht, whose 1950 *Origins of Mohammadan Jurisprudence* became a standard reference for western scholars in the mid-20th century. Since the 1980s, this theory has come into serious question. Sherman A Jackson, *Islamic Law and the State: The Constitutional Jurisprudence of Shihab al-Din al-Qarafi* (EJ Brill, 1996) 74. 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*. Hallaq (n 51) 10. 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'. Kamali (n 2) 336. Without denying the validity of the view that *ijtihad* remains a valid form of jurisprudence, and indeed that the revealed law requires jurists 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*. Jackson, *ibid* 74. Jackson proposes that in the medieval period a dialectic ensued between *ijtihad* and *taqlid*, with the latter becoming predominant but both always extant. He 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', Jackson concludes that effecting legal change within Islam not only does not require the dismantling of *taqlid* in favour of renewed *ijtihad*, but *taqlid* may hold greater power to sway society because it rests on settled authority instead of being subject to perpetual re-invention (at 97–101).

building on al-Ghazali's work, found three levels of goals in Sharia. The first consists of the now universally agreed five main objectives, the *maqasid al-Sharia*: to protect life, religion, intellect, family and property.[54] 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 of compensation protected the right to property.[55]

On a second level are '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*'.[56] 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.[57] Of the purposive principles discovered by classical jurists, *istihsan* (equity) and *maslahah* (public interest) are particularly well suited to facilitate adaptation to changing social circumstances. Both are grounded in the *maqasid al-Sharia*. Some jurists, especially Hanbali and Shafi'ite adherents, disapprove of them as introducing human discretion. Others argue that their use is at times necessary to avoid injustice that could defeat the purposes of Sharia.

Istihsan, often translated as equity, allows negation of a ruling that would cause hardship or injustice. When strict application of the texts, *ijma* and *qiyas* would lead to a result that clashes with the *maqasid al-Sharia*, the jurist may overturn that result if the proofs supply a principled basis to do so.[58] 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 pure water is not always available.[59] According to *istihsan*, a jurist may choose a weaker plausible ruling than the one strict *ijtihad* indicates, if the latter would result in injustice. As with *ra'y*, textualists initially opposed *istihsan* as a manifestation of juristic discretion, but 'it survived in the later Hanafite and Hanbalite schools as a secondary method of reasoning'.[60] Of the main Sunni schools, only the Shafi'ite entirely rejects *istihsan*.[61]

[54] The *maqasid* facilitate *qiyas*, as the jurist locates the legal cause behind a ruling by identifying the interest it furthers. Hallaq (n 17) 109.

[55] Khaled Abou El Fadl, 'Islam and the Challenge of Democratic Commitment' (2003) 27 *Fordham International Law Journal* 4, 46.

[56] Mashood A Baderin, *International Human Rights and Islamic Law* (Oxford University Press, 2003) 43.

[57] Mohammed Abed al-Jabri, *Democracy, Human Rights and Law in Islamic Thought* (IB Tauris, 2009) 250.

[58] Kamali (n 2) 218.

[59] Hallaq (n 17) 108.

[60] Hallaq (n 17) 50.

[61] Kamali (n 2) 218.

Imam Malik is credited with developing *maslahah mursalah*, the doctrine of the public interest.[62] *Maslahah* may be invoked like *istihsan*, to avert the normal results of applying the main proofs, only with the public good rather than individual justice as its aim.[63] *Maslahah* is crucial to public law as a driving principle of legislation, especially in areas recognised as within the purview of the ruler rather than of the jurists. When confronted with a range of permissible policies, the ruling authority, guided by the *maqasid al-Sharia*, 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'.[64]

E. Applying the Law

Classical Islamic law divides acts into five categories: obligatory (*wajib*), recommended (*mandub*), discouraged (*makruh*), forbidden (*haram*), and those on which the law has nothing to say (*mubah*). Jurists infer which category an act falls into by the language used to describe it. An act may 'please' God, or God may attach 'no blame', or may 'abhor' it, for example. When God commands an act and failure to perform it 'incurs punishment or censure', that act is obligatory; if it is commanded but no punishment is indicated then it is merely recommended.[65] Similarly, acts that God commands abstention from are discouraged or forbidden, depending on whether their performance is to be punished in this life.[66] In mainstream jurisprudence, encouraged or discouraged acts are not justiciable. Under the doctrine of *ibahah*, any act which is not forbidden is permitted, even if disapproved of.

Rulings take the form of opinions (*fatawa*, singular *fatwa*) or decisions (*ahkam*, singular *hukm*).[67] In themselves, *fatawa* neither settle a case nor set precedent. They are merely opinions, which a *mufti* may issue spontaneously or in response to a question – which may or may not relate to an actual case.[68] Because it is impossible to say whether a sincere effort has found a correct interpretation of Sharia, no *mufti* can gainsay another's *fatwa*. *Qadi*s issue *ahkam*, which the parties must obey. A *qadi* might follow a *fatwa* submitted by a petitioner, or seek one from a *mufti* who is expert in the area of law at issue. Jackson cites the thirteenth century Maliki jurist Shihab al-Din al-Qarafi as arguing that

[62] Baderin (n 56) 42–43.

[63] Kamali (n 2) 237 (citing examples such as the decision of the second caliph, Umar, to suspend the punishment of amputation for theft in a time of famine).

[64] Kamali (n 2) 30.

[65] Jackson (n 53) 117.

[66] Jackson (n 53) 117.

[67] The term *ahkam* also refers to rulings stated in the sources of law.

[68] *Mufti*s must be *ulama*, 'pious and of just character and must take religion and law seriously'. Hallaq (n 21) 147.

most even of the recorded opinions of the Prophet were *fatawa* not *ahkam*, analogous to *obiter dicta*,[69] and thus strictly speaking do not establish precedents.[70] However, as the means by which jurists share the results of their contemplations, *fatawa* remain vital building blocks of Islamic jurisprudence.

II. ISLAMIC LAW AND INTERNATIONAL LAW

Sharia has an international aspect, both as a universal law, and in its subset that deals with international relations, *siyar*. *Siyar* can inform an Islamic state's commitments under general international law (understood here to encompass treaties, customary international law, and regimes such as the United Nations or World Trade Organisation),[71] but may at times clash with the prevailing understanding of that law. Some Islamic states address the potential for conflict through constitutional clauses stating which body of law is supreme, or via reservations or declarations alongside their treaty commitments. This results in some variance across Islamic states in the relationship between Islamic law and international law.

International law and Islamic law have interacted for centuries. *Siyar* emerged in the Hanafi school, its first exponent being Abu Hanifa himself.[72] 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*)'.[73] The European founders of international law surely knew of their ideas.[74] Although they were

[69] Dicta are statements in a judicial opinion that do not bear on the outcome of the case, so do not set precedent.

[70] Jackson (n 53) 215.

[71] Unless otherwise specified, this book uses the term 'international law' in this sense.

[72] Mohamed Elewa Badar, 'Ius in Bello under Islamic International Law' (2013) 13 *International Criminal Law Review* 593, 600. 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, often due to the Hanafite tendency to rely more on *maslahah* than the other schools do. Malik stayed closer to the traditions of Medina, while al-Shafi'i constructed an influential theory based on a presumption of hostile relations with unbelievers. Muhammad Munir, 'Public International Law and Islamic International Law: Identical Expressions of World Order' (2003) 1 *Islamabad Law Review* 369, 398.

[73] Badar (n 72) 600; Mohammad Talaat Al Ghunaimi, *The Muslim Conception of International Law and the Western Approach* (Martinus Nijhoff, 1968) 34–35. Al-Shaybani aggregated and presented rulings regarding relations between the Muslims and other communities. The rulings and their evidences were largely received from Abu Hanifa, catalogued and occasionally refined by al-Shaybani and his senior colleague Abu Yusuf. Today, al-Shaybani's *Kitab al-Siyar al-Saghir* (The Shorter Book on International Law) is the most authentic early *siyar* treatise available.

[74] See, eg, Majid Khadduri, *War and Peace in the Law of Islam* (Johns Hopkins University 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'). CG Weeramantry, *Islamic Jurisprudence: An International Perspective* (Palgrave Macmillan, 1988) 151–58 (the travels, studies, contacts and correspondence of Grotius show 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).

at best under-represented in the early development of the international system, today Islamic states are influential members of the main international regimes and lawmaking bodies. Thus to a degree, Islamic legal theory and state practice influence general international law. In light of this coevolution, it is unsurprising that although they proceed from different first principles, Islamic law and international law often reach similar rules.

A. International Human Rights Law

Like Sharia, international human rights are, according to their proponents, universal and unquestionable. In positive law this is basically true: with a few exceptions and reservations, the vast majority of states adhere to at least the first generation of UN human rights treaties. The exact legal root of human rights is however not clear. The 'orthodox international view' postulates that humans inherently own rights, that 'the denial of certain basic liberties to any human being is universally unacceptable', and that rights accrue to individuals.[75] The preambles to the international human rights instruments simply assert their own universal truth. Historically, the human rights system is rooted in ancient religious and moral ideas as re-cast by Enlightenment era philosophers and applied to governance in Europe and North America in the seventeenth and eighteenth centuries.[76] The human trauma of the world wars spurred international awareness, resulting in the Universal Declaration of Human Rights (UDHR) and subsequent efforts to realise its ideals.[77] The constitutions of Algeria and Palestine evoke this tradition, promising respectively to protect '[f]undamental freedoms, human rights and rights of the citizen' and '[b]asic human rights and liberties'.[78]

The sources of international human rights law are of the same types as the sources of international law generally: treaties, international custom, shared principles of law, and judicial or academic opinion as 'subsidiary means'.[79] In principle, 'international courts do not make law', but their decisions bind the parties to the case at hand.[80] UN Security Council resolutions can also create binding law.[81] The UN considerably influences the soft law of human rights,

[75] Neville Cox, 'The Clash of Unprovable Universalisms – International Human Rights and Islamic Law' (2013) 2 *Oxford Journal of Law and Religion* 307, 312–13.

[76] Legal recognition of human rights arguably dates at least to Hammurabi. Ed Bates, 'History' in Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran (eds), *International Human Rights Law*, 2nd edn (Oxford University Press, 2014) 16.

[77] *Ibid* 28–31.

[78] Constitution of Algeria 1996 (amended 2016) art 38; Basic Law of Palestine 2003 (amended 2005) art 10(1).

[79] Statute of the International Court of Justice (ICJ Statute) art 38(1).

[80] Christine Chinkin, 'Sources' in Moeckli, Shah and Sivakumaran (eds) (n 76) 86.

[81] *Ibid* 90.

through General Assembly resolutions as with the UDHR, and through institutions like the Human Rights Council and the High Commissioner for Human Rights.

Customary international law forms as states 1) undertake (or forego) actions because 2) they believe they are bound by law to do so – the elements of state practice and *opinio juris*. A custom exists when most states, or most states in a region, consistently act similarly under colour of law.[82] Indicators of custom can include resolutions of the General Assembly, the Human Rights Council and other inter-state bodies, which reveal states' understanding of their obligations,[83] as well as their actions in international politics. Treaties pre-empt custom if they conflict, but a treaty 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'.[84]

In human rights law, custom preceded treaties. In 1948 the aspirational UDHR declared an emergent set of norms, in the potent form of an unopposed General Assembly resolution (Saudi Arabia, South Africa and the Soviet bloc abstaining). 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,[85] implement many of the rights the UDHR declared. They were proclaimed by the General Assembly in 1966 and entered into force through state ratifications in 1976. These three documents, often referred to as the international bill of rights, are the foundation of 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 (CERD), the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the Convention against Torture

[82] There is no precise rule to determine if enough states follow a practice for it to qualify as customary. The practice should be extensive, ie followed by many states, particularly those whose interests are at stake, and representative, ie those states follow it consistently. *North Sea Continental Shelf Cases (Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands)* [1969] ICJ Rep 3; Committee on Formation of Customary International Law, 'Final Report of the Committee: Statement of Principles Applicable to the Formation of General Customary International Law' in International Law Association Report of the Sixty-Ninth Conference (London 2000) (International Law Association, London 2000) 25–26.

[83] Analogous acts of governments, including legislation or administrative acts, policy statements, and participation in treaty and other international regimes, can contribute to the formation of customary law. It is not always clear whether these demonstrate state practice, *opinio juris* or both. Treating declarations as practice seems to assume that states' actions match their words. Chinkin (n 80) 83.

[84] Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (Vienna Convention) art 53.

[85] Ilias Bantekas and Lutz Oette, *International Human Rights Law and Practice* (Cambridge University Press, 2013) 149.

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).

Human rights treaties differ in concept from traditional treaties. They redound not to the benefit of states per se (as for example trade or security treaties do), but rather represent states' agreement to forego aspects of their sovereignty for the benefit of all persons. The UN treaty system includes monitoring, reporting and other bodies, some with general remits and others associated with particular treaties. The most prominent are the Human Rights Committee, established under the ICCPR primarily to review reports from states party detailing measures taken to implement the rights the treaty protects,[86] and the Human Rights Council, a subsidiary body of the General Assembly.[87] Regional treaties in Africa, the Americas and Europe supplement the global regime, as does the Arab Charter of Human Rights for some members of the League of Arab States. The treaties and monitoring bodies helped to spur the development of an international civil society dedicated to promoting human rights, whose actors range from non-governmental organisations to academics to multinational corporations. The resulting proliferation of monitoring and reporting has added greatly to the academic and juridical sources that traditionally comprised the main subsidiary means of interpreting international law.[88]

The International Court of Justice has general jurisdiction over international law, but only states have standing before it. For individuals, most decisions relating to human rights emerge from regional and national courts. 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, although only the European Court hears complaints by individuals. The Human Rights Council may also assess individual complaints and issue opinions. States party to the Optional Protocol to the ICCPR agree to allow the Committee to hear individual complaints raised against them. While 120 states have ratified or acceded to the protocol, among Islamic states only Algeria, Djibouti, Libya, the Maldives, Somalia and Tunisia have done so.

[86] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) arts 28, 40.

[87] UN General Assembly Resolution 251 (15 March 2006) UN Doc A/RES/60/251; See also Chinkin (n 80) 78. 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'.

[88] Chinkin (n 80) 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)').

Increasingly since the nineteenth century, constitutions have curtailed states' powers in order to protect individual rights.[89] The 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'.[90] The ICCPR protects many of the same rights as eighteenth and nineteenth century national constitutions: life, liberty, property, expression, worship and due process. The ICESCR addresses rights drawn from the development of social democracy in the nineteenth and twentieth centuries, concerning matters such as health, labour, social welfare and education. States guarantee most of the rights laid out in the ICCPR,[91] but commit only to make best efforts toward fulfilling those the ICESCR describes.[92]

International human rights law has a distinctly western flavour.[93] When the drafting of the bill of rights began in the late 1940s, many of today's Islamic states were not yet independent. In numbers of delegations and participants, Muslim nations were thus under-represented particularly at first, but increasingly took part as more became independent. When the General Assembly unanimously approved the ICCPR and ICESCR, 17 of today's Islamic states took part.[94] In a few areas representatives of Muslim states influenced the text of these conventions. 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 socio-economic rights; peoples' rights of self-determination; and implementation measures along with the right to petition.[95]

[89] Bates (n 76) 20–22. Early international instruments 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 principle of general freedom, subject to limitation only by law. The 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.

[90] Theo van Boven, 'Categories of Rights' in Moeckli, Shah and Sivakumaran (eds) (n 76) 145.

[91] ICCPR art 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').

[92] International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR) art 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').

[93] Mutua ties the system tightly, even identically, to western liberal democracy. Makau Wa Mutua, 'The Ideology of Human Rights' (1996) 36 *Virginia Journal of International Law* 589.

[94] Afghanistan, Algeria, Egypt, Iran, Iraq, Jordan, Kuwait, Libya, Malaysia, Mauritania, Morocco, Pakistan, Saudi Arabia, Somalia, Syria, Tunisia and Yemen, as well as Indonesia, Lebanon, Sudan and Turkey. See Susan Waltz, 'Universal Human Rights: The Contribution of Muslim States' (2004) 26 *Human Rights Quarterly* 799, 806–807.

[95] *Ibid* 813–37. The drafting and adoption history 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 of the right to self-determination (at 837).

Islamic law remains relatively unobtrusive at the international level, while international human rights law has gained the adherence of most Islamic states. Nonetheless, especially now that a modern Islamic view of international human rights law is developing, the two paradigms exert a certain mutual gravitational pull. Islamic law enters the international arena as Islamic states' values inform their participation in agreements and in institutions. Mutua argues that this indicates an opportunity to rethink some standards along Islamic lines, as the twentieth century social welfare state that overtook the nineteenth century minimalist republican model more closely resembles an ideal Islamic state.[96] International law influences Islamic law by encouraging Islamic states to seek interpretations of Sharia that fit international norms.

B. *Siyar*

Before international law and the state system developed, Islamic jurists faced questions of how their polity should relate to others. Classical Islamic law applied a dichotomy of *dar al-harb* ('house of war') and *dar al-Islam* ('house of Islam'). It classified people by religion and political affiliation, not nationality.[97] From the early days of the Islamic state, norms applicable to relations between Muslim citizens and outsiders formed. *Siyar*, literally 'practices' (singular *sirah*),[98] was 'a temporary institution' to regulate relations with non-Muslims until Islam subsumed the world.[99] This implied a law of nations 'not based on mutual consent or reciprocity, but on [Islamic rulers'] own interpretation of their political, moral and religious interest'.[100] Nonetheless, as the caliphate interacted with other sovereigns and non-Muslim groups and individuals, *siyar* developed through juristic refinement and the acts of caliphs into a law of the external dealings of the *umma*. Two of its components inform Islamic international law today: the law of *jihad*, and the rules that apply to non-Muslims in the community.

Jihad means 'struggle'.[101] It is linguistically related to *ijtihad*,[102] hinting at a broad meaning that could for example encompass a personal struggle to

[96] Mutua (n 93) 589, 597–98.

[97] Muhammad ibin al-Hasan al-Shaybani, *Kitab al-Siyar al-Saghir* (Mahmood Ahmad Ghazi tr, Islamic Research Institute, 1998) 19–20.

[98] Badar (n 72) 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').

[99] Khadduri (n 74) 44. Khadduri prefers 'law of nations' over 'international law' because it is broad enough to encompass earlier legal regimes that extended across nations within a single civilisation, but were not truly international (at 43–44).

[100] Khadduri (n 74) 45.

[101] 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) 5.

[102] Caner Dagli, 'Jihad and the Islamic Law of War' in Ghazi bin Muhammad, Ibrahim Kalin and Mohammad Hashim Kamali (eds), *War and Peace in Islam: The Uses and Abuses of Jihad* (Royal Islamic Strategic Studies Centre, 2013) 58.

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'.[103] 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'.[104] The fourteenth 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'.[105] 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'.[106] The early external relations of the Muslim community presumed a state of war between *dar al-Islam* and *dar al-harb*. Today, peace is the norm and war the exception. Thus even if expansive *jihad* is obligatory, its expression as war might be obsolete. The core obligation of *jihad* is to defend the faith and spread the *da'wah*, the call to Islam. In the Prophet's time, this often required war. Today, 'speech and writing' as well as armed force can further the ultimate aim of *jihad*, an 'ideology and welfare programme … of well-being for all humanity'.[107]

At least as they concern war, international norms are not at all foreign to Islamic states. In its martial aspect, *jihad* doctrine displays a consistent regard for the life, intellect, property, progeny and religion even of non-Muslims, allowing their violation only if needed to physically protect the *dar al-Islam*. This implies a recognition of some rights as belonging to all individuals, as part of God's creation, which can support a broader Islamic understanding of international law. The rules restricting when the ruler may initiate *jihad* resemble the doctrine of just war that later developed in Europe.[108] The rules of conduct of *jihad* presaged humanitarian law, as the first 'mature elaboration of these rules in the context of a system of international law'.[109] The degree to which the rules European states adopted grew out of Islamic precedents is not clear, but the large zone of congruence between the two systems suggests compatibility.

Citizenship in the caliphate derived from faith and physical presence. In principle, any Muslim could become a citizen by remaining in the *dar al-Islam*

[103] Asma Afsaruddin, 'Views of Jihad Throughout History' in Mashood A Baderin (ed), *International Law and Islamic Law* (Ashgate Publishing Ltd, 2008) 97.
[104] Khadduri (n 74) 55 (citing Quran LXI, 10–13).
[105] Mohammad Hashim Kamali, 'Introduction' in Ghazi bin Muhammad, Ibrahim Kalin and Mohammad Hashim Kamali (eds), *War and Peace in Islam: The Uses and Abuses of Jihad* (Royal Islamic Strategic Studies Centre, 2013) xiv.
[106] Khadduri (n 74) 56.
[107] Maududi (n 101) 7.
[108] Khadduri (n 74) 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*').
[109] Weeramantry (n 74) 134; See also Al Ghunaimi (n 73) 85.

for 15 days. Modern Islamic states do not grant citizenship so easily, nor do most require profession of Islam.[110] Following the verse 'there is no compulsion in religion',[111] and the tradition that originated with the Prophet, an Islamic state tolerates religious diversity. According to Berween, four principles should inform how an Islamic state treats non-Muslims: equality as all created by God; fair administration of justice; kindness; and respect and honour.[112] 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.[113] (A slave nonetheless retains rights against ill treatment as well as positive rights such as expression, religious practice and property rights.) As the *dar al-Islam* expanded, the pact of *dhimmah* evolved. It allowed some non-Muslims (*ahl al-dhimmah*, or *dhimmis*) to live in the *dar al-Islam*, protected in return for a tax, and to practice their own faiths. 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 uphold basic civil equality and the rule of law.[114]

Jurists developed the *dhimmah* theory as a framework for the reality of non-Muslims residing permanently within the *dar al-Islam*. 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 but kept their own religion.[115] *Dhimmi* status was available to all non-Muslims, not only *ahl al-kitab* (people of the book, ie monotheists).[116]

[110] 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 Republic of Maldives 2008 (amended 2018) art 9(d).

[111] Quran 2:256.

[112] Mohamed Berween, 'Non-Muslims in the Islamic State: Majority Rules and Minority Rights' in Baderin (ed) (n 103) 603–605.

[113] 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'. Al-Shaybani (n 97) 63 para 91. Al-Shaybani and Abu Yusuf would grant freedom to one such who 'embraces Islam before being made captive', while their teacher Abu Hanifa would consider the person a slave regardless, belonging to the *umma* collectively as *fay*' (spoils of war) (at 63, para 91).

[114] Mohamed Berween, 'Non-Muslims in the Islamic State: Majority Rules and Minority Rights' in Baderin (ed) (n 103) 607 quoting Muhammad Qutb, *Islam the Misunderstood Religion*, 5th edn (Islamic European Cultural Centre tr, 1984) 166.

[115] Kamali (n 110) 114 (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') (citing Baladhuri, *Futuh al-Buldan*; Zuhayli, *Haqq al-Hurriyyah* 146.

[116] Kamali (n 110) 110.

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).[117] There were many variations, 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 cost of military protection.

Although arguably the *dhimmah* lost its relevance with the end of the caliphate,[118] it showed that Islamic law recognises some rights as universal. In modern terms, Kamali sees citizenship as the starting point, with some distinctions based on faith. 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, which confers citizenship 'by the fact of birth and residence'.[119] Mawdudi, by contrast, would transpose the classical *dhimmah* to modern times. An Islamic state should allow non-Muslim citizens 'perfect freedom of religious belief and permit[] them to act according to their creed', so long as their practices do not 'fatally affect the public interest from the viewpoint of Islam'.[120] 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'.[121] The difference is more one of philosophy than of substance: either way, non-Muslims could follow their own ways in private, but should respect Islamic norms in the public space.

C. *Siyar* and International Law

Because there is no conceptual separation between international and national Islamic law,[122] *siyar* derives from the same sources and proofs as the rest of

[117] Kamali (n 110) 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*, 2nd edn (translated by Jamaal al-Din M Zarabozo) (International Islamic Publishing House, 2007) 665.

[118] Kamali (n 110) 113 (the *dhimmah* 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). 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' (at 115).

[119] Kamali (n 110) 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' (at 134).

[120] Maududi (n 101) 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' (at 28).

[121] Maududi (n 101) 27–28.

[122] Al-Shaybani (n 97) 19.

Islamic law.[123] More than most other areas of Islamic law, however, *siyar* is prone to develop via the acts of rightly guided rulers. As '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'.[124] 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'.[125]

Whether the respective proofs of international and Islamic law are logically similar is debated.[126] There is at least one significant conceptual difference: states have no special status under *siyar*. As an application of Sharia, *siyar* directly binds individuals.[127] Therefore, for example, not just the state, but all citizens must honour a treaty made in their name. Similarly, Islamic international law has in principle always allowed individuals to invoke its provisions.[128] This is crucial to its use to enforce human rights, as unlike under European-derived international law which runs between states, citizens of an Islamic state automatically enjoy standing to seek redress under international Islamic law for their rights.

Since the Umayyad and early Abbasid 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 international developments 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 in other areas. The techniques of *fiqh* provide further tools for *siyar* to

[123] Weeramantry (n 74) 130.
[124] Khadduri (n 74) 47.
[125] Badar (n 72) 601.
[126] Khadduri considers the particular proofs of *siyar* analogous to the sources recognised in article 38(1) of the ICJ Statute. Khadduri (n 74) 48 (comparing 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*). Ford sees less convergence. Christopher A Ford, 'Siyar-ization and its Discontents: International Law and Islam's Constitutional Crisis' (1995) 30 *Texas International Law Journal* 499, 521–30 (the Prophet's example showed only that the leader of the global *umma* can enter into agreements, which may not apply to individual Islamic rulers; custom's role in Islam differs from in international law because it cannot sanction derogation from the immutable proofs and is impermanent; *qiyas* is 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 long-standing 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).
[127] Khadduri (n 74) 45 ('the Muslim law of nations was ordinarily binding upon individuals rather than territorial groups'); See also al-Shaybani (n 97) 47 para 29 (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').
[128] Al-Shaybani (n 97) 20–21.

continue to evolve. Whether exercised by the *ulama* or a wider public through legislators, renewed *ijtihad* would surely make use of methods like *qiyas* and *maslahah* to adapt the principles of Islam to modern international affairs. Alternatively, while *taqlid* is not equivalent, or even closely similar, to the common law doctrine of *stare decisis*,[129] there is scope for the use of judicial decisions and other precedents as persuasive authority, much as in European civil law. Islam has a longstanding practice of recognition and deference to the authority of learned jurists. 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 law makes it unlikely that its methodology can ever completely converge with a system grounded in state sovereignty.

III. THE ISLAMIC LAW OF HUMAN RIGHTS

Islamic law recognises some rights as common to all humans, regardless of religion or other distinctions. One way the Quran reveals its universal scope is by specifically addressing Muslims ('O believers') in some verses, while others speak to all humanity ('O humankind'), indicating that all share a fundamental dignity as children of God.[130] 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. The constitutions of Iran, Saudi Arabia and Somalia explicitly recognise the idea of divinely ordained human rights.[131]

A. Human Rights Principles of Sharia

Pre-modern jurists did not develop a formal human rights sub-field of *fiqh*. But a set of rights is visible in Sharia, for example implied in mirror-image duties

[129] Ford (n 126) 529 (discussing the use of precedent in the context of article 38(1)(d) of the ICJ Statute).

[130] Abdulaziz Sachedina, *Islam and the Challenge of Human Rights* (Oxford University 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?' *ibid* 89.

[131] 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]') (citing 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 (amended 2013) 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').

owed by others to each person,[132] or made explicit in the proofs by statements instructing humans to apply their own understanding or follow their own preferences in certain regards. Since the middle ages, Muslim jurists have recognised an overarching system of rights (*haqq*) within Islam, including rights of God such as observance of the five pillars of Islam,[133] 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'.[134] Individuals also incur duties as an integral part of owning irrevocable rights.[135] In addition to prescribing specific rights and duties, the proofs provide evidence of guiding principles to further inform a system of individual rights that has significant similarities to modern international human rights regimes.

Universal human dignity, individual freedom and equality form the foundation of Islamic human rights. The Quran and the teachings of the Prophet indicate respect for the innate dignity of each person, Muslim or not. The core principle that whatever is not forbidden is permitted, *ibahah*, implies 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, although its notion of equality may not exactly match a modern western or international understanding, Islam brought to seventh century Arabia a revolutionary 'vision of creating an egalitarian society'.[136] Dignity, freedom and equality are among the most important principles for lawmakers and courts to consider as they continue to develop the Islamic law of human rights.[137]

Respect for universal dignity (*karāma*) is central to Sharia.[138] The Quran affirms the dignity of 'all human beings without limitations or qualifications of

[132] See, eg, Al-Jabri (n 57) 217 ('What is a right for a person, is a duty due to him'). This applies especially to the ruler, whose divine trust requires rule according to justice. Kamali (n 110) 211 (the Quran recognised a divine trust 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 and avoided arbitrariness and indulgence in' his own desires).

[133] *Shahada* (testifying that 'there is no God but Allah and Muhammad is His Prophet'), prayer, *zakat* (charitable giving), fasting during Ramadan and the *hajj* (pilgrimage to Mecca).

[134] Ebrahim Moosa, 'The Dilemma of Islamic Rights Schemes' (2001) 15 *Journal of Law and Religion* 185, 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' (at 191).

[135] 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').

[136] Mohammad Hashim Kamali, *Freedom, Equality and Justice in Islam* (Islamic Texts Society, 2002) 47.

[137] 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 (amended 2018) art 68.

[138] See, eg, Moosa (n 134) 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').

any kind'.[139] Kamali equates the ruler's duty to pursue the *maqasid al-Sharia* with recognition of, and a commitment to uphold, human dignity.[140] In Weeramantry's view, Islam emphasises the same intrinsic dignity that forms 'the underlying basis of modern doctrines of human rights'.[141] Sachedina does not go quite so far, but argues that recognising such dignity can, together with the Quran's universalist vision of a single community under God and the fact that God endowed humans with an intuitive sense of morality, 'serve as a minimalist foundation for human rights in Islam'.[142] While it is certainly incumbent on an Islamic state to enhance human dignity, respect for dignity, while prerequisite to respect for human rights, is not in itself sufficient.[143] Ensuring dignity does not necessarily prevent, for example, governmental interference in 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 wellspring of human rights in Islam. It arises from core tenets such as *ibahah*, and from numerous instructions encouraging believers to seek knowledge and understanding and to discuss community affairs among themselves. God enabled people to choose their own actions, because they can only truly follow Sharia by freely deciding to do so.[144] Kamali argues that although the proofs and classical jurists rarely use the term freedom (*hurriyyah*), they establish a presumption of freedom through language of permission (eg, 'has been made lawful'; 'there is no blame'; 'who has ever forbidden you?'), rendered yet broader by al-Shatibi's insight that the proofs indicate a 'state of forgiveness [that] falls between that which the *Shari'ah* has declared forbidden and that which it has declared permissible'.[145] Although individual freedom is the presumption, it is 'circumscribed by the needs of society and by the fact that the individual is a social being'.[146] The Maldives constitutionalises this principle, guaranteeing citizens that they are 'free to engage in any conduct or activity' within the limits of Sharia and express provisions of law.[147]

[139] Kamali (n 135) 1.
[140] Kamali (n 135) 90.
[141] Weeramantry (n 74) 63–64.
[142] Sachedina (n 130) 93.
[143] Jack Donnelly, 'Human Rights and Human Dignity: An Analytic Critique of Non-Western Conceptions of Human Rights' (1982) 76 *American Political Science Review* 303, 307.
[144] Weeramantry (n 74) 75 (citing Muhammad Iqbal for the argument that freedom of choice is prerequisite to goodness); See also Kamali (n 136) 18 (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').
[145] Kamali (n 136) 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' (at 30).
[146] Weeramantry (n 74) 75.
[147] Constitution of the Maldives 2008 (amended 2018) art 19.

Equality is a third fundamental principle of Islam,[148] about whose interpretation proponents of Islamic law and of international human rights have disagreed. The proofs strongly enjoin equality.[149] There is a fundamental tension between this basic principle, 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'.[150] For example, 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.[151] Rather, the verses 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.[152]

B. Human Rights According to Islamic Law

The set of human rights that Islamic law guarantees overlaps considerably with the international bill of rights. Its substance derives mainly from two sources: rulings of Islamic law, and the ruler's use of the law within the allotted realm of

[148] See, eg, Kamali (n 136) 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').

[149] Al-Jabri (n 57)230–31.

[150] Ann Elizabeth Mayer, *Islam and Human Rights: Tradition and Politics*, 4th edn (Westview Press, 2007) 99.

[151] Baderin (n 56) 134–35.

[152] Baderin (n 56) 135–36. Even without the accretions of classical rulings, there is a tension between the humanist ideal of absolute equality, and the fact that at points the Islamic proofs endorse differential treatment between men and women, Muslims and non-Muslims, and slaves and free persons. In legal proceedings, equality has always been fundamental. Weeramantry (n 74) 76–77; See also Kamali (n 136) 80–90 (the proofs accord non-Muslims equality at law except in matters relating to religious belief or practice). Where the proofs refer to differences in status, they usually cite piety; other distinctions arise largely in enjoining those with greater means to support those with less. See also al-Jabri (n 57) 232–33; See also Kamali (n 136) 49 (verses that rank some people above others indicate 'mainly spiritual distinction in the realm of '*ibādah*'). 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') (at 48–49). Kamali concludes based on the proofs 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' (at 72). Based on 'the preponderance of evidence in the sources … some of the instances 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' (at 80).

siyasah Sharia.[153] In interpreting and applying the law, the ruler must be guided by the public interest: 'the overall objective and purpose of the *Shari'ah* is the promotion of human welfare and prevention of harm *(maslahah)*'.[154] In the area of the law that relates to individual rights, the principles of dignity, freedom and equality should guide the ruler's understanding of the public interest.

These traditional priorities of Sharia can translate into the modern language of human rights. Based on examining the proofs, 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'.[155] These accrue to 'all human beings with no exception'.[156] A society that does not guarantee them cannot equitably apply 'the *shari'ah* punishments'.[157] Sharia also strongly respects privacy. For example the Quran forbids entering a home without permission, the Prophet forbade reading another's private correspondence, and the Caliph Umar accepted his subjects' admonition that he could not accuse them based on evidence improperly obtained.[158]

In addition to its duty to respect basic rights of all persons, an Islamic state owes its citizens extensive 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'.[159] Mawdudi argues similarly, and further finds that the proofs 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.[160] The state must ensure the general right of privacy, to 'guarantee the inviolability of a citizen's home, private life, and honor'.[161] The proofs admonish an Islamic ruler against spying on the people in any way, particularly as it can cause society to 'begin[] to suffer from a state of general distrust and suspicion'.[162]

[153] Eventually, Islamic jurists came to recognise that the law must afford public authorities, such as caliphs or sultans, a certain amount of discretion to make law in order to govern.

[154] Baderin (n 56) 42.

[155] Al-Jabri (n 57) 251.

[156] Al-Jabri (n 57) 240.

[157] Al-Jabri (n 57) 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"').

[158] Weeramantry (n 74) 71–72.

[159] Muhammad Asad, *The Principles of State and Government in Islam*, 2nd edn (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').

[160] Abul A'la Maududi, *Human Rights in Islam*, 2nd edn (Islamic Publications Ltd, 1995) 22–34.

[161] Asad (n 159) 84–85 (citing Quran 104:1, 49:12 and 24:27, as well as two Prophetic *ahadith*).

[162] Maududi (n 160) 24–25 (citing *ahadith* reported by Abu Dawud and Mu'awiya to the effect that a ruler who spies on the people will ruin them).

Islamic law recognises socioeconomic rights. Adjunct to the basic rights recognised in the Quran and *ahadith*, the Quran describes supplementary rights of 'the "weak oppressed"' (*al-mustad'afun*), those lacking enough wealth or power to enable them to enjoy their rights without special care.[163] These supplemental rights, realised as 'the right to *al-zakat*' (the Islamic alms tax) and 'the right to charity',[164] are as important as the other human rights in Islam as they 'form the bases of the full enjoyment of the general basic rights'.[165] By early consensus this treatment was extended to non-Muslims who entered into a covenant.[166]

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'.[167] According to Asad, the state must also uphold the promise of the proofs 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',[168] a view Mawdudi concurs with.[169] In order to enable understanding and progress, an Islamic state should also provide free and compulsory education.[170] 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.[171]

The core principles of Islam support a coherent system of individual rights. In the 'rights scheme in traditional Muslim jurisprudence', duties toward society are as obligatory as prayer.[172] Similarly, Islamic human rights are monolithic – there is no conceptual separation between civil and political and socioeconomic rights, as exists 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 tribal norms of the Arabian Peninsula when it arose, Islam brought substantial advances in areas such as procedural rights, economic rights and women's rights.[173] Some Islamic rules have since come to be seen as disabling

[163] Al-Jabri (n 57) 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' (at 241).
[164] Al-Jabri (n 57) 243.
[165] Al-Jabri (n 57) 240.
[166] Al-Jabri (n 57) 247.
[167] Al-Jabri (n 57) 246 (citing the 9th century jurist Ibn Hazm to argue that Islamic alms and charity equate to social security).
[168] Asad (n 159) 87–88.
[169] Maududi (n 160) 31.
[170] Asad (n 159) 86–87.
[171] 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) 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' (at 141).
[172] Moosa (n 134) 192: '[C]ivil and devotional obligations are accorded the same moral status'.
[173] Nisrine Abiad, *Sharia, Muslim States and International Human Rights Treaty Obligations: A Comparative Study* (British Institute of International and Comparative Law, 2008) 2–20.

rather than advancing universal rights, partly because times have changed and partly because other cultures where Islam was 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'.[174]

C. Compatibility of Islamic Law and International Human Rights

Although they approach human rights from incongruous starting points, Islamic law and international law arrive at many similar rules.[175] This does not 'justify the grafting of presumptions from one system to the other',[176] but the overlap is not limited to substantive conclusions. In important ways, the grounding principles also coincide. Al-Jabri argues that the Enlightenment amalgamation of religious faith with human reason coheres 'with the Islamic attitude which establishes human rights on reason (*al-'aql*) and *al-fitrah* (nature), covenant and *al-shura* (consultation)'.[177] Cox argues that focusing not on ideological differences but on common principles may improve understanding – for example both blasphemy and hate speech can be understood as offensive speech. A veil can also be seen as an implementation of a wider principle that when in public people should cover body parts that local society sees as sexualised.[178]

Basic principles of Islamic law render it naturally accommodating of international human rights standards.[179] 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'.[180] 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'.[181] Baderin identifies a key similarity in that both international and Islamic law presume individuals may do as they please, barring legitimate restraint by a political

[174] Al-Jabri (n 57) 210.

[175] Weeramantry (n 74) 120–21; Moosa (n 134) 189. Moosa cautions against extrapolating a fundamental compatibility from the admittedly 'considerable overlap in some of the[ir] concerns and objectives'. According to Baderin, differences in underlying 'political and legal philosophy' do not dictate 'complete discord' between international human rights and Islamic law. Baderin (n 56) 31.

[176] Moosa (n 134) 189.

[177] Al-Jabri (n 57) 194–95.

[178] Cox (n 75) 328.

[179] Al-Jabri identifies freedom and equality as the foundational principles of human rights under both an Islamic and an international understanding. Al-Jabri (n 57) 180–201. According to Sachedina, Islamic law can connect with the international human rights paradigm through shared core principles such as the innate dignity of humans. Sachedina (n 130) 92–93.

[180] Moosa (n 134) 209.

[181] Al-Jabri (n 57) 212–13.

authority justified for example by the need to keep people from violating one another's rights (such as by crime).[182] Kamali understands the Islamic principle of equality as reflecting into constitutions through clauses guaranteeing equality before the law, before the courts, in employment opportunities and in 'general duties and obligations such as … taxation and military service'.[183] Sachedina argues to the contrary, that 'Shari'a does not advance a concept of egalitarian citizenship' but 'simply divides the populace into Muslim members, with full privileges, and non-Muslim minorities, with protected status'.[184] Nevertheless, Islamic law would not forbid extending equal rights to non-Muslims.

Islam takes a community-oriented approach to human rights. Its main priorities for social relations appear to be peace, piety and social justice. This contrast with the individual focus that characterises international human rights law represents a point of potential misunderstanding. It need not, however, present a practical impediment, as the 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 individual rights, especially but not only 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 honour their duties. Like Islam defines duties that de facto give rise to rights, international human rights imply corresponding duties.[185] Morgan-Foster argues that western discourse could gain by re-emphasising individual duties as an integral component of rights, emulating the Islamic approach in this respect.[186] 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' compatible with Sharia.[187]

[182] Baderin (n 56) 45.

[183] Kamali (n 136) 49–50 citing Samir Aliyah Qad, *Nazariyyah al-Dawlah fi'l-Islam* (Mu'assasah al-Jami'iyyah, 1980) 86.

[184] Sachedina (n 130) 77.

[185] See, eg, Samantha Besson, 'Justifications' in Moeckli, Shah and Sivakumaran (eds) (n 76) 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').

[186] Jason Morgan-Foster, 'Third Generation Rights: What Islamic Law Can Teach the International Human Rights Movement' (2005) 8 *Yale Human Rights and Development Journal* 67, 79–89.

[187] Baderin (n 56) 50. '[R]ather 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 common aims of 'the enhancement of human dignity and the promotion of human welfare' (at 32).

3

Islamic States

Historical examples, particularly precedents set by enlightened caliphs, go some way towards demonstrating Islamic rule. But an Islamic state, particularly one with a written constitution, also needs ideological underpinnings. Even as the classical caliphate faded, Islamic jurists justified its existence and powers within Sharia's universalist claim to incorporate the law of the land. Their theories laid the groundwork for later ideas of an Islamic state.

Beginning during the Ottoman decline and through the colonial period, after a centuries-long pause in ideological development, reformist Muslim thinkers tried to re-conceive Islamic governance. A basic debate is whether to hark back to the proofs of law, especially the Quran and the *sunna* of the Prophet, to build a purer version of Islamic rule (revivalists), or to take a modernist approach. Modernists would resile from the rules of the past and base government on broad principles of Sharia, or simply leave the citizens to decide, through democratic processes, whether to enact Islamic values into national law. This is the ideological backdrop against which modern Islamic constitutions developed.

The exposition of *siyar* prepared the ground for states committed to Sharia to join the international system. Islam has long accepted treaties, mediation and arbitration, and regulated war long before the state system emerged. Today, Islamic states participate and wield influence in all major international forums. At the same time, especially through the Organisation of Islamic Cooperation (OIC) and in utilising the compromissory jurisdiction of the International Court of Justice (ICJ),[1] Islamic states use international institutions to continue to develop international law within Islamic parameters.

The first part of this chapter presents the classical theories of the caliphate and discusses the role of religious scholars in Islamic governance. Its second part traverses the modern history of Islamic constitutionalism, from the Islamist theorists of the nineteenth and twentieth centuries to the postwar establishment of Islamic constitutional states. The third part of the chapter analyses modern Islamic states' constitutionalisation of international law and their twenty-first century international engagements. The aim is to enable a further analysis of

[1] States can, by including a compromissory clause in a treaty, assign the ICJ jurisdiction to adjudicate disputes that arise between them concerning the treaty.

constitutional and treaty commitments made by Islamic states to uphold the rights of their citizens (and others under their jurisdiction), in simultaneous light of Sharia and international human rights law.

I. THE CALIPHATE

Islamic governance developed via the acts of enlightened leaders. The caliphs drew on the Prophet's teaching, but also on Arab traditions of decentralised rule by tribal leaders, and later, on Persian mysticism. However, many rulers lacked the level of piety and familiarity with Sharia that the Companions shared. The Prophet, the Rashidun caliphs and the Umayyads established the practice of Islamic rule; under the Abbasids, the theory began to develop. The law lagged the politics, as scholars sought to fit Umayyad and Abbasid rule into a frame that would allow both the rulers and the *ulama* to maintain that the caliphate operated according to law. This resulted in a close similarity 'between the theories of *fuqaha*' on the caliphate and the actual forms of rule in Islam'.[2] Ultimately, leading *ulama* such as al-Ghazali and al-Mawardi had to recognise the potential for tension between the ruler and the law. They posited a religious duty not to challenge the authority of a duly installed caliph or sultan, even one who strayed from correct Islamic rule,[3] as to resist risked strife and greater harm to the *umma*.

Two inquiries occupy the theorists, both classical and modern: who should be the ruler and how does the law constrain the ruler? Around the year 1000, even as the caliph's political power waned, Al-Mawardi 'extend[ed] *shari'a* concepts and vocabulary to cover existing practice' of government.[4] He propounded a theory of the caliphate, describing its duties and powers and tracing the institution back to the Prophet. In the thirteenth/fourteenth century, Ibn Taymiyyah developed *siyasah Sharia*, arguing that the law of a ruler, until then treated as independent, is subordinate to Islamic law and must operate within its constraints. Al-Mawardi delineated the caliph's sacred and temporal duties and powers, and how to select and qualify an Islamic ruler. Ibn Taymiyyah conceptually unified Sharia and the state, effectively espousing a trade whereby Islamic rulers acknowledge a higher power in return for wide leeway to govern.

[2] Mohammed Abed al-Jabri, *Democracy, Human Rights and Law in Islamic Thought* (IB Tauris, 2009) 36 ('the Sunni theory of the caliphate is generally an attempt to legalize an accomplished fact'). *Fuqaha*' is a plural form, meaning 'those who are versed in *fiqh*'.

[3] Jonathan P Berkey, *The Formation of Islam: Religion and Society in the Near East, 600–1800* (Cambridge University Press, 2003) 125 (quoting Ibn Hanbal's prohibition of rebelling against political authorities). This built on the earlier work of al-Shafi'i, who asserted that Sharia permits '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. Ann KS Lambton, *State and Government in Medieval Islam* (Oxford University Press, 1981) 17.

[4] Sami Zubaida, *Law and Power in the Islamic World* (IB Taurus, 2003) 92.

A. Theory of the Caliphate

The universalist aspirations of Islam, and the need to show continuity of rule since the Prophet led to the establishment of the caliphate as a matter of law. Jurists of the classical era asserted that Islamic law, as the law of God, superseded human law, including edicts of earthly rulers. As the caliphate became effectively a prize claimed or bestowed by military conquerors, the jurists applied a gloss of legal theory over the realities of power. 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 when he wrote.[5] According to al-Mawardi, the caliph's main duties were 'to maintain religion according to early precedents, enforce judicial decisions, and protect the people'.[6] Since the end of the Rashidun era, according to Masud, the only proper justification of the caliphate has been to uphold Sharia.[7] Three areas al-Mawardi addressed bear particularly strongly on constitutionalism: how to select the caliph; duties and qualities of a caliph; and the caliph's right to delegate powers, as to a vizier.

Al-Mawardi's first concern was to ensure the legitimacy of the caliph in office. 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*.[8] Even after the caliphate became hereditary, in principle succession remained a matter of the ruling family – usually instructed by the late caliph – identifying the next caliph, followed by the *bay'ah* ritual. 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).[9] Either means maintains continuity of the divine right to rule that passed from the Prophet to the *umma*, who then delegate it to each caliph – since the entire power is delegated, this arguably includes the prerogative to name a successor. Some advanced the idea that winning power through force conferred the authority to appoint the caliph.[10] The Ottoman sultans simply proclaimed themselves caliphs. Today, Kamali argues that the will

[5] Muhammad Khalid Masud, 'The Changing Concepts of Caliphate – Social Construction of Shari'a and the Question of Ethics' in Kari Vogt, Lena Larsen and Christian Moe (eds), *New Directions in Islamic Thought* (IB Taurus & Co, 2009) 187–205, 190. Al-Mawardi is 'regarded as the first Muslim jurist to expound a political theory', *ibid*.

[6] Ira M Lapidus, *Islamic Societies to the Nineteenth Century: A Global History* (Cambridge University Press, 2012) 294.

[7] Masud (n 5) 187–205, 194.

[8] Mohammad Hashim Kamali, *Citizenship and Accountability of Government: An Islamic Perspective* (Islamic Texts Society, 2011) 151.

[9] Masud (n 5) 187–205, 190–91.

[10] Masud (n 5) 193.

of the people remains the root of a caliph's authority, as the *bay'ah* 'completes and brings to fruition the initial nomination'.[11] Asad argues that since the proofs of law do not set out clear requirements, it is up to the community to decide how to elect its ruler, and for how long.[12]

According to al-Mawardi, the caliph must be healthy, wise, brave and just, capable of *ijtihad* and a member of the Quraysh tribe.[13] This did not entirely match historical reality; for example, '[t]he majority of the caliphs were not literate, let alone capable of *ijtihad*'.[14] The last criterion, reserving the caliphate to the Quraysh, remained controversial.[15] 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.[16] The Prophet being from a Quraysh clan added to 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*'.[17] According to Asad, in modern terms the Quran and the Prophet's *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.[18]

The Islamic polity quickly outgrew the ability of even a rightly guided caliph to personally carry out the detailed duties of religious and political leadership. The jurists responded with theories of delegation. Islamic theory recognises grades of power, all ultimately delegated from God: God devolved leadership of the *umma* on the Prophet, and it passed thence to the caliphs.[19] The jurists' task was to justify its further de facto devolution on governors, military leaders,

[11] Kamali (n 8) 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', *ibid*.

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

[13] Masud (n 5) 187–205, 191.

[14] Masud (n 5) 187–205, 191.

[15] Masud (n 5) 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).

[16] Masud (n 5) 192.

[17] Lambton (n 3) 170, citing Ibn Khaldun, *The Muqaddimah*, Vol. I, 396–401. For a discussion of the nature of *'asabiyya* see Lambton (n 3) 159.

[18] Asad (n 12) 42.

[19] Lambton (n 3) 95.

civil servants, judges and other officials. Al-Mawardi pronounced the canonical theory, distinguishing a vizierate of delegation from a vizierate of execution. The vizier of delegation was essentially the caliph's alter ego, requiring the same qualifications (except Qurayshi descent) and empowered to do anything the caliph could do, except select the caliph's successor or dismiss officials the caliph had appointed.[20] As such, when the caliph departed office, the vizier's standing was lost too. An emir or other vizier of execution served the caliphate, carrying out the caliph's orders or wielding powers for specific purposes but not exercising political discretion, and thus could continue in office.[21] Al-Mawardi found authority for delegation in the Quran, and recognised its practical necessity and that loyal ministers could help to prevent the caliph falling into error.[22] The fact that *fiqh* could flex to encompass the variety of configurations of authority that characterised the Abbasid caliphate suggests that modern constitutions also might distribute powers, perhaps in novel ways, without compromising their Islamic character.

B. The Caliph and the *Ulama*

Islamic law has always had an organic, changing aspect. This is visible in the Quran itself, as later revelations occasionally abrogated earlier ones. As the first generations of Muslims, who had known the Prophet or his Companions, passed, study groups in the various regions of the empire maintained the explorations of how Sharia should apply to their society. Gradually the *ulama* – a class of recognised scholar-jurists – coalesced and assumed a leading role in the efforts to discover Islamic law. Although the caliphs applied Islamic law, and influenced its content through the precedents their actions set, from the time of Mu'awiya they began to concede to the *ulama* the right to declare that content. The *ulama* essentially assumed the Companions' prerogative to elaborate the law, with their consensus becoming determinative in the Sunni tradition.[23] As a result, the caliph was to a degree beholden to the scholars, who 'were clear that the law was their province and that it was theoretically binding on the caliphs and their servants'.[24] Except for the *mihna*, when the caliph al-Ma'mun attempted to reclaim divine authority as espoused by the Umayyads, the Abbasids and subsequent caliphs 'accepted the scholars' claim to be the custodians of the law

[20] Lambton (n 3) 96.

[21] Lambton (n 3) 99.

[22] Abu'l-Hassan al-Mawardi, *Al-Akham as-Sultaniyyah: The Laws of Islamic Governance* (translated by Asadullah Yate) (Ta-Ha Publishers Ltd, 2018) 37 (quoting Quran 20:29–32).

[23] Berkey (n 3) 142 (citing al-Bukhari, *Sahih 'Kitab aal-'ilm'* 10: the *ulama* are the 'heirs of the Prophet').

[24] Zubaida (n 4) 78 (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).

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'.[25]

The jurists necessarily recognised in the rulers a wide freedom to govern. There was an inherent tension between the scholars' idea of the Prophet's *sunna* as a main source of law, and the caliph's authority.[26] A balance developed. The jurists developed theories that left the subset of law that governs *mu'amalat* (social relations) to the ruler's discretion, while local *muftis* held sway in family matters and *ibadat* (private and devotional matters). 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'.[27] The *ulama* lent the ruler legitimacy, and institutional recognition of their *fatawa* gave the scholars scope to see that the state respected Islamic norms. A clear boundary both limited the ruler's power to interpret the law and kept the *ulama qua* scholars from 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'.[28] *Qadis* (judges) and other state officials made and enforced decisions based both on Sharia and on the ruler's decrees.[29] Some *ulama* served as *qadis* and administrators, but others held that 'to maintain the very independence and legitimacy of the law' they should remain apart.[30]

Ibn Taymiyyah, among other contributions to Islamic jurisprudence, formalised this division of competences between the *ulama* and temporal rulers. Even while developing theories of why and how government should obey the dictates of revealed Sharia, he 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*).[31] The central dilemma facing Ibn Taymiyyah was that in his time, 'it was no longer possible to preserve the fiction of the obligatory nature of a universal caliphate'.[32] The risk was that religion and state might diverge. Ibn Taymiyyah, building on teachings of the Caliph Ali and Ibn Hanbal, answered that even an unjust imam wielded authority legitimately, as Sharia requires temporal leadership in order to

[25] Zubaida (n 4).

[26] Zubaida (n 4).

[27] Khalid Abou El Fadl, *Islam and the Challenge of Democracy* (Princeton University Press, 2004) 14–15.

[28] Sherman A Jackson, 'Shari'ah, Democracy and the Modern Nation-State: Some Reflections on Islam, Popular Rule and Pluralism' (27) *Fordham International Law Journal* 88, 101 (footnote omitted).

[29] Zubaida (n 4) 78 (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').

[30] Anver M Emon, 'Shari'a and the Modern State' in Anver M Emon, Mark Ellis, Benjamin Glahn (eds), *Islamic Law and International Human Rights Law* (Oxford University Press, 2012) 52–81, 73.

[31] *Ibid* 70–71.

[32] Lambton (n 3) 145.

fulfil religious duties of the state such as public safety, distribution of alms, and *jihad*.[33] His formalisation of a situation that was already true in fact – sultans ruled the Islamic lands, barely acknowledging the caliph's authority – had two key implications, beyond reaffirming the supremacy of Sharia in governance. Ibn Taymiyyah's exposition of *siyasah Sharia* amounted to recognising a sultan's right to regulate, and admitted that correct Islamic rule could exist in a context of multiple independent Islamic states. The idea that the *ulama* stated the law while the caliphs applied it to governance had existed for centuries. The caliph depended not only on viziers and emirs to implement policy, but on the *ulama* to acknowledge legitimacy as an Islamic leader. Ibn Taymiyyah clarified that the caliphs were applying Islamic law as they governed, but asserted that this arrangement was inherent in the law, not dependent on the institution of the caliphate. This was the door by which the *ulama* tried to ensure their ongoing relevance to public law.

The influence of the *ulama* was pervasive. *Muftis* gained respect for their learning and piety, and for the quality of their reasoning, which emerged into the law through their influence as teachers and the questions they answered for clients and courts. Their accessibility to ordinary people was important to the spread of an understanding of Sharia as something independent of the authority of temporal rulers. When serving as *qadis* in the provinces of the empire, their rulings played a crucial role in assimilating the *sunna* of the Prophet to prevailing laws and customs.[34] The spread of discussion circles and teaching centres encouraged the evolution of formally acknowledged legal schools with intricate interpretive methodologies and canons of rulings, 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 relationship between governing authorities and society. The end result was that the classical caliphate operated (in theory) under a very modern seeming principle that all earthly rulers were subject to the law, which was overseen by an independent authority.

C. Legacy of the Caliphate

The caliphate remains the reference model for an Islamic state. For many modern Islamists, it established that Sharia requires the rule of law, not arbitrary governance. Al-Mawardi's work declared the contours of correct Islamic governance, while Ibn Taymiyyah pronounced the status of laws established by caliphs or

[33] Lambton (n 3) 145.

[34] Wael B Hallaq, *A History of Islamic Legal Theories: An Introduction to Sunni Usul al-Fiqh* (Cambridge University Press, 1997) 13.

emirs within the framework of Sharia. According to the Islamic proofs, the analysis of the classical jurists and the examples of pious caliphs, a caliph rules by consent of the people, and must possess qualities such as piety, wisdom, fairness and courage, to enable just rule. Even in the absence of a recognised caliph, any Islamic leader should share these qualities. Beyond these basic principles, the classical idea of Islamic rule is flexible – as it had to be to maintain the view that the caliphs adhered to Sharia. The arguments of the *ulama* and the historical examples of rightly guided rule show that Islamic governance is open to a variety of administrative manifestations. The jurists established a principled frame of reference that has persisted, as Islamic governance has evolved and even, in some cases, amalgamated European political ideas. The idealised caliphate has come to stand for a social contract exchanging correct Islamic governance for civil obedience, with Sharia supplying the underlying constitutional context.

II. IDEAS OF AN ISLAMIC STATE

The rise of the Ottoman caliphate revived universalist aspirations. The shock of its collapse recalled the Mongol conquest of Baghdad centuries before. Through the post-Abbasid interregnum, government had remained at least nominally Islamic. The Ottoman regime, though regionally and ethnically rooted, was accepted as a legitimate caliphate. By contrast, when again in 1924 the caliphate fell, it reflected a realignment of power that left nearly all Muslim lands under European control. This rendered the idea of a universal caliphate remote at best. During this new interregnum, ideas of Islamic governance continued to develop. Scholars and political leaders reconceived Muslim self-rule, building on principles of Islam or precedents of rightly guided Islamic governance, often joined to western political models. Most embraced the nation-state, rather than calling for political unification of all Muslims.

Some of these state-building ideas have aimed to remove Islam from the public sphere in favour of a secular or nationalist ideology. Turkey is the prototypical example. Among political Islamists, some still aspire to a renewed caliphate, but most advocate reinventing Islamic governance from first principles.

Among the reformists who embrace Islam, debate runs between revivalists, who seek to hew as closely as possible to the proofs of law, and modernists, who would eschew strict adherence to proofs and precedents, leaving Muslim citizens to implement Islamic values through legislation if they so choose. Despite their divergent grounding principles, these approaches are in important ways compatible. Both revivalists and those modernists who accept a non-secular state advocate that majority Muslim states should be grounded in principles of Islamic law and faith.[35] Crucially, both groups espouse rule with the consent

[35] See, eg, Abdolkarim Soroush, *Reason, Freedom, and Democracy in Islam: Essential Writings of Abdolkarim Soroush* (translated and edited by Mahmoud Sadri and Ahmad Sadri) (Oxford

and participation of the *umma*. They advocate what amounts to renewed *ijtihad* in the public sphere, and are willing to experiment with forms of government prototyped in secular democracies. Albeit in different ways, both viewpoints echo the call for rule by the Quran and *sunna* that has recurred periodically since the ancient Kharijites, often set against the idea of a particular person with the right to rule. Neither approach would preclude learning from the ways in which prior generations interpreted and applied the texts.

A. Islamic Revivalism

Two strands of historical thought disproportionately inform the debate on reviving Islamic rule according to fundamental principles. One emerged from Arabia in the eighteenth century, the other from Egypt in the late nineteenth century. Both are deeply rooted in Islamic tradition, sharing a reverence for the original proofs of law and a professed disdain for much of the juristic work of the classical era. (However, many of their substantive conclusions of law tend to reflect those of at least some 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 idea of an Islamic state emerged in Iran in the twentieth century, grounded in Shia theology. Together, these visions of political Islam inform nearly all efforts to construct a state based on the words of the Quran and the Prophet's *sunna*.

Modern Islamic reformism dates to the eighteenth century Arabian Wahhabi movement.[36] 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 the only sources of authority.[37] 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 nineteenth and twentieth 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*

University Press, 2000) 126 (in a religious society, 'any purely secular government would be undemocratic').

[36] Lapidus (n 6) 360, 488.

[37] Lapidus (n 6) 488.

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).[38] Unlike some who followed Abduh in applying Islamic reform to advocate pseudo-secular modernisation, his pupil Muhammad Rashid Rida developed a revivalist model of political Islam based on Abduh's teaching. Rashid 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'.[39] Rashid 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.[40]

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 than the others, as *ijtihad* is uncontroversial in Shia Islam, and he did not advocate permitting laypersons 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 sideline them in favour of an enlightened caliph as the civil and religious leader, advised by religious scholars who might or might not be *ulama*.[41]

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.[42] Mawdudi diverged from Qutb and Khomeini in working not

[38] Ira M Lapidus, *A History of Islamic Societies*, 2nd edn (Cambridge University Press, 2002) 517–18.

[39] *Ibid* 581.

[40] Masud (n 5) 187–205, 196.

[41] Seyyed Vali Reza Nasr, *Mawdudi and the Making of Islamic Revivalism* (Oxford University Press, 1996) 97.

[42] Hamid M Khan, 'Nothing is Written: Fundamentalism, Revivalism, Reformism and the Fate of Islamic Law' (2002) (24) *Michigan Journal of International Law* 273, 308.

towards a political revolution in the near term, but to educate an Islamic society in preparation for an essentially peaceful reshaping of the political order.[43] 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 to 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'.[44] 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.[45] The assembly would be advisory rather than legislative, as the ruler would reach correct conclusions of law through *ijtihad*, acting simultaneously as chief judge and law-giver, in the mould of the original Medinan governance.[46] 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,[47] 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 singular authority would devolve on any 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

[43] Nasr (n 41) 78.
[44] Nasr (n 41) 44.
[45] Nasr (n 41) 89.
[46] Nasr (n 41) 90.
[47] See, eg, Noah Feldman, *The Fall and Rise of the Islamic State* (Princeton University 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').

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.

B. The Modernist View

Ever since the 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, educational and technological ideas of secular European states, while still maintaining a close connection to Islam.[48] 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'.[49]

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 conclusions of law as would have emerged in Medina under the Prophet, their application 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', whose mechanical application in an institutionally, politically and socially very different modern state risks 'logical or social dissonance'.[50] This indicates a need to re-think those rules. Failure to consider the historical context in which a rule developed can result in the application of values that neither have a strong foundation in Islamic law, nor reflect modern priorities of governance.[51] 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'.[52]

An-Na'im goes further, arguing that only where the state remains neutral with regard to religion can Muslims fulfil their religious obligations entirely of

[48] Lapidus (n 38) 496–97 (the effort to modernise began some decades earlier in the Tanzimat reforms, but only with the 1876 uprising of the 'Young Ottomans' which led to the constitution did it explicitly seek to incorporate Islamic values).

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

[50] 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?* (Oxford University Press, 2008) 258, 285.

[51] *Ibid* 258, 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).

[52] Al-Jabri (n 2) 36–37.

their own volition, which he sees as a fundamental tenet of Islam.[53] In a state that adhered to the principle of 'civic 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, for the greater good of society.[54] Such an approach would rely on the broad Islamic consciousness and shared values of a Muslim society to develop a state infused with Islamic values.

Modernist Muslim thinkers share with the revivalists a desire to re-think how Islam should operate in the public space. They also agree that it is time 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 revivalists to depart from the literal words of the proofs of law. One important implication 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. 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'.[55]

C. Islamism

Islamic revivalists and Muslim modernists alike have developed their ideas atop a foundation of tradition. Notwithstanding real differences and vehement ideological competition, there is also a wide area of agreement. 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 a consensus 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

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

[54] *Ibid* 93.

[55] See, eg, Feldman (n 47) 119–20.

and aspirations of Islamic societies'.[56] 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 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.[57] Far from having ossified to 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*.[58]

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.[59] This does not fit the classical model of Islamic governance, and engenders strong objection from *ulama* concerned about the integrity of *fiqh*, but it nonetheless represents a point of congruence among most commentators on political Islam, 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,[60] may create sufficient space for 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.

[56] An-Na'im (n 53)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.

[57] Jackson (n 28) 88, 93.

[58] Jackson (n 28) 91–92.

[59] See, eg, Feldman (n 47) 119–20.

[60] It is also sometimes argued that the outcome of *shura* can bind the ruler's decisions. See, eg, Yusuf al-Qaradawi, 'Islam and Democracy' in Roxanne L Euben and Muhammad Qasim Zaman (eds), *Princeton Readings in Islamist Thought* (Princeton University Press, 2009) 230, 244–45. Although this is likely a minority view, absent consensus to the contrary, it may still fall within the range of acceptable interpretations.

On this point the revivalists seem unwilling to concede in principle: although in practice they have been willing to 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.

D. Islamic Constitutions

Experiments with written Islamic constitutions began in the nineteenth century. The 1861 Constitution of Tunisia reflected a shared desire of Muslim citizens and European states to constrain the monarchy.[61] The 1876 Ottoman Constitution is the only example of a caliphate agreeing to a written constitution (in force 1876–1878 and 1909–1922). Under it, the Sultan ceded a modicum of power to an elected assembly and, from 1909, agreed to swear fealty to Sharia and to the Constitution. In the nineteenth and twentieth centuries, pressed by increasingly evident European military and industrial advantages, efforts ensued to modernise Ottoman governance. The Constitution culminated a process of institutional and legal reforms known as the Tanzimat,[62] by which public officials and scholars sought to adapt western forms of government and military and bureaucratic organisation. It was abrogated two years after the Sultan adopted it, and only reinstated as the empire finally collapsed. The only other written constitution from this era that invoked Islam was the 1906 Persian Constitution, supplemented by the 1907 Fundamental Law that gave place to Islamic law and to the *ulama* as its guardians. Like its Tunisian and Ottoman predecessors, the 1906–1907 Persian Constitution remained in effect only briefly, as the state was continuously beset by political disputes, financial collapse, coups and foreign interventions until the First World War.[63]

After the Second World War, national independence was the priority. The caliphates had had some characteristics of states,[64] but an autonomous nation-state only became the regional norm after the Second World War. Most of the new states adopted written constitutions that drew on European legal traditions. They often also incorporated Islam, for example as the state religion or

[61] Dawood I Ahmed and Moamen Gouda, 'Measuring Constitutional Islamization: The Islamic Constitutions Index' (2015) 38 *Hastings International and Comparative Law Review* 1, 20. At the time Tunisia was an autonomous emirate within the Ottoman Empire.

[62] See, eg, William Ochsenwald and Sydney Nettleton Fisher, *The Middle East: A History*, 6th edn (McGraw-Hill, 2004) 298–99.

[63] *Ibid* 365–67.

[64] 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, 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') (at 11) (concluding that at least as early as the first quarter century of the Umayyad era, the caliphate fit the proposed definition).

to guide legislation. This built on the earlier use of European constitutional forms as a vehicle to install Islamic governance as an indigenous bulwark against despotism.[65] In Pakistan, Mawdudi brought to the Constitution an overarching theory of Islamic government. The 1949 Egyptian Civil Code prototyped a way to integrate Islamic law into secular law. Drawing on Abd el-Razzak el-Sanhuri's proposal to emulate the Swiss Civil Code, it established a hierarchy whereby courts should use first local custom, then Islamic law, when facing gaps in statutory law.[66]

Sanhuri aimed to integrate Islamic law with the state's legal tradition, which in Egypt included a half century's recent experience with French law. In contrast, the code he proposed for Iraq reflected Iraq's application of the Ottoman Civil Code, the *Majalla*, incorporating Hanafi rulings of *fiqh*.[67] Sanhuri envisioned 'legal reform as a functional successor to the caliphate: the Islamic world could be unified by a common legal framework informed by the Islamic *shari'a* but borrowing also from other legal systems'.[68] His ideas percolated through the codes of Bahrain, Jordan, Kuwait, Libya, Qatar, Syria and the UAE,[69] and into constitutions across the region. The result is a range of constitutional patterns, with some reflecting French, British or American examples; some constitutional monarchies along Ottoman lines; some assemblies with legislative powers, others merely consultative; and a few documents that simply state principles of governance rather than defining or restraining powers. Allowing a state's legal tradition to guide its implementation of Islamic law keeps the focus on Sharia but can accommodate traditional institutions such as Afghanistan's *Loya Jirga* or the hereditary Rulers of Malaysia.

The constitutional history of Islam describes an ongoing attempt to apply the teaching and examples of the Prophet and his Companions to an evolving society. From the Sunni point of view, correct governance is found in the law and shown by the caliphates. Arguably, what makes a state Islamic is a grounding in core principles of Islam and the provision of rule according to Sharia, not its institutional design. According to this view, the Prophet's state and the caliphates represented specific constructions, each appropriate for a particular society at a particular time. Today it may be possible to integrate their principles with new mechanisms of government to form a modern state that is no less Islamic. The Quran and the teachings of the Prophet are relatable to international standards

[65] Ahmed and Gouda (n 61) 1, 17.

[66] Amr Shalakany, 'Between Identity and Redistribution: Sanhuri, Genealogy and the Will to Islamise' (2001) (8) *Islamic Law and Society* 201, 225. The provision remains in the current version of the code; Civil Code of Egypt 1948 art 1 (referring to 'the principles of Moslem Law').

[67] Enid Hill, 'Al-Sanhuri and Islamic Law: The Place and Significance of Islamic Law in the Life and Work of 'Abd al-Razzaq Ahmad al-Sanhuri, Egyptian Jurist and Scholar, 1895–1971' (1988) (3) *Arab Law Quarterly* 1, 35.

[68] Nathan J Brown, *Constitutions in a Nonconstitutional World: Arab Basic Laws and the Prospects for Accountable Government* (SUNY Press, 2012) 165.

[69] Hill (n 67) 39.

of governance. Both Islamic governance and international law develop at least in part through state practice. The idea of Islamic constitutionalism seems now to have coalesced around similar basic forms to western constitutions; a duty of consultation or right of legislation; guarantees of civil rights; and a substantive role for Sharia. This modern pattern of Islamic constitutionalism also entails engagement with the rest of the world, both Islamic and non-Islamic.

III. ISLAMIC STATES IN THE INTERNATIONAL SYSTEM

The latest phase of Islamic constitutionalism is its internationalisation. Since the Second World War, new regimes and constitutions have proliferated across the Muslim world. Simultaneously, Islamic states' international relations have expanded and deepened. Islamic constitutions interweave the concepts propounded by Islamists and modernists, and also often include provisions giving weight to international law. In contrast to the classical dichotomy of *dar al-Islam* and *dar al-harb*, engagement with foreign states is now the norm; evidently, Islamic states accept the long term existence of a pluralistic world order. Islamic states have joined the UN and other international bodies, and adhere to international and regional treaties. A specifically Islamic international community has also developed, and is evolving a shared understanding of human rights. These trends toward constitutionalism and internationalisation have accelerated in the twenty-first century.

A. Islamic International Law

By the time of the early Abbasid caliphate, classical *siyar* had begun to reach its limits. Perhaps if the caliphate had remained strong and united longer, juristic theory would have evolved to account for multiple Islamic states and prolonged co-existence with non-Muslim states. Now that avowedly Islamic states are again active on the world stage, apparently content to remain independent of one another, their actions serve, as did the acts and rulings of the early caliphs, to demonstrate the understanding of Muslim leaders of how they should conduct the community's external relations. International Islamic associations, especially the OIC, provide venues to demonstrate consensus. These developments evidence new norms of Islamic international law,[70] but they do not

[70] Bader argues that the traditional division of the world into Muslims and non-Muslims, with only the former represented by a 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 [Organisation of Islamic Cooperation (OIC)] and its Charter'. Mohamed Elewa Badar, 'Ius in Bello under Islamic International Law' (2013) 13 *International Criminal Law Review* 593, 601–602.

mark a complete break with the classical past. *Siyar* contains strong principles of respect for precedent and adherence to agreements which enable Islamic states to engage in the international system, yet still remain faithful to Sharia.

i. Reciprocity and State Recognition

Reciprocal recognition of sovereigns is a cornerstone of international law, but alien to *siyar*, which recognised only God's authority and a single, universal Islamic state.[71] Ford asserts that this casts doubt on reciprocity, and whether Islam permits treaties with unbelievers.[72] Arguably however, reciprocity has informed relations between Muslims and non-Muslims since it 'was applied in Islamic history by 'Umar'.[73] The Prophet conducted diplomatic relations with the Christian Abyssinian kingdom and the Byzantine Empire, and traded with Mecca even while at war with Mecca. These diplomatic relations were 'chiefly religious in character', but as political considerations became more important the caliphs 'were in almost continuous diplomatic negotiation with the Byzantine emperors on peace treaties, payments of tribute, exchanges of prisoners and payments of ransoms',[74] demonstrating recognition by state action. Munir questions Khadduri's characterisation of the *dar al-harb* as lacking competence to enter into treaties, based on Quranic references to other nations and the Prophet's agreements.[75] Ford may be correct that in principle *siyar* could recognise as sovereigns only God and the imam, but in fact the caliphs recognised other rulers, treating them according to protocols as sovereigns.[76] This '[s]tate practice', Weeramantry argues, 'elevated the principle of recognition to a definite place in Islamic international law'.[77] The need

[71] See, eg, *ibid* 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'); See also Mohammad Talaat Al Ghunaimi, *The Muslim Conception of International Law and the Western Approach* (Martinus Nijhoff, 1968) 91.

[72] Christopher A Ford, 'Siyar-ization and its Discontents: International Law and Islam's Constitutional Crisis' (1995) 30 *Texas International Law Journal* 499, 504.

[73] Muhammad Munir, 'Public International Law and Islamic International Law: Identical Expressions of World Order' (2003) 1 *Islamabad Law Review* 369, 407.

[74] CG Weeramantry, *Islamic Jurisprudence: An International Perspective* (Palgrave Macmillan, 1988) 142.

[75] Munir (n 73) 406–407.

[76] Weeramantry (n 74) 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"').

[77] Weeramantry (n 74) 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 2018 art 12; Constitution of Republic of Mauritania 1991 (amended 2012) art 80.

to make treaties and otherwise conduct relations with the non-Islamic world led to de jure as well as de facto recognition, which 'produced a new theory of international relations – no longer a relationship of hostility but one of enduring peace'.[78]

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. The fragmentation of the Abbasid caliphate added another new dimension, as a multiplicity of Islamic states came to co-exist 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 recognized several Islamic rulers in Central Asia and India. The Moghul emperors likewise recognized Islamic sovereigns both in India and outside'.[79] This did not however require much evolution of Islamic law, as the various rulers already bore duties to one another and to their peoples as fellow Muslims. 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'.[80]

ii. Treaties – Pacta Sunt Servanda

Like international law, *siyar* requires that agreements be honoured.[81] The rule *pacta sunt servanda* was so strong in classical *fiqh* that even when treaty 'purposes and terms … were apparently contrary to some principles of Islam' (thus the ruler had erred in agreeing to them), 'this was resolved in favour of the treaty's binding nature'.[82] Its justification however differs between Islamic and international law: divine commands in the former case and evolved customary practice in the latter.[83] This makes it hard to assert that international law and *siyar* share compatible values, rather than simply arriving at similar rules for independent reasons.

[78] Weeramantry (n 74) 148.

[79] Weeramantry (n 74) 143. Sixteenth-century correspondence shows the Islamic sovereigns of India and Gujarat remonstrating with each other based on the Quranic injunctions to honour promises (at 141).

[80] Weeramantry (n 74) 148.

[81] Weeramantry (n 74) 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').

[82] Badar (n 70) 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')).

[83] See, eg, 'United Nations Conference on the Law of Treaties' (Vienna 26 March – 24 May 1968) (18 April 1968) UN Doc A/CONF.39/C.1/SR.29, 151 para 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').

Siyar and international treaty law share further similarities. Weeramantry observes that the doctrines al-Shaybani reported include amendment, impracticability due to changed circumstance, and renunciation, 'basic aspects of the modern law of treaties'.[84] *Siyar* may bind stronger states to their 'contractual and other obligations towards the weaker' even more than international law does because 'the Islamic state [views] itself as being only a trustee of power', not a sovereign in the sense of international law.[85] The Muslims' fulfilling of the Prophet's promise to the Quraysh,[86] 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'.[87] Acknowledging a higher sovereign does not disable an Islamic state's prerogative to enter into agreements; on the contrary, Islamic rulers must not only uphold their agreements, but must also apply them in full accordance with their obligation under Sharia to deal justly even with unbelievers. Thus even a peace agreement that does not subject a foreign ruler to Islamic law may not 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'.[88]

Modern Islamic states show a propensity to form treaties, particularly with one another. This may reflect greater trust in a counterparty who is also committed to Islam, shared political interests, or 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 compromissory jurisdiction of the ICJ than are other states.[89] 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.[90] More have been willing to include compromissory

[84] Weeramantry (n 74) 140.

[85] Weeramantry (n 74) 131 (citing Quran 16:91, 92).

[86] The Quraysh were the leading tribe of Mecca, of whom the Prophet was himself a member.

[87] Weeramantry (n 74) 140.

[88] Muhammad ibn al-Hasan al-Shaybani, *Kitab al-Siyar al-Saghir* (translated by Mahmood Ahmad Ghazi) (Islamic Research Institute, 1998) 60, para 80.

[89] Emilia Justyna Powell, 'Islamic Law States and the International Court of Justice' (2013) 50 *Journal of Peace Research* 203, 205 ('Islamic law dyads … have the largest number of bilateral compromissory treaties memberships'). Powell defines 'Islamic law states' as 'states that officially and directly apply sharia to a substantial part of personal, civil, commercial or criminal law' (at 209). See also Sara McLaughlin Mitchell and Emilia Justyna Powell, *Domestic Law Goes Global: Legal Traditions and International Courts* (Cambridge University Press, 2011) 217.

[90] 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. Powell (n 89) 212–15. 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' (at 212). Conversely, participation in regional organisations was associated with less use of compulsory ICJ jurisdiction, as Islamic law states

clauses giving the ICJ jurisdiction over disputes arising out of particular treaties.[91] 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.[92]

Participation in international and bilateral treaties has become the Islamic norm. This facilitates Islamic states' participation in, and influence on, the international legal order. Badar argues that Islam's failure thus far 'to win the whole world' renders the making of treaties with non-Muslims 'not only permitted, but encouraged in order to prevent conflicts'.[93] The Prophet's city-state engaged in treaty relations – indeed, it began as a treaty with and among Medinan tribes. In the caliphate, treaty commitments 'towards non-Islamic states were accorded full recognition'.[94] Today, treaties concluded between Islamic states can help them to harmonise their laws as well as regulate their international interactions. Particularly in the Arabian Peninsula and the Maghreb, international agreements substantially affect domestic law. Ratified treaties have direct effect in Bahrain, Djibouti, Kuwait, Oman and Qatar.[95] The power of the constitutional courts or councils of Afghanistan, Algeria, the Comoros, Libya and Tunisia to review international agreements affirms the supremacy of their constitutions.[96]

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' (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' (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 compulsory jurisdiction, but the more likely to enter into treaties with compromissory clauses (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') (at 214).

[91] Powell (n 89) 204. 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' (at 205). See also Mitchell and Powell (n 89) 217.

[92] Powell (n 89) 214–15.

[93] Badar (n 70) 602.

[94] Weeramantry (n 74) 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)' (at 140).

[95] Constitution of Bahrain 2002 (amended 2017) art 37; Constitution of Djibouti 1992 (amended 2010) art 70; Constitution of Kuwait 1962 art 70(1); Basic Statute of Oman 1996 (amended 2011) art 76; Constitution of Qatar 2003 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.

[96] Constitution of Afghanistan 2004 art 121 (the Supreme Court may review 'laws, decrees, interstate treaties, and international covenants'); Constitution of Algeria 1996 (amended 2016) art 186

Conversely, the Basic Law of Saudi Arabia specifies that its own implementation may not violate 'the treaties and agreements the Kingdom has signed'.[97] International agreements have greater force than ordinary laws in Algeria, the Comoros, Djibouti, Libya, Mauritania and Tunisia.[98]

B. Islamic States and International Law

The modern structures of states and treaties provide a way for Islamic states, each representing part of the *umma*, to consult and declare their collective understanding of Sharia. This is not classical *ijma*, but especially if the jurists supported the conclusions, then these would arguably form strong customary law. Islamic states appear to have formed a consensus that they 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'.[99] All OIC members are UN members, except Palestine with Permanent Observer status. The constitutions of Algeria, the UAE and Yemen reaffirm their commitment to the UN Charter.[100] All Islamic states from the Atlantic to the Iranian border are members of the Arab League. In Africa (including the Comoros), all Islamic states are members of the African Union. Islamic states have served on the UN Security Council and the Human Rights Council.[101] Most OIC Member

(the Constitutional Council 'rules on the constitutionality of treaties'); Constitution of the Comoros 2018 art 12 (the Supreme Court reviews treaties for constitutionality on the request of 'the President of the Union, by the President of the Assembly of the Union or by the Governors of the Islands'); Draft Constitution of Libya 2016 art 150(5) (the Constitutional Court reviews treaties 'before ratification and subsequent submission to the Senate'); Constitution of Mauritania 1991 (amended 2017) art 79 (on referral by the President or legislative leaders); 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' (at art 15).

[97] Basic Law of Saudi Arabia 1992 (amended 2013) art 81.

[98] Constitution of Algeria 1996 (amended 2016) art 150; Constitution of the Comoros 2018 art 12; Constitution of Djibouti 1992 (amended 2010) art 70; Draft Constitution of Libya 2016 art 17; Constitution of Mauritania 1991 (amended 2017) 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').

[99] Charter of the Organisation of Islamic Cooperation 2008 (OIC Charter) art 2(1).

[100] Constitution of Algeria 1996 (amended 2016) art 31 (Algeria 'shall adopt the principles and objectives of the United Nations' Charter'); 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 Organization and international ideals'); Draft Constitution of Yemen 2015 art 10 (also specifying the Universal Declaration of Human Rights and the Arab League Charter).

[101] Islamic states elected to the Security Council for at least one term since 1946 include Algeria, Bahrain, Egypt, Jordan, Kuwait, Malaysia, Morocco, Oman, Pakistan, Qatar, Tunisia and the UAE. Djibouti, Iran, Iraq, Libya, Mauritania, Oman and Syria have served on the Council as well, but were not then under Islamic constitutions. Saudi Arabia was elected in 2013 but declined the seat. Most Islamic states have served at one time or another on the Human Rights Council. In 2020, Islamic members included Afghanistan, Bahrain, Libya, Mauritania, Pakistan, Somalia and Qatar.

States are also members of the World Trade Organization (WTO), although eight Islamic states are not, including two of the largest, Iran and Iraq.[102]

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.[103] Libya's draft constitution requires the state to base its foreign policy on 'cooperating with regional and international organizations within the framework of international law'; likewise, the United Arab Emirates grounds its foreign policy in 'international ideals'.[104] Somalia and Yemen's draft constitutions cite general international law as a source of guiding principles.[105] As all these constitutions give prominent place to Islamic law in the national legal order,[106] the fact that they highlight commitments to international law indicates confidence that Islamic law and international law can co-exist. By contrast, the reference in the Basic Law of Saudi Arabia to 'the law and international agreements' for 'procedures and rules' governing extradition hints at a narrow scope for international law, in light of the strong Islamic supremacy clauses in that Law.[107]

Recent decades have seen growing engagement of Islamic states with international law. 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.[108] Islamic law states utilise the mechanisms of the international system, selecting arbitrators from Islamic states to give greater weight and familiarity (in the sense of a familiar legal

[102] As of 2020, all OIC Member States are also in the WTO except Algeria, Azerbaijan, the Comoros, Iran, Iraq, Lebanon, Libya, Palestine, Somalia, Sudan, Syria (OIC membership suspended) and Turkmenistan. Of these, all but Palestine and Turkmenistan hold observer status.

[103] Constitution of Qatar 2003 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'); Draft Constitution of Yemen 2015 art 10 (Yemen 'shall adhere to' ratified treaties 'and the generally recognized principles of International Law').

[104] Draft Constitution of Libya 2016 art 16; Constitution of the United Arab Emirates 1971 (amended 2009) art 12.

[105] Draft Constitution of Yemen 2015 art 10; Draft Constitution of Somalia 2012 art 3(4) (founding principles of Somalia include promoting 'general standards of international law').

[106] All five constitutions include clauses aimed at ensuring legislation complies with Islamic law. Draft Constitution of Libya 2016 art 8 (Sharia is 'the source of legislation'); Constitution of Qatar 2003 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 2009) art 7 (Sharia is 'a main source of legislation'); Draft Constitution of Yemen 2015 art 4 (Sharia is 'the source of legislation'). Somalia recognises the supremacy of Sharia over the constitution. Draft Constitution of Somalia 2012 art 4(1).

[107] Basic Law of Saudi Arabia 1992 (amended 2013) art 42. The Basic Law subordinates itself entirely to the Quran and the Prophet's *sunna* (at art 1).

[108] OIC Charter 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').

background) to decisions.[109] Effectively, these states apply procedural tools of international dispute resolution, without risking conflict with Islamic principles by adopting substantive rules 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.[110]

The last quarter of the twentieth century saw the coalescing of an Islamic community of states, centred on the OIC, founded as the Organisation of the Islamic Conference in 1969. From the 1980s, Islamic scholars and Muslim leaders also evolved a common set of Islamic human rights norms. This began in 1981 with an aspirational Universal Islamic Declaration of Human Rights, and developed further through the OIC's 1990 Cairo Declaration on Human Rights in Islam. In 2008 the Arab League's Arab Charter on Human Rights became the first binding human rights treaty between Islamic states. Through these instruments, reforms to national constitutions, and the interactions of Islamic states with the international legal order, a new model of Islamic constitutionalism has taken shape. The OIC has influence as an international actor. In addition to facilitating a shared Islamic vision of human rights and international responsibilities, with more Member States than any international organisation but the UN, the collective views of its constituent states must influence international law, both customary law and treaties.

This community of Islamic states provides a potential structure to realise Sanhuri's vision of a new caliphate formed of law. The early caliphate and the reinvigorated Ottoman Empire engendered a myth of expansion *ad infinitum* suited to an empire based on a universalist religion.[111] Today, political Islam can still strive toward universality, via persuasion and by influencing the international consensus regarding how states and peoples should interact. Expressing universalism through integrating Islamic states and contributing an Islamic point of view to world discourse differs qualitatively from classical *jihad*, but it still

[109] Powell (n 89) 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 approach may not suit strict interpretations of Islam, however, which discourage agreements based on unknown future events, eg the selection of an arbitrator (at 208).

[110] As of 2007, only two ICJ decisions had mentioned Islamic law. Seven further judicial opinions urged the court in general terms to take Islamic law into account, particularly when invoking customary law. Clark B Lombardi, 'Islamic Law in the Jurisprudence of the International Court of Justice: An Analysis' (2007) 8 *Chicago Journal of International Law* 85, 94. Khaliq argues this reticence on the part of the ICJ is at least in part explained by the fact that states, including Islamic states, have so far not seemed 'confident enough in the system to frame issues in terms of any relevant local customs and practices as well as of international law; to claim their stake in the international legal order before the Court and to allow all such issues to be argued before it'. Urfan Khaliq, 'The International Court of Justice and its Use of Islam: Between a Rock and a Hard Place?' (2013) 2:1 *Oxford Journal of Law and Religion* 98, 117–18.

[111] See, eg, Lapidus (n 6) 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').

spreads the call of Islam. A 'virtual caliph' embodied by collaborating states can seek to universally apply the principles of Islam, including those that concern human rights, the same fundamental mission that lay before the Prophet and the caliphs. With revealed Sharia, history and international law outlining the scope of operation available to Islamic states, it becomes possible to examine in detail the integration of Islam into state structures, and the resulting implications for the human rights commitments Islamic states undertake.

4

Islam, Constitutions and Democracy

Consent to and participation in governance are international human rights.[1] However, it is not universally agreed that constitutions, democracy and Islamic governance can easily co-exist. Reconciling these points of view encounters the conundrum that in the Prophet's time states in the Westphalian sense were unknown, nor constitutions, elections, representative government or separations of powers. Yet most of today's Islamic states are constructed along those lines, and their citizens show no widespread desire to abandon democratic forms – if anything, they prefer to enhance them. Sharia supplies basic principles of governance, but does not seem to require particular forms. The main aim of this chapter is to show how constitutions and institutions of democracy can serve Islamic ends, channelling the ruling power that once resided with the caliph.

Islamic governance has evolved over centuries. The institutional structures that prevailed on the Arabian peninsula in the early years or even the more complex bureaucracy of the imperial caliphate may not suit today's needs. There is now a plurality of Islamic states and no agreed caliph. Yet Islamic jurisprudence and political theory presume a monolithic governing power (albeit beholden to the law). Classical and modern writers on Islamic governance often short-hand the idea of an Islamic government as 'the ruler'. Whether or not Sharia requires the concentration of political power in an individual is debatable and depends in part on where the lines lie between executive delegation and shared governance, or between governance and lawmaking.

This chapter examines traditional Sunni governance in light of constitutionalism, checks and balances, separations of powers and representative democracy. It first summarises some main principles of government that derive from Islamic history and jurisprudence: the right to rule with the people's consent; just rule; and consultation. It then connects Islamic government to written constitutions, and the designation of a ruler via heredity or elections. The third part of the chapter applies Islamic principles to separations of powers: between civil and

[1] See, eg, Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) (UDHR) art 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').

religious authorities; by affording an elected assembly a degree of oversight of the government; and via an assembly participating in lawmaking through legislation. The final main part discusses the role of judicial bodies in safeguarding these constitutional bargains and the peoples' rights. The chapter concludes that Islamic states still uphold the main principles of traditional Islamic governance, even while adapting democratic and constitutional forms to implement them.

I. PRINCIPLES OF ISLAMIC GOVERNANCE

Sharia holds rulers to ideals that are 'compatible with democracy and pluralism'.[2] The *bay'ah* (acclamation of a new caliph) shows that government is by consent. Drawing on Quranic verses and *ahadith*, and the practices of the early caliphs, Kamali outlines further norms.[3] Leadership is a public trust. The ruler's first duty is to command good and forbid evil. The ruler must consult with the community: the principle of *shura*. Notwithstanding the ideal of the caliphate, Islam arguably has no intrinsic preferred type of political system, but *bay'ah*, *shura*, *ijtihad* and *ijma* are 'conducive to the social construction of democracy'.[4] Drawing on the examples of the caliphate and the efforts of revivalist and modernist thinkers, this part of the chapter sets out core principles that any Islamic government should implement. It begins with what might be called the divine right to rule, which raises a key question: does God bestow power on the ruler, or on the people, who then delegate it to the ruler? It then discusses the overarching concept of just rule, and finally, *shura*.

A. The Divine Right to Rule

Today, states are the atomic actors of international law, sovereign *qua* states. However, 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'.[5] The power, if it does not arise from the people themselves (as secularists argue), springs from God. But does it flow to the ruler directly, or through the *umma* to the ruler? The answer may affect whether and how

[2] Azzam S Tamimi, *Rachid Ghannouchi: A Democrat Within Islamism* (Oxford University Press, 2001) 80 (discussing Ghannouchi's *Al-Hurriyat al-'Ammah Fid Dawlah al-Islamiyyah* (Public liberties in the Islamic state) (Beirut, 1993) in light of *ijtihad*, *ijma* and *shura*).

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

[4] Nader Hashemi, 'Islam and Democracy' in John L Esposito and Emad El-Din Shahin (eds), *The Oxford Handbook of Islam and Politics* (Oxford University Press, 2013) 72.

[5] CG Weeramantry, *Islamic Jurisprudence: An International Perspective* (Macmillan, 1988) 131.

the people may share in the ruling power. 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 Islamic states in the Arabian Peninsula are six monarchies,[6] and one republic, Yemen. Republics predominate elsewhere, except for Brunei, Jordan and Morocco.

In conventional Sunni understanding, the earliest caliphs led by agreement of the community. Once the succession became contested, theories of legitimation developed. Most arose from disagreements between partisans of Ali and the prominent clans who held the caliphate. Sharon traces the debate 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.[7] Abu Bakr and Umar became caliphs based on consensus and seniority (and Abu Bakr's designation of Umar).[8] Umar tried to institute consensus, but schism made that inoperable after its one use, the *shura* that chose Uthman.[9] The resurgence during Uthman's caliphate of the 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'.[10] Ali grounded his argument against Mu'awiya in consensus, but in fact became caliph based on his seniority in Islam.[11] Mu'awiya based his power on divine predestination demonstrated by military might, bluntly acknowledging he had become caliph 'with my sword'.[12] He inaugurated hereditary rule, incurring from later jurists 'the charge of kingship' (*mulk*, implying a usurpation of God's will) when he 'appoint[ed] his own son Yazid as his successor to the caliphate during his own lifetime'.[13]

Mu'awiya's successors claimed that the caliphate descended from the last caliph designated through *shura*, Uthman, and that the ruling charisma attached to the descendants of Abu Manaf, 'the common ancestor of Muhammad, Ali,

[6] Bahrain, Kuwait, Oman, Qatar, Saudi Arabia and the United Arab Emirates.

[7] 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) 25 ('*rida wa-jama'ah, sabiqah, qarabah, wasiyyah* [and] *nass*').

[8] *Ibid* 21. 'The principle of seniority achieved some legal standing with the establishment of the *diwan* of 'Umar (at 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' (at 17).

[9] *Ibid* 21–22.

[10] *Ibid* 22–23.

[11] *Ibid* 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. *Ibid* 26. The same events also rendered Mu'awiya's claim to consensus unlikely.

[12] Mohammed Abed al-Jabri, *Democracy, Human Rights and Law in Islamic Thought* (IB Tauris, 2009) 42. Mu'awiya resorted to predestination 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*]' (at 41–42).

[13] GR Hawting, *The First Dynasty of Islam: The Umayyad Caliphate AD 661–750*, 2nd edn (Routledge, 2000) 13.

al-Abbas and Mu'awiya'.[14] Once the Prophet's legacy had grown to that of the unquestionable founder of the faith, the claim based on inheritance from Uthman began to look unconvincing,[15] in view of the closer kinship between the Prophet and his first cousin Ali,[16] or for that matter with Abdallah ibn Abbas, their paternal uncle and the Prophet's heir.[17] The Abbasids succeeded the Umayyads on grounds that the latter had deviated from Islamic rule, and that the imamate descended in the Banu Hashim.[18] In principle and in fact, they reinstated the priority of *qarabah*, kinship to the Prophet.[19] To the assertion of predestination they answered (besides the 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 … in the "divine will"'.[20] Ali's partisans posthumously attached *qarabah*, then 'introduced *wasiyyah*', designation, which 'changed the picture completely', attaching 'a divine aura' which 'transformed [the caliph] in Shi'ite thinking to a God-guided imam'.[21] This established an unassailable ideology,[22] but also rendered the schism with the Sunni caliphs extremely difficult to resolve. Sharon presents the terms of the debate over the source of the caliphs' right to rule as essentially set by the end of the first Islamic century.[23]

'*Khalifa*' can translate as either deputy or successor, but to whom? There is an extensive literature on whether a caliph is *khalifat allah* or *khalifat rasul allah* – God's deputy, or the Prophet's successor. The former implies a divine right to rule, while the latter indicates only that the caliph assumed the Prophet's political mandate. Al-Jabri argues that the first caliphs were primarily military

[14] Ann KS Lambton, *State and Government in Medieval Islam* (Oxford University Press, 1981) 46 and fn 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'. Sharon (n 7) 30.

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

[16] Sharon (n 7) 31.

[17] Sharon (n 7) 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*' (at 29–30).

[18] Lambton (n 14) 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').

[19] Sharon (n 7) 31.

[20] Al-Jabri (n 12) 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' (at 43).

[21] Sharon (n 7) 31. *Wasiyyah* 'meant that the Prophet in an explicit ordinance, *nass*, nominated 'Ali as his heir' (at 25).

[22] Sami Zubaida, *Law and Power in the Islamic World* (IB Tauris, 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).

[23] Sharon (n 7) 35.

commanders, as the proofs of law lacked a clear prescription for government and Arab tradition did not include state structures.[24] After the first *fitnah*, the civil war that ended in Hasan's abdication 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]'.[25] The Abbasid dynasty reintroduced succession to the Prophet.[26] The Prophet's silence as to his succession, at least in the Sunni tradition, could signal that the responsibility for government devolves on the people generally: he demonstrated the principles of an Islamic society, then trusted those who understood the message to carry it forward.

In a sense, modern Islamic rulers can draw on the same legitimacy the classical caliphs held in trust as deputy or successor. The foundation of governance, according to al-Mawardi, is a 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'.[27] The ruler stands on both sides of the duty, the recipient of individual loyalty but owing loyalty to God. Today, leadership of the *umma* is fragmented. This does not mean Islamic states lack a legitimate sovereign. Classical jurists occasionally recognised more than one caliph, for example postulating that Sharia could countenance the co-existence of an Umayyad dynasty in Spain with the Abbasids in Baghdad, due to an ocean separating them. The Abbasid caliphate itself encompassed multiple independent emirs or commanders, ruling provinces in the name of the distant caliph. Thus, it would not be a major innovation to say that multiple Islamic rulers can co-exist under the umbrella of sovereignty that a caliph once personified, but that today might be found in a direct relationship between God and the *umma*, or even in the collective Islamic legitimacy of an international organisation like the Organisation of Islamic Cooperation (OIC).

B. Just Rule

The Quranic idea of just rule, as developed by the early caliphs, resembles the modern norm of the rule of law. The Quran contains the idea of rule as a public trust, forbidding arbitrariness. Abu Bakr acknowledged his rule was not absolute, but subject to Sharia. Ibn Taymiyyah based his theory of

[24] Al-Jabri (n 12) 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').

[25] Lambton (n 14) 46, fn 6.

[26] Crone and Hinds (n 15) 16 (however they 'did not thereby stop regarding themselves as deputies of God').

[27] Anver M Emon, 'Shari'a and the Modern State' in Anver M Emon, Mark Ellis and Benjamin Glahn (eds), *Islamic Law and International Human Rights Law* (Oxford University Press, 2012) 69.

siyasah Sharia – 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 direct instruction from God. A ruler must act to advance the public good – understandable in terms of *maslahah*, the 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 modern international standards.

The caliph held office conditionally. Abu Bakr asked the people to '[a]ssist me when I am right but [] stop me when I am wrong' and to obey him only while he obeyed God.[28] Obedience to God meant adherence to the Quran and the *sunna*, reflecting the view that these 'stood for whatever was perceived to be right and proper in any given case',[29] a proxy for 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 ingredient of just rule is equality before the law, implied in the Prophet's *hadith* that all Muslims are equal, like teeth in a comb.

Consent, expressed in the *bay'ah*, implies the ruler is a trustee of the people.[30] 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 and avoided arbitrariness and indulgence in' his own desires.[31] Because each Muslim, including the ruler, is responsible to God, Islamic rule can never be 'capricious or arbitrary'.[32] Corruption was not to be tolerated. 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'.[33] *Hisbah* is a duty of all Muslims, which a ruler exercises on behalf of the *umma*. This does not relieve individuals of their duties (a Muslim who is made aware of errant behaviour must try to correct it),[34] but it is especially incumbent on the ruler, who has the authority and power to enforce Sharia norms.

Islamic law is egalitarian. Umar awarded retaliation to a man whom a senior Companion, Amr ibn al-As, allegedly insulted in the mosque.[35] During their

[28] Kamali (n 3) 199. The Quran places rulers and government officials under a duty 'to faithfully discharge their trust' on behalf of God and the community (at 211) (citing Quran 4:58 and 38:26).

[29] Crone and Hinds (n 15) 67.

[30] Kamali (n 3) 211.

[31] Kamali (n 3). As with King David, this places a duty on government officials 'to faithfully discharge their trust' on behalf of God and the community Kamali (n 3).

[32] Weeramantry (n 5) 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').

[33] Kamali (n 3) 203.

[34] Tamimi (n 2) 98 (quoting Ghannouchi 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').

[35] Kamali (n 3) 202 (Amr submitted himself, and the man forgave him).

caliphates, Umar and Ali were each involved in lawsuits; the courts 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.[36] The ethic that required *muftis* (*ulama* qualified to issue *fatawa*) to give legal advice whenever asked enabled people to understand their 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 complaints against official acts.

The community may withdraw its allegiance and dismiss a ruler who fails to uphold these principles. *Hisbah* implies a community right, or even a duty, to remove an unjust ruler, at least if it is possible without strife (*fitnah*). According to Kamali, this is seen as grounded in the Quranic commands to 'enjoin good [and] forbid evil' and to 'fear tumult' or oppression,[37] although the community must determine the mechanisms and conditions for its exercise. Al-Qaradawi considers an Islamic ruler a fallible 'employee' of 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'.[38] Some Islamic constitutions implement this as impeachment. In Afghanistan, Egypt, Libya, Mauritania and Yemen the people's representatives can vote (by two-thirds) to remove the president from office.[39] Grounds in Afghanistan include 'crimes against humanity, national treason or other crimes'.[40] This is not exactly

[36] Kamali (n 3) 263–64.

[37] Kamali (n 3) 280–81 (citing Quran 9:71 and 8:25).

[38] Yusuf al-Qaradawi, 'Islam and Democracy' in Roxanne L Euben and Muhammad Qasim Zaman (eds), *Princeton Readings in Islamist Thought* (Princeton University Press, 2009) 235.

[39] Constitution of Afghanistan 2004 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 (amended 2019) 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); Draft Constitution of Libya 2016 art 123 (request by 'absolute majority of the elected members' of the House of Representatives or the Senate; accusation by two-thirds of the combined chambers; trial by judges from the top courts); Constitution of Mauritania 1991 (amended 2017) art 93 (accused by an absolute majority of both houses of the legislature, 'judged by the High Court of Justice'); Draft Constitution of Yemen 2015 art 201 (accused by 20% of House of Representatives; trial commences if 'a majority of members' of the Federal Council agree; impeachment by two-thirds of that Council). Conversely, heads of states can dissolve parliaments in Algeria, Mauritania, Morocco and Syria, and in Egypt and Libya can do so with the approval of a public referendum. The president of Syria need only proffer a reasoned decision, while the other constitutions require consultation with legislative or judicial leaders. Constitution of Algeria 1989 (amended 2017) art 147 ('After consulting the President of the Council of the Nation, the President of the People's National Assembly, the President of the Constitutional Council and the Prime Minister'); Constitution of Egypt 2014 (amended 2019) art 137; Draft Constitution of Libya 2016 art 122; Constitution of Mauritania 1991 (amended 2017) art 31 ('after consultation with the Prime Minister and the Presidents of the Assemblies'); Constitution of Morocco 2011 art 96 (consulting the Constitutional Court); Constitution of Syria 2012 art 111(1).

[40] Constitution of Afghanistan 2004 art 69.

the rule Abu Bakr announced, but there is 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).

C. *Shura*

An enigmatic yet core injunction for Islamic governance is consultation, *shura*. The Quran commands the Prophet to 'consult [the community] in their affairs' and praises consultation,[41] but does not specify manner, subject matter or interlocutors. Kamali argues that these are 'left to the discretion of the community'.[42] *Shura* promises the *umma* a voice in governance. It 'is a right of the community, a vehicle for the exercise of its authority, and a means therefore by which to fight despotism'.[43] It is more 'a right of the ruled' than 'a duty on the ruler', because in the Rashidun caliphate the caliph 'was not installed until after *al-shura* was conducted'.[44] The means of consultation can be designed to accommodate the views of both experts and the public, but should not displace elections that let the public demonstrate (or not) allegiance to the ruler.[45] The prevailing view is that some form of substantial consultation is obligatory,[46] although al-Jabri argues that *shura* 'falls under "good morals" and "commendable behaviour" [not] "obligations and duties"', thus strictly speaking is not a duty of the ruler or a source of binding decisions.[47] If citizens of Islamic states share both national citizenship with each other and a broader Muslim citizenship with the global *umma*, *shura* might even operate on multiple levels, as when Islamic governments consult their citizens, but also engage in international Islamic forums such as the OIC.

Shura is often invoked as the core principle of Islamic democracy. In the early caliphate *shura* became 'a symbol signifying participatory politics and legitimacy'.[48] The Prophet consulted his Companions regarding affairs of state. Even when one of them was acknowledged as caliph, the Companions routinely consulted one another in matters of Islam and Sharia. Consultation

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

[42] *Ibid* ('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').

[43] Kamali (n 3) 204 (citation omitted).

[44] Al-Jabri (n 12) 227.

[45] Kamali (n 3) 206.

[46] See, eg, Kamali (n 3) 204 (Sharia requires 'that government should consult the community, especially the learned among them, in public affairs').

[47] Al-Jabri (n 12) 125.

[48] Khalid Abou El Fadl, *Islam and the Challenge of Democracy* (Princeton University Press, 2004) 16.

lent pluralism to governance, as the Companions represented different clans and, as the Muslim people and territory expanded, spread to various regions and served as liaison to the caliph in Medina. According to Ghannouchi, *shura* demonstrates 'that the power of interpreting the text' accrues not to 'any one particular person or institution' but to 'the entire *Ummah*, the vicegerent of God'.[49] In this view, the *umma* conditionally delegates some of its right to self-rule to political leaders, but must still exercise its residual share in the ruling power through *shura*, for example through legislation and guardianship of the constitution. It is not clear whom the ruler should consult: for example, close advisors; the *ulama*; the *umma* or their representatives; or a select group of prominent, pious citizens? Nor is there consensus over whether the ruler must obey the results.[50]

Every modern Islamic state institutionalises *shura* in the form of a legislature or an advisory council. An elected assembly represents the citizens and might exercise part of the legislative or executive power. In that sense, it could in part play the role of the ruler, and in part defer to the executive while still providing non-binding advice. Ghannouchi sees *shura* as encompassing legislation as well as advice. Through *ijtihad* based on 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'.[51] Monitoring institutions with members 'elected from among senior judges and scholars' apply a similar form of *shura* when they 'act as a constitutional control over parliament in order to guarantee' fidelity to the constitution and Sharia.[52] There is a qualitative difference, however: advisory *shura* presents an opinion for the ruler to consider, whereas a legislative *shura* acts as the ruler by declaring law. Innovations such as parliamentary rule and legislation have arguably rendered the tool of *shura* far more complex but potentially more powerful than it was in the classical caliphate.

Appointed advisory *shura* councils or Islamic councils, constitutionally established in Algeria, Brunei, Libya, Mauritania, Pakistan and Yemen, reflect the older type of consultation. Members should be *ulama* or otherwise expert in Islam, and are appointed by the chief executive, except in Libya and Yemen where the legislature makes the appointments.[53] Apart from in Pakistan, their

[49] Tamimi (n 2) 100.

[50] Abou El Fadl (n 48) 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').

[51] Tamimi (n 2) 101.

[52] Tamimi (n 2) 101.

[53] Constitution of Algeria 1989 (amended 2016) art 196 (members are 'among the national elites in various sciences'); Constitution of Brunei Darussalam 1959 (amended 2006) art 3A; Draft Constitution of Libya 2016 art 172; Constitution of Mauritania 1991 (amended 2017) art 94; Draft Constitution of Yemen 2015 art 283 (Federal Council selects, by two-thirds majority), 295 (establishing the Ifta Council), art 296 ('Sharia scholars' from multiple schools of jurisprudence, consulting 'senior specialists in the humanities and applied sciences'); Constitution of Pakistan 1973 (amended

main duty is to advise regarding religion or to respond to questions posed by the government.[54] Pakistan has adapted *shura* to a legislative age: the Council of Islamic Ideology advises whether proposed national or provincial laws would be 'repugnant to the Injunctions of Islam' (and thus liable to invalidation by the Federal Shariat Court).[55] 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 compiling a list of Islamic injunctions that 'can be given legislative effect'.[56]

II. ASSIGNING THE GOVERNING POWER

Since the schisms that ended the Rashidun caliphate, disagreement has persisted over who inherited the Prophet's role of leading the *umma* on God's behalf. Islamic states channel this inheritance first to the state via a constitution, then to a ruler chosen according to that constitution. Traditionally, *shura* reflected the covenant between government and the *umma* into public life.[57] A constitution arguably usurps *shura*, by freezing the terms of the trust a ruler holds to govern the *umma*, in effect defining the future boundaries of *shura*. For some Islamists, democracy veers uncomfortably close to establishing rule by human endeavour rather than by God's will. Yet arguably, constitutions and democracy can also support *shura* and *hisbah*, so can facilitate rather than diminish rule by Sharia.

A. Sharia and Constitutions

May the *umma* give allegiance to an abstraction, such as a constitution or a state? The *bay'ah* only signified loyalty to the caliph. Saudi Arabia emulates this,

2018) 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 members should include at least two current or former senior judges and at least one woman. At least 1/3 must have at least 15 years' experience of 'Islamic research or instruction', *ibid* art 228(3). Members should represent 'various schools of thought', *ibid* art 228(3)(a). The details of Brunei's Religious Council are established by a law. Constitution of Brunei Darussalam 1959 (amended 2006) art 2(1).

[54] Constitution of Algeria 1989 (amended 2016) art 195 (the Council should promote *ijtihad* and render opinions on questions of Sharia when asked); Constitution of Brunei Darussalam 1959 (amended 2006) 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); Draft Constitution of Libya 2016 art 172 (addressing questions from state authorities; conducting research; issuing *fatawa*); Constitution of Mauritania 1991 (amended 2006) art 94 (gives opinions on questions posed by the President of the Republic); Draft Constitution of Yemen 2015 art 295 (issuing *fatawa* on 'matters presented to' the Council).

[55] Constitution of Pakistan 1973 (amended 2018) art 229.

[56] *Ibid* art 230(1)(a), (c), (d). For more on the council's role, see Jeffrey A Redding, 'Constitutionalizing Islam: Theory and Pakistan' (2004) *Virginia Journal of International Law* 759, 768–69.

[57] Al-Jabri (n 12) 189–90.

naming the Quran and *sunna* as the constitution and granting the King plenary powers.[58] 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),[59] and the Ottoman Constitution, and would disregard most theories of an Islamic state propounded since the nineteenth century. Khan and Ramadan propose a definition that includes any constitution containing a 'supremacy clause', requiring that all laws be compatible with it, and a 'submission clause' subordinating itself to Sharia.[60] Constitutional principles also have Islamic antecedents. The Prophet assumed power in Medina under a written agreement. Abu Bakr declared a compact with the *umma*. Uthman, by accepting the caliphate on condition that he follow the examples set by Abu Bakr and Umar, showed that the compact can outlive the caliph.[61] Classical jurists found in Sharia a contract between ruler and *umma*, which neither could unilaterally abrogate. Today, Islamic constitutions incorporate principles gleaned from the proofs of law, examples from the caliphates and the Ottoman Constitution, and European models.

i. Supremacy and Legitimacy

A threshold challenge for an Islamic constitution is its standing versus Sharia. 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.[62] It did not address which of those 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 potential tension because Sharia incorporates a 'specific code of law'.[63] In addition to Saudi Arabia's Basic Law, four Islamic constitutions expressly address this: Somalia subordinates its draft constitution to Sharia and Libya's draft constitution requires that it be interpreted in accordance with Sharia,[64] while the constitutions of Iraq and Malaysia assert their

[58] Basic Law of Saudi Arabia 1992 (amended 2013) art 1 (the Quran and the Prophet's *sunna* are the constitution), art 6 (the people pay allegiance to the King).

[59] Oman's Basic Statute significantly defers to Sharia in its substantive provisions.

[60] L Ali Khan and Hisham M Ramadan, *Contemporary Ijtihad* (Edinburgh University Press, 2011) 116 (the submission clause should specify at least the 'Basic Code', that is, the Quran and the Prophet's *sunna*).

[61] Ali's refusal of this condition and later assumption of the caliphate without it arguably did not negate this possibility, but showed that it may be negotiated one way or the other prior to the ruler's assumption of power.

[62] Ottoman Constitution 1876 (amended 1909) art 3.

[63] 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) 196.

[64] Draft Constitution of Libya 2016 art 8; 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

own supremacy.[65] The practical scope for collision 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, provisions would, where possible, be read compatibly with Islamic law. Only if a provision were written or applied so as to collide with a clear norm of *fiqh* would the supremacy issue arise in practice.

Is a formal constitution permitted? Pre-modern history offers limited guidance. Though it did show that the Prophet was willing to govern based on a written covenant, the Constitution of Medina comprised only a small part of the polity's law. Far the greater part was Sharia and, where Sharia was silent, Arab custom. Abu Bakr promised to rule according to the Quran and the Prophet's words and example,[66] establishing Sharia as a further element of the constitutional bargain. The caliphs exercised power conditionally. 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.[67] But there was no formal, written constitution.

Written constitutions may be necessary for a complex society that lacks a divinely guided leader like the Prophet, or the Companions who had observed his *sunna*. They are now the norm for Islamic states.[68] Most modern Islamists accept the idea of a written constitution. Khomeini and Mawdudi helped to create constitutions. The proponents of the Ottoman Constitution, the only example of a caliphate acceding to a formal constitution, asserted its legitimacy via such principles as *shura* and *bay'ah*. The *Shaykh-ul-Islam* and *ulama* criticised the process for allowing non-Muslims to participate in lawmaking, but not over the idea of a constitution per se.[69] A more basic concern is that professing loyalty to a national constitution diminishes the universality of the *umma*. Kamali reconciles such doubts, expressed for example by Mawdudi and al-Qaradawi, through al-Sa'idi's thesis that Muslims simultaneously share a type of citizenship across state borders, and national citizenship with non-Muslim citizens.[70] Islamic governance arguably permits constitutions, because

consistent with the Shari'ah and the Constitution', *ibid* 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', *ibid* art 3(1).

[65] 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 *ibid* art 5 ('The law is sovereign' and the people, through their votes and their constitutional institutions, are the source of authority).

[66] Ira M Lapidus, *Islamic Societies to the Nineteenth Century: A Global History* (Cambridge University Press, 2012) 80.

[67] Abou El Fadl (n 48) 11.

[68] See, eg, Khan and Ramadan (n 60) 115 ('constitutionalism has emerged, though not without question, as part of contemporary Islamic law').

[69] Zubaida (n 22) 136–37. 'One '*alim*, however, the Qadiaskar Seyfeddin, consistently supported the constitution, citing verses from the Quran and prophetic *hadith* in favour' (at 137) (citing Niyazi Berkes, *The Development of Secularism in Turkey* (Hurst, 1964) 228).

[70] Kamali (n 3) 129–31.

the Prophet ruled by written agreement; Abu Bakr disclaimed divine right in favour of an exchange of promises with the *umma*; and the proofs of Sharia contain no clear prohibition of it.

ii. Constitutional Amendment

Pre-modern precedent for representatives of the people to participate in constitutional amendment is limited to the short-lived Ottoman Constitution, exercised only once. Such participation is not, however, difficult to justify under basic principles of Islam, if one accepts the renewal of *ijtihad*.[71] Most present day revivalists and Islamic modernists argue that developing and understanding Sharia via *ijtihad* is a right and duty of the entire *umma*, not only the *ulama*. This would hold particularly true within the zones of law that under *siyasah Sharia* belong to the ruler rather than to the *ulama*. The *bay'ah* and *shura* show that the people must consent to, and be consulted during, rule over them. Ongoing consultation is the means to maintain the social contract. If Sharia permits constitutionalism, and if the people agree that their agreement needs to be updated, it seems unlikely that Sharia would forbid it.

While the Prophet lived, the constitution evolved with the needs of the *umma*, as Quranic verses were revealed to guide their actions. The first question that required a debated change in the basic rules of government was whether and how to designate a successor. Subsequently, the Rashidun caliphs 'varied their system of administration – or, as we would say today, the constitution of the state' to fit changing needs.[72] Umar, for example, incorporated the Persian institution of the *diwan*, a civil service bureau, and brought the armies under state control, paid from public funds.[73] The caliphs did not, however, innovate as readily in matters concerning the rights of citizens or the relationship between the *umma* and the caliph. To do so risked giving rebels a principle to rally around, as when the Kharijites rebelled against Ali, citing what they considered 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. The first formal provision for amendment came in the Ottoman Constitution, amendable by two-thirds of the elected Chamber of Deputies and the appointed Senate, with the Sultan's assent.[74]

Had there been any notion in the classical era of a written constitution, it could probably have envisaged amendment. Islamic rule rests on consent.

[71] Islamic revivalists and modernists alike argue that all Muslims may participate in developing Islamic law.

[72] Muhammad Asad, *The Principles of State and Government in Islam*, 2nd edn (Islamic Book Trust, 1980) 27 (citing the example of the variations in ways to select the caliph exercised during the Rashidun caliphate).

[73] Lapidus (n 66) 63–64.

[74] Ottoman Constitution 1876 art 116.

The ruler governs, the people accept the ruler and Sharia sets the boundaries. In order to govern, the ruler may alter the institutions of the state, particularly the executive administration. This implies that the ruler may change the constitution, within the boundaries of Sharia. A new ruler could not unilaterally undo an amendment made by mutual consent – but could simply decline power in the first place, as Ali did, asserting his prerogative as an imam to interpret Sharia unfettered, rather than pledge to follow precedents set by Abu Bakr and Umar.[75] The issue is more complex if ruling power is divided, as for example when an elected parliament shares in the executive power. Some constitutional changes might then affect the balance of power between 'ruler' and 'people'. But even if the ruling power is diffused, mutual consent of all parties including representatives of the people would be equivalent to agreement between a sole ruler and the people.

All modern Islamic constitutions provide for amendment. Except in Brunei, Oman and Saudi Arabia, where the monarch wholly controls the text,[76] amendment requires the agreement of the citizens, via representatives or referendums. Most Islamic constitutions divide the amendment power between the head of state and a legislature, by supermajority, as did the Ottoman Constitution;[77] envisage amendment without involving the head of state;[78] or provide for amendment by parliament alone.[79] A referendum is common practice in the Middle East and the norm in North Africa. In Iran the highest executive (the Leader) proposes amendments for ratification by referendum, excluding the legislature.[80] The Maldives and Yemen require a referendum to amend certain provisions.[81] In Afghanistan, notwithstanding a powerful president, a *Loya Jirga*

[75] Ali was invited to succeed Umar, on condition that he govern in accordance with the Quran and the examples set by the Prophet and the first two caliphs. He declined, citing his duty as an imam to exercise his judgment in applying the rules of the Quran and the Prophet. Uthman agreed to the condition, and became caliph. Al-Qaradawi (n 38) 245.

[76] Constitution of Brunei Darussalam 1959 (amended 2011) art 85(1) (only the Sultan may amend); Basic Statute of Oman 1996 (amended 2011) art 81 (amendment by royal decree); Basic Law of Saudi Arabia 1992 (amended 2013) art 83 (amendment by royal decree).

[77] Ottoman Constitution (1876) art 116. The Ottoman model prevails in Bahrain, Jordan, Kuwait, the Maldives, Qatar and the UAE. See Table 1: Constitutional Amendment Provisions.

[78] Across North Africa, constitutions that establish strong, independent chief executives nonetheless provide for amendment without that executive's approval. See Table 1.

[79] Parliaments in the Comoros, Iraq, Malaysia, Pakistan, Palestine, Somalia and Yemen can enact amendments without executive assent (Iraq and Somalia also require a referendum). See Table 1.

[80] Constitution of Iran 1979 (amended 1989) art 177 (excluding constitutional amendments from the normal rule of art 59 which requires legislative concurrence by two-thirds majority to enact the results of a referendum).

[81] Constitution of the Maldives 2008 (amended 2018) art 262(b) (referendum if the amendments affect basic rights or freedoms or presidential or legislative terms of office); Draft Constitution of Yemen 2015 art 413 (provisions requiring a referendum to amend have not yet been specified). 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 (amended 2018) art 264. The previous Constitution of Yemen required a referendum for amendments that affect the distribution of powers between the president and the legislature, ie arts 62, 63, 81, 82, 92, 93, 98, 101, 105, 108, 110, 111, 112, 116, 119, 121, 128, 139, 146, 158 or 159. Constitution of Yemen 1991 (amended 2015) art 158.

adopts amendments by a two-thirds vote.[82] Otherwise, these approaches reflect Ottoman, French and British constitutional legacies. They also largely comport with Islamic principles and precedents.

Sharia likely places some limits on constitutional amendment. Even the 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). Even if a government may modify the basic agreement in ways that affect the rights of citizens, the core set of rights that inhere in Sharia limits the scope for innovation. The failure of mechanisms to adjust the social contract contributed to the outbreak of the first *fitnah*, the civil war that split the Muslim community, apparently permanently. A formal process keeps debate in a constructive channel, alleviating the risk of chaos, and guarantees citizens a role in adjusting the framework through which Sharia plays out in the public space. By helping to address one cause of the demise of the Rashidun caliphate, an amendment process arguably represents a justifiable adoption of new tools in the Islamic public interest.

B. Choosing a Ruler

How to select a ruler is a central question of Islamic political theory. The classical theory of rulership (*sultaniyya*) prescribed designation by the prior caliph, or selection by community leaders, followed by acclamation by the people (*bay'ah*). Some Islamic constitutions follow designation, in practice hereditary rule as in the classical caliphates, but many incorporate democratic forms drawn from European models. Both means have been called incompatible with Sharia: hereditary rule for *mulk* (kingship, as opposed to correct Islamic rule by an imam) and democracy for transgressing *tawhid* (God's singularity and supremacy) or for *bid'ah* (improper innovation to God's plan).[83] Every Islamic constitution is thus potentially open to criticism for an un-Islamic way of choosing the ruler. This section addresses whether Sharia can accommodate hereditary rule, election, time-limited rulership, campaigning for office and representation, to assign the ruling power that once rested with a caliph.

[82] Constitution of Afghanistan 2004 art 150. The *Loya Jirga* is a congress of all members of the National Assembly and the chairs of the provincial and district councils, *ibid* art 110 (the president participates, but as an ordinary member). As an institution, it is defensible as continuing a tradition that, while without obvious Islamic precedent, does not seem to transgress core principles. If Islam can accommodate parliamentary democracy and constitutionalism, then empowering a supreme council of the people to amend the constitution would be a logical extension.

[83] See, eg, *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'.

Hereditary rule was the de facto practice of the post-Rashidun caliphs, perceivable as *mulk* but accepted by al-Mawardi as a permissible act of designation, when affirmed by *bay'ah*. It persists in ten Islamic states, sometimes alongside instructions for the act of designation. 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, by approving the choice of Heir Apparent.[84] The constitutions of Bahrain, Jordan, Morocco, Oman and Qatar also specify hereditary rule.[85] In the United Arab Emirates, the hereditary Emirs of the seven constituent monarchies select the president from among themselves for a renewable five-year term.[86] 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.[87]

Some Islamists hold that western style democracy usurps God's supremacy,[88] tantamount to denying *tawhid*. Al-Qaradawi replies that the Quranic verses raised to support this argument addressed Muslims as a particular group within a wider world of unbelievers, whereas a discussion of modern Islamic 'democracy assumes a *Muslim* society'.[89] This can be seen as refining the views of for example Qutb, who rejected any system whereby people are governed by man-made laws. But if a society 'first established [Islam] in their hearts and lives',[90] as Qutb advocated, they could then reasonably use tools developed in foreign systems to implement Islamic governance.[91] If after the Prophet the

[84] Constitution of Kuwait 1962 art 4(1) (hereditary succession), art 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 (amended 2013) art 5 ('The most eligible among' the male descendants of the founding King is invited to assume the throne), art 6 (citizens pledge allegiance to the King). The Basic Law seems not to admit the possibility that the people might withhold the *bay'ah*.

[85] Constitution of Bahrain 2002 (amended 2017) art 1(b); Constitution of Jordan 1952 (amended 2016) art 1; Constitution of Morocco 2011 art 43; Basic Statute of Oman 1996 (amended 2011) art 5; Constitution of Qatar 2003 art 8.

[86] Constitution of the United Arab Emirates 1971 (amended 2009) arts 1, 51.

[87] Actual power resides with the government, which is responsible to the House of Representatives and headed by one of its members. Constitution of Malaysia 1957 (amended 2010) art 32(1) ('Supreme Head of the Federation'), art (3) (elected by and from the Conference of Rulers), art 40(1) (acts 'in accordance with the advice of the Cabinet'), art 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'), art (3) (the cabinet is 'collectively responsible to Parliament').

[88] 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 Euben and Zaman (eds) (n 38) 147 (referencing Quran 43:84, 12:40, 3:64).

[89] Al-Qaradawi (n 38) 240–41 (original emphasis) (referencing Quran 6:116, 12:103, 7:187, 29:63, 11:17, 2:243, 34:13, 38:24).

[90] 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 Esposito and Shahin (eds) (n 4) 61.

[91] Al-Qaradawi sees 'no Islamic legal impediment to acquiring an idea or a practical solution from non-Muslims'. Al-Qaradawi (n 38) 237 (for example, the Prophet adopted Persian military tactics, and had polytheist prisoners of war teach Muslim children to write).

people, not hereditary rulers, became God's vicegerents, then this would represent a mere technical adjustment, not a basic change to the Islamic nature of a society.

Sharia is immutable, but human understanding of it evolves. Classical Islamic governance did not utilise election, time-limited terms, campaigning for office, or representation. But might the Prophet or the Rashidun caliphs have employed democratic forms, if their society had known them? Arguably, Islamic principles can support choosing leaders by election. The example of the Rashidun caliphs, chosen (or freely accepted) by the community, shows that the people may select their rulers. Kamali argues that electing the ruler through universal suffrage is 'a modern equivalent of the caliphate', permitted or even required by principles of Islamic rule applied to modern society.[92] Al-Qaradawi considers elections an Islamic duty, as the principles of just rule, *shura* and a ruler beholden to the people make voting '[the equivalent of] legal testimony for a candidate's abilities'.[93] While no caliphate until the late Ottoman era instituted elections or representation, they have enough support in the proofs of law and antecedents in early practice to argue that they accord with Sharia. Rather than interfering with God's plan, might they help to implement *bay'ah*, *shura*, and *ijtihad*, and be justifiable under *maslahah* if they could increase the well-being of the community?

Where practiced, presidential election is for a limited term,[94] which has no pre-modern Islamic precedent. But according to al-Jabri, a fixed term would have made little sense given the original definition of the caliph as essentially a commander, coupled with the impossibility of predicting the duration of the wars against apostasy; when the wars ended, the caliph 'would lose the title of "commander" and resume his former place'.[95] Uthman's precedent – assassination – showed that a caliph's term could end when 'people were bored with him', but also demonstrated the danger of failing to define the caliph's duties beyond the military, or to provide for peaceful removal.[96] Iran's Supreme Council of religious scholars pre-approves presidential candidates.[97]

Sharia appears to discourage campaigning for office. The Prophet disdained office-seekers.[98] This presents a challenge for a polity large enough to require

[92] Kamali (n 3) 131 (citation omitted) (arguing against 'confin[ing] the Islamic system of rule to only the historical caliphate').

[93] Al-Qaradawi (n 38) 237–38 (citing Quran 65:2 and 22:30 for a duty to bear true witness and 2:283 and 28:26 for a duty to vote when asked) (original brackets).

[94] Islamic states that elect a president, except Afghanistan, Djibouti and Somalia, limit the president to two terms, or two consecutive terms. Terms range from four to seven years. See Table 2: Establishing the Executive.

[95] Al-Jabri (n 12) 39.

[96] Al-Jabri (n 12) 40.

[97] Constitution of Iran 1979 (amended 1989) arts 107, 108. The president is only the second most powerful executive after the Leader, *ibid* art 113.

[98] For example, two men approached him 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.

elections in order to express the people's choice of a ruler. Al-Turabi would replace campaigns with 'a neutral institution that would explain to the people the options offered in policies and personalities',[99] somewhat akin to the pre-selection process used in Iran. Such a model could, however, be susceptible to manipulation. Absent a truly neutral nominating institution, today's larger, more complex Islamic societies might need campaigns. It might not be possible for people to gather enough information to exercise *bay'ah* by voting without political parties, and the candidates themselves, presenting their best arguments for election.

Representation can facilitate the people's ongoing participation in political leadership. The caliphates provide no exact precedent. Asad sees no problem, as the Prophet and the Rashidun caliphs routinely consulted with tribal leaders whose people would surely have agreed to be represented by them if asked.[100] Kamali argues that when Medina pledged the *bay'ah* to Abu Bakr on behalf of the *umma*, it showed that some members of the community may speak for the rest in matters of governance and, through *shura*, this applies '*mutatis mutandis*, to the election of other officers and representative organs of government'.[101] But *bay'ah* is a discrete event, while *shura* is ongoing. This *bay'ah* may have set a precedent for representation in choosing the ruler. However, for it to support representatives exercising executive or legislative 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 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'.[102] In Asad's view, consultation in the sense of Quran 42:38 requires an elected assembly as a practical matter, to 'be truly representative of the entire community' in a modern, complex society.[103]

Nearly all Islamic states follow one or the other of the means of nominating the ruler that al-Mawardi recognised:[104] selection, associated with the Rashidun caliphate, or designation (in practice, heredity), which prevailed from Umayyad to Ottoman times. An underlying commonality of the objections raised – *bid'ah* and denying *tawhid* for updated selection; *mulk* for heredity – is that they break the chain of delegation of power from God to the ruler. Sharon suggests a way around this. The dilemma after Umar, whereby '[t]he absence

[99] Hasan al-Turabi, 'The Islamic State' in Euben and Zaman (eds) (n 38) 220.
[100] Asad (n 72) 53.
[101] Kamali (n 3) 152.
[102] Ahmad Moussalli, 'Hassan al-Banna' in Esposito and Shahin (eds) (n 4) 136 (citing Hasan al-Banna, *Al-Imam al-Shahid Yatahaddath*, Dar al-Qalam, Beirut, 1974, 99–100).
[103] Asad (n 72) 45.
[104] 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 head of state is unique. Nominal rule by councils of traditional leaders as in Malaysia and the UAE resembles the leadership structure of the Medinan state, except that in Malaysia this ruler has only ceremonial authority.

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',[105] might be resolved through a new consensus of the *umma*, as in a *majlis al-shura* (consultative assembly) to enact a constitution. This would re-establish the legitimacy of the rulership, if this new consensus could be construed as *ijma*, and open the possibility of assigning power by means specified in that same constitution. Designation of a successor followed by *bay'ah* was clearly within the contemplation of classical Sharia. Today, modern tools such as elections and representation can also help to realise rule by consent, rule of law and consultation.[106]

III. DIVIDING THE GOVERNING POWER

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, imperial'.[107] Since then, models of government have proliferated. Some of them may advance both political stability and participatory governance. The original, perfect government of Medina depended on the presence of the Prophet. The Arab tradition of tribal leaders governing in council suited a small polity. In the classical era, the only known approach to governing a larger society was imperial autocracy, with its tendencies toward either tyranny or disintegration. A caliph could designate a vizier, or delegate non-discretionary executive authority to governors or other officers, but fundamentally the power to govern was indivisible (although local and traditional leaders could act somewhat independently). The later Ottoman Empire was the first Islamic state to experiment with sharing executive authority and with modifying law through legislation rather than by edict.

Nearly all Islamic constitutions now distribute executive and legislative powers across different power centres. Modern commentary has settled on a sole elected executive officer, aided by a legislature, as the most appropriate structure for an Islamic state.[108] More Islamic states establish a presidential system than hereditary rule or parliamentary democracy. Presidential states and constitutional monarchies usually constrain the ruler's power through granting an elected assembly a degree of executive oversight or power to enact

[105] Sharon (n 7) 22.

[106] Al-Qaradawi argues that democracy and its tools are the best available means to these ends, so Muslims should use them. Al-Qaradawi (n 38) 236 (there is no reason not to seek better means, but until they 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').

[107] Emon (n 27) 68.

[108] Asad considers presidential democracy best because it subjects the ruler to election, but does not dilute executive power. Asad (n 72) 61.

legislation. Most Islamic constitutions now separate powers along at least three lines. First, as in the caliphate, political leaders do not necessarily lead the state religion. Second, the head of state usually no longer wields the entire executive power. Finally, a legislature and a government typically share the caliph's traditional power to create law under *siyasah Sharia*.

A. Separating Civil from Religious Authority

Many states separate civil and religious authority. For example, the French state rests on a strong principle of *laïcité* and the American constitution is understood to require a separation of church and state. Some might look askance at an Islamic state's declaration of a state religion, or political leaders holding religious authority. Yet this is not a specifically Islamic phenomenon – the British monarch heads the Church of England, Germany collects taxes for the Catholic and Evangelical churches, Greece is Orthodox, Thailand is Buddhist. Neither Islamic tradition nor international law would preclude a caliph, or head of state, from serving as the unifying centre of the religion, while delegating the duties of government. The only practical point where the consensus of Islamic states in this area may appear to conflict with international norms is 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.[109] Although some early jurists held that the caliph's authority was divine, as 'vicegerent of God on earth',[110] unlike the Prophet the caliph could err in interpreting the Word of God.[111] Some 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.[112] Abu Bakr, Umar, Uthman, Ali and for that matter Mu'awiya, had standing as Companions who had known the Prophet well,[113] but in so far as they could claim religious primacy it was as the delegate of the Companions collectively, not in their own right. Thus, even

[109] Sharon (n 7) 16.

[110] See, eg, Muhammad Khalid Masud, 'The Changing Concepts of Caliphate – Social Construction of Shari'a and the Question of Ethics' in Kari Vogt, Lena Larsen, Christian Moe (eds), *New Directions in Islamic Thought* (IB Tauris & Co, 2009) 190 (citing the eighth century jurist Abu Yusuf).

[111] Sherman A Jackson, *Islamic Law and the State: The Constitutional Jurisprudence of Shihab al-Din al-Qarafi* (EJ Brill, 1996) 215.

[112] 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'. Lambton (n 14) 19.

[113] See, eg, John Kelsay, *Arguing the Just War in Islam* (Harvard University 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*').

as caliphs ruled the Muslims, their religious authority could not be absolute.[114] An-Na'im cites objections Umar and Ali raised to a decision of Abu Bakr: these 'would have been inconceivable if Abu Bakr had been exercising the religious authority of the Prophet'.[115] Only after hereditary rule became entrenched did the idea of a divinely ordained caliph enter Islamic theory.

Several Islamic constitutions recognise religious authority in the ruler. In all Islamic monarchies except Jordan, the ruler holds a title or responsibilities that indicate leadership of the religion. The Saudi approach resembles the Umayyad caliphate, with the King bearing the duty to 'rule according to' *fiqh* and 'supervise the implementation of' Sharia,[116] but deferring matters of interpretation to the *ulama*. Brunei, Morocco and Malaysia follow the Ottoman model of unifying civil and religious leadership in a hereditary monarch, albeit wielding respectively absolute, constitutionally constrained, and effectively no temporal powers.[117] Shi'ite Iran follows a model without an exact pre-modern precedent. Both religious and secular supremacy rest with the Guardian Council of senior *ulama*. The Leader, who holds final executive and legislative authority, must, in the view of the Assembly of Experts, be the country's most learned Islamic scholar.[118] Where not also the head of the religion, the temporal ruler usually has no specific religious role under the constitution.[119]

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, although non-Muslims served in administrative roles, even senior ones, during most of the caliphates. According to Asad, as any ideologically based polity needs a true believer at its head, only a Muslim is certain to be fully committed to the aims of Islam.[120] There is additional support

[114] Masud (n 110) 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').

[115] Abdullahi Ahmed An-Na'im, *Islam and the Secular State* (Harvard University Press, 2008) 59.

[116] Basic Law of Saudi Arabia 1992 (amended 2013) art 55. Citizens should 'pledge allegiance to the King on the basis of the Book of God and the Prophet's Sunnah, as well as on the principle of "hearing is obeying"', *ibid* art 6.

[117] 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).

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

[119] The King of Bahrain is designated 'loyal protector of the religion and the homeland', but without specific powers. Constitution of Bahrain 2002 (amended 2017) 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.

[120] Asad (n 72) 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').

in the Quranic command to '[o]bey God and obey the Apostle and those in authority *from among you*'.[121] In addition to the states where a hereditary ruler also heads the religion, 11 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'.[122] All of these apart from Somalia have a strong, independent executive. Pakistan, whose parliament controls the executive power, requires Muslim members of parliament to be observant.[123] 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.

B. Dividing the Executive Power

Whether and how an Islamic state may divide the power to rule depends in part on how that power flows to the government. God is the wellspring, but it is conceptually simpler to redirect power to an elected assembly if it flows to institutions through the people, and to the ruler as an institution, than if it passes from God to the ruler directly. Although the proofs of law and the caliphates provide little precedent for an assembly to share in executive power, Sharia does not seem to forbid it. The principle of *maslahah* might even favour it. Dividing power facilitates oversight of the executive. Ali implemented regular inspection of government work to ensure justice and inhibit corruption, but lacking an institutional basis, this faded under later caliphs. Durable restraint by an assembly, manifest for example in the power to vote or remove confidence, can safeguard against such backsliding. In the past one had to accept flawed rulers.

[121] Asad (n 72) 41 (emphasis added).

[122] Asad (n 72) 41. See Constitution of Afghanistan 2004 art 62(1); Constitution of Algeria 1989 (amended 2016) art 87; Constitution of Kuwait 1962 art 4(5) (the heir apparent must be 'a legitimate son of Muslim parents'); Draft Constitution of Libya 2016 art 111(1); Constitution of the Maldives 2008 (amended 2018) art 109(b) (Sunni); Constitution of Mauritania 1991 (amended 2017) 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 2003 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); Draft Constitution of Yemen 2015 art 182(1). The president of Afghanistan 'cannot act based on', *inter alia*, 'religious … considerations during his term in office'. Constitution of Afghanistan 2004 art 66.

[123] Constitution of Pakistan 1973 (amended 2018) art 62(1)(d) ('not commonly known as one who violates Islamic Injunctions'), (e) (must have 'adequate knowledge of Islamic teachings and [practice] obligatory duties prescribed by Islam [and abstain] from major sins'), art 113(d), (e) (art 62 applies *mutatis mutandis* to provincial assemblies). These requirements do not apply to non-Muslims, 'but such a person shall have good moral reputation', *ibid* art 62(2).

Now, institutional barriers can help to keep the government from mishandling its duties.

i. Restraining the Executive

Reallocating executive power arguably usurps the nominal ruler's prerogative to govern unfettered but by Sharia. Indeed, the caliph's authority went still further. A caliph who, despite remonstration, persisted in impious behaviour or unjust rule nonetheless retained the right to rule if deposing him would risk *fitnah* – strife, chaos or civil war.[124] Up to a point, orderly injustice was the lesser evil. Neither the classical jurists, the government of Medina, nor the caliphate indicate an Islamic ruler is anything other than an individual with plenary authority. However, even the Companions disputed about this: Uthman insisted the caliph's power was absolute and indivisible, but Ali and others disagreed.[125]

If executive power comes from God directly, then it might not lie within the ruler's remit to share it with an assembly, even where the assembly may enact legislation for the ruler to enforce. Asad presents the 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 understood to indicate that after counsel, the ruler alone decides.[126] Asad notes however that this 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* to show that the Prophet felt obliged to let his counsellors' opinions sway his actions.[127] The analogy to an elected assembly is imperfect, as the Prophet chose his own advisors. But if representation is permitted, and if the Prophet could acquiesce in his advisors' views when they ran counter to his own, then arguably the people's representatives may constrain the decision space of the ruler.

The Ottoman Constitution set the first, limited precedent of a caliphate institutionalising a sharing of the ruling power.[128] It is now common in Islamic states for elected assemblies to exercise a measure of oversight or control

[124] Zubaida (n 22) 91 ('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').

[125] Their disagreement was among the causes of the subsequent *fitnah*. Al-Jabri (n 12) 41.

[126] Asad (n 72) 55 (quoting Al-Imran 3:159).

[127] Asad (n 72) 55 (the Prophet 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').

[128] The General Assembly could vote on legislation and interpolate members of the government. Ottoman Constitution 1876 art 27 (powers to designate the Grand Vizier or appoint the government were not shared).

of governments. Except for Brunei, Oman, Saudi Arabia and the UAE,[129] heads of state and government in some degree either share power with, or are subject to oversight by, an elected body.[130] 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 (exercised by a prime minister). More typically, the head of state leads the government,[131] or appoints a prime minister to do so.[132] The prime minister chooses ministers alone or in consultation with the head of state.[133] Since the head of state can either determine policy or install or remove the government, these remain within al-Mawardi's law of the sultanate. In the Arabian Peninsula states and the Comoros, executive power is nearly undiluted. Other Islamic constitutions, notably in North Africa, empower the assembly to help choose, or approve the head of state's choice of, a government. In Egypt, Iraq, Morocco and Tunisia the largest

[129] Constitution of Brunei Darussalam 1959 (amended 2011) art 4(1) (the Sultan has 'supreme executive authority'), (1A) (the Sultan is the prime minister); Basic Statute of Oman 1996 (amended 2011) art 42 (powers of the Sultan as head of state and chief executive). The King of Saudi Arabia holds absolute power. The UAE reserves the federal governing power to the Supreme Council of hereditary Emirs. In Oman, one of the legislative houses is elected, but the Sultan retains final discretion to promulgate laws. Basic Statute of Oman 1996 (amended 2011) art 58.

[130] Nearly all Islamic constitutions provide for at least one elected chamber. Constitution of Afghanistan 2004 art 83 (*Wolesi Jirga*, five-year term); Constitution of Algeria 1989 (amended 2016) arts 112, 118 (People's National Assembly and two-thirds of the Council of the Nation elected), 119 (five and six-year terms, respectively); Constitution of Bahrain 2002 (amended 2017) arts 56, 58 (Chamber of Deputies, four-year term); Constitution of the Comoros 2018 art 66 (Assembly of the Union is elected), art 67 (details established by law); Constitution of Djibouti 1992 (amended 2010) arts 44, 45 (National Assembly, five-year term); Constitution of Egypt 2014 (amended 2019) arts 101, 102, 106 (House of Representatives, five-year term); Constitution of Iran 1979 (amended 1989) arts 62, 63 (Islamic Consultative Assembly, four-year term); Constitution of Jordan 1952 (amended 2016) arts 67, 68 (House of Representatives, four-year term); Constitution of Kuwait 1962 arts 80, 83 (National Assembly, four-year term); Draft Constitution of Libya 2016 arts 78, 80 (House of Representatives, four-year term), arts 86, 88 (Senate, six-year term); Constitution of the Maldives 2008 (amended 2018) arts 5, 79(a) (People's Majlis, five-year term); Constitution of Mauritania 1991 (amended 2017) arts 46, 47 (National Assembly, five-year term; Senate, six-year term); Constitution of Morocco 2011 arts 60, 62, 63 (Chamber of Representatives, Chamber of Councillors, five and six-year terms respectively); Basic Law of Palestine 2003 (amended 2005) arts 48(1), 47(3) (Legislative Council, four-year term); Constitution of Qatar 2003 arts 76, 77, 81 (Advisory Council, 30 of 45 members elected, four- year term); Constitution of Syria 2012 arts 55–57 (People's Assembly, four-year term); Constitution of Tunisia 2014 arts 50, 56 (Assembly of the Representatives of the People, five-year term); Draft Constitution of Yemen 2015 art 138 (House of Representatives), art 141 (Federal Council), art 154 (four-year terms).

[131] In Afghanistan, Algeria, the Comoros, Djibouti, Iran, the Maldives, Mauritania, Morocco and Yemen, the head of state leads the government. See Table 2.

[132] This is the practice in Bahrain, Egypt, Jordan, Kuwait, Libya, Palestine, Qatar, Somalia and Syria. See Table 2.

[133] The appointed head of government selects the ministers in Egypt, Palestine, Somalia and Tunisia. In Afghanistan, Algeria, the Comoros, Iran, the Maldives, Syria and Yemen the president appoints and dismisses ministers as well as the prime minister. In Bahrain, Djibouti, Jordan, Kuwait, Mauritania, Morocco and Qatar, the head of state chooses the prime minister and the government in consultation with the prime minister. The Draft Constitution of Libya assigns the competence to form the government to the president and to the prime minister in separate articles. See Table 2.

party or bloc in parliament must be invited to form the government.[134] In most Islamic states except absolute monarchies, parliament votes confidence to seat a government.[135]

Some Islamic states offset the assignment to the people of part of the ruling power with powers of monarchs and presidents to appoint legislators. This helps to institutionalise dialogue between the ruler and the people's assembly, preventing the assembly as a body from entirely disregarding the views of the executive. In Qatar, the Emir appoints one-third of the Advisory Council.[136] Otherwise lower (or sole) houses are elected.[137] Afghanistan, Algeria, Bahrain, Jordan, Libya, Mauritania, Morocco, Yemen and the four parliamentary republics have bicameral legislatures (although in Iraq the establishment of an upper house remains pending).[138] In Bahrain and Jordan the King appoints all members of the upper house.[139] The presidents of Afghanistan and Algeria appoint one-third of their upper houses.[140] In Malaysia the ruler appoints the

[134] In Egypt the president may appoint any candidate, but if that candidate is rejected must then appoint the leader of the largest parliamentary party. See Table 2.

[135] The exceptions are the Comoros, Djibouti, Kuwait, Libya, Morocco, Qatar and Syria. In Kuwait and Syria the parliament may comment on the proposed government. Except in the Comoros, Djibouti, Qatar and Yemen, parliaments may also remove the government or prime minister. In Qatar the al-Shoura Council can require the removal of an individual minister but not the prime minister. See Table 2.

[136] Constitution of Qatar 2003 art 77 (15 of 45 members).

[137] In addition to constitutions noted above, see Constitution of Iraq 2005 arts 47, 54 ('limited to four calendar years'); Constitution of Malaysia 1957 (amended 2010) art 55(3) (five-year term, unless dissolved first); Constitution of Pakistan 1973 (amended 2018) art 51 (ten of 342 seats reserved for non-Muslims, the rest allocated among the provinces and federally administered areas), art 52 (five-year term, unless dissolved first); Draft Constitution of Somalia 2012 arts 60, 72 (four-year term).

[138] Constitution of Afghanistan 2004 art 82; Constitution of Algeria 1989 (amended 2016) art 112; Constitution of Bahrain 2002 (amended 2017) art 51; Constitution of Iraq 2005 art 46 (Council of Representatives and Federation Council, the latter to be established by a law), art 62 (the law must pass by a two-thirds majority of all members); Constitution of Jordan 1952 (amended 2016) art 62; Draft Constitution of Libya 2016 art 77; 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 Mauritania 1991 (amended 2017) art 46; Constitution of Morocco 2011 art 60; Constitution of Pakistan 1973 (amended 2018) 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); Draft Constitution of Yemen 2015 art 138 (House of Representatives), art 141 (Federal Council). Egypt's 2014 constitutional revisions dissolved the upper house, the Shura Council, merging its employees into the House of Representatives. Constitution of Egypt 2014 (amended 2019) art 245. The 2019 amendments established a Senate, but with purely consultative powers, *ibid* art 249. Two-thirds of the Senate are elected, the rest appointed by the President of the Republic, *ibid* art 250. See also Constitution of Egypt 2012 art 82 (establishing the Shura Council), art 128 (president appoints 10% of members), art 130 (six-year term).

[139] Constitution of Bahrain 2002 (amended 2017) art 52; Constitution of Jordan 1952 (amended 2016) art 36.

[140] Constitution of Afghanistan 2004 art 84 (the president appoints to a five-year term 'from among experts and experienced personalities', half of whom must be women); Constitution of Algeria 1989 (amended 2016) art 118 (appointed from among 'national personalities and qualified experts'), art 119 (six-year term).

majority of senators,[141] but on the government's advice, leaving the actual power with the House of Representatives. Elected members of upper houses usually represent regions.[142]

ii. Can the People Rule Themselves?

Westminster style parliamentary rule is incongruous with classical *siyasah* or the theories of political Islamists such as Asad or Mawdudi. Despite apparently providing a powerful means to apply *shura*, 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 prototyped by the selection of Abu Bakr as caliph, nomination by *ahl al-hall wa'l-'aqd* followed by the *bay'ah*. Parliamentary rule implies a qualitatively different division, a collective exercise by the people's representatives of the executive power. Even if their role 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 did not exist in the caliphate. A parliament may more resemble a group of ruling elders, the model that pre-dated the Prophet's political entity in Arabia, and which the Prophet himself employed.

Several Islamic states emulate the Westminster model. The titular rulers of Iraq, Malaysia, Pakistan and Somalia wield so little authority that power effectively resides with the parliament, which establishes and sustains the government. The lower house elects the president in Iraq and Somalia.[143] In Pakistan,

[141] 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).

[142] Constitution of Afghanistan 2004 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 1989 (amended 2016) art 118 (two-thirds of the Council of the Nation elected 'among members of' local assemblies); Draft Constitution of Libya 2016 arts 86, 88 (Senate members are directly elected, 'taking into account the geographic balance in the distribution of seats'; six-year term); Constitution of Malaysia 1957 (amended 2010) art 45(1), (3), (3A) (each of the 13 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 2017) art 47 (senators are elected by 'indirect suffrage' from the regions to a six-year term); Constitution of Morocco 2011 art 63 (three-fifths of the Chamber of Councillors represent 'local collectivities', two-fifths represent professional organisations; six-year term); Constitution of Pakistan 1973 (amended 2018) 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 12 elected from federal territories, including one woman and one technocrat from the capital); Draft Constitution of Somalia 2012 art 60 (the people of each state elect the same number of representatives to the Upper House, for a four-year term); Draft Constitution of Yemen 2015 art 141 (Federal Council members are allocated regionally).

[143] Constitution of Iraq 2005 art 58(3). Election requires a two-thirds majority, *ibid* art 67(1), with the nominees selected by a process determined by a law, *ibid* art 66. Draft Constitution of Somalia 2012 art 89.

members of the Senate and provincial assemblies also vote for the president.[144] In Malaysia and Pakistan, the nominal chief executive in all main aspects of governing must follow the advice of the cabinet of ministers.[145] The president of Somalia must do likewise, 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.[146] 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.[147] In all four states, the lower house of parliament can vote or withdraw confidence. It may be that these states have developed the mechanisms of *siyasah*, adopting new structures conducive to rule according to Sharia. In particular, Pakistan's constitution goes to considerable lengths to institutionalise Sharia, an effort Mawdudi himself was involved in.

Parliamentary government is arguably incongruous with Sharia. In Asad's view, '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',[148] and the possible need for compromise among parties to set policy would work against the 'single-mindedness and inner continuity so essential for an Islamic state'.[149] However, principles of Sharia provide at least a starting point to reason toward rule by an assembly. For example, al-Jabri argues that because the Quran speaks in the plural in enjoining believers to 'obey … those given authority among you', 'it is not necessary according to *al-shari'ah* to have only one person in charge'.[150] The Quran praises the *umma* because 'they conduct their affairs by consultation among them'.[151] Zubaida argues that '[a]fter the Prophet … [a] leader was no more than a practical necessity', leaving citizens free to select and remove leaders as they choose.[152] The fact that parliamentary rule does not comport with classical examples may only show that it did not fit the political structures familiar to that society at that time.

[144] National Assembly members cast nearly half of the votes, the senators about one-seventh, with the remainder split equally among the four provinces. Constitution of Pakistan 1973 (amended 2018) art 41(3). There are 96 senators and 336 members of the National Assembly, *ibid* arts 59(1), 51(1). 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 assembly aggregates the same number of votes as Baluchistan, *ibid* Second Schedule, art 18(1). As Baluchistan's assembly has 65 seats, the provincial assemblies together cast 260 votes to elect the president, *ibid* art 106.

[145] Constitution of Malaysia 1957 (amended 2010) art 40(1); Constitution of Pakistan 1973 (amended 2018) art 48(1).

[146] Draft Constitution of Somalia 2012 art 90.

[147] Constitution of Iraq 2005 arts 70(G), 75, 73.

[148] Asad (n 72) 59.

[149] Asad (n 72) 60.

[150] Al-Jabri (n 12) 36.

[151] Quran 42:38, quoted in Kamali (n 41) 39.

[152] Zubaida (n 22) 90.

C. Legislation

Having breached the norm of monolithic authority, Islamic states can contemplate separation of powers. A significant innovation is legislation, whereby an elected assembly exercises part or all of the caliph's power to declare law for the public space. Al-Mawardi and Ibn Taymiyyah conceded the caliph's right to create law within the limits of *siyasah Sharia* but did not contemplate any role for ordinary citizens in lawmaking. If Sharia can admit legislation, then the question of how to apportion the power to legislate between the government and an assembly arises. Most Islamic states now balance the traditional power of the ruler to declare law within the sphere of *siyasah* with the democratic norm of legislation enacted by an elected assembly.

Arguably, lawmaking by legislation serves the public interest. Rule by edict risks instability or capriciousness. Legislation is durable, separates lawmaking from government and affords the people ongoing input. As with sharing the executive power that once accrued entirely to the caliph, most Islamic states – except absolute monarchies and parliamentary republics – have separated legislative from executive powers. The Ottoman caliphate set the first precedents. If the Prophet's ruling power, the divine trust, devolved on the *umma* rather than being bequeathed by God to the caliph personally, then reassigning to a legislature the caliph's power to issue laws is more likely to be permissible. Without an elected assembly there may be little restraint on a ruler who failed to rule in accordance with Sharia.

In practice, the legislative approach has won almost universal acceptance. Only in Saudi Arabia does the ruler's power reach the absolute level of the Rashidun caliphs as advocated by Mawdudi, with the assembly exercising purely consultative powers. Brunei and Oman, 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 Asad's idea of an assembly empowered to reject legislation. Elsewhere, the assembly's role can be as little as to propose legislation for the ruler's consideration. Or, at the other extreme, parliamentary democracies assign the head of state no legislative power. Iran and Morocco formally do likewise, but in Iran the Guardian Council supervises both branches and in Morocco the King also acts as prime minister. In most Islamic states, the government or legislators propose laws, the assembly and the executive agree to pass them, and a legislative supermajority can overcome the executive's refusal.

i. Legislation as Shura*?*

The classical jurists recognised roles for the people in governance such as *shura* (consultation) and *hisbah* (the duty to prevent harm to the *umma*). Legislation can institutionalise *shura*, channelling the views of the *umma* rather than (or in addition to) those of chosen counsellors and experts in Sharia. But it is not

clear that *shura* can extend beyond case by case consultation to altering legal frameworks, without usurping the ruler's prerogatives. Most Islamic constitutions both recognise the duty of *shura*, and permit legislation. Even where a body nominally tasked with *shura* holds lawmaking power, there is a separate provision for consultation, which seems to indicate that Islamic states see a distinction. Citizens in an Islamic polity have the right to express an unsolicited opinion on governance (implicit in *hisbah*), and to criticise the government.[153] Offering unsolicited criticism could include proposing a specific change to *siyasah* law. Rather than a manifestation of *shura*, legislation may be more a mechanism to help realise both *hisbah* and *shura* in a constitutional order.

Legislation empowers the people to interpret Sharia for the public space. Most of the basic principles are uncontroversial. The *umma* have always had a right or duty of *shura* or *hisbah*. The ruler must apply Sharia but may enact laws as necessary to govern. This entails consultation, which may occur through representation. The example of the Prophet following the counsel of his Companions arguably indicates that an assembly could amend or reject a proposed law. This does not yet establish that the people can, through legislation, alter the legal framework of the state. However, when the early jurists elaborated the law, the edicts and administrative decisions of past rulers formed part of the legal environment. Although they could not admit it, the *ulama*'s exposition of Sharia owed some of its substance to such de facto sources. In that sense, governments in the caliphate made lasting changes to the law. As the people participate more formally in governance today, for example through voting or representation in assemblies, they naturally continue to influence the development of law.

ii. Enacting Laws

Typically, both the ruler and the assembly must assent to laws. Nearly all Islamic constitutions at least allow the legislature to decline laws proposed by the ruler. Only in Brunei, Oman, Saudi Arabia and the UAE does the ruler wield plenary authority over final legislative text.[154] Islamic presidential republics

[153] Kamali (n 3) 159 (referencing the *hadith*, 'the best form of *jihad* is to speak a word of truth to a tyrannical ruler').

[154] Constitution of Brunei Darussalam 1959 (amended 2006) art 39 (the Sultan has 'the power to make laws'), art 43(5) (the Sultan can enact a law despite a negative vote of the Legislative Council); Basic Statute of Oman 1996 (amended 2011) art 41 (the Sultan's 'command is obeyed'), art 42 (the Sultan's prerogatives include '[p]romulgating and ratifying Laws'); Basic Law of Saudi Arabia 1992 (amended 2013) art 44 ('The King is the ultimate source of' legislative, executive and judicial authority), art 70 (laws are issued by royal decree); Constitution of the United Arab Emirates (UAE) 1971 (amended 2009) art 110(2)(c) (the Supreme Council of the Emirs has final authority over passage of bills). Oman has a bicameral assembly, with powers to review draft legislation and propose amendments, but the Sultan retains the final power to approve the text. Basic Statute of Oman 1996 (amended 2011) art 58bis. 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

and constitutional monarchies compromise by empowering the head of state to either approve or block legislation.[155] Most offset that power by allowing a supermajority of the assembly to enact laws even if the chief executive objects.[156] This resembles the 1909 amendments to the Ottoman Constitution, whereby Parliament could override the Sultan's refusal to approve a law via a two-thirds majority of each house – however, the Sultan appointed all members of the upper house.[157] Today in Afghanistan, Algeria, Bahrain, Jordan and Qatar, the ruler appoints enough legislators to potentially block the legislature's override power. Where there are bicameral legislatures, both houses must consent,[158] but in Morocco and Somalia if they fail to agree then the lower house may approve a text with an enhanced majority, and in Algeria and Morocco the government can ask the lower house to vote on the law.[159] The presidents of Algeria, Djibouti, Mauritania and Tunisia may under certain circumstances submit questions to public referendum.[160] In the Comoros, the Maldives, Mauritania and Tunisia the president may require a second reading but must promulgate a measure if it passes again by an 'absolute majority' or by a majority of all members.[161] In Iran, Iraq, Malaysia, Pakistan and Somalia the nominal head of state essentially cannot prevent laws being enacted.

Saudi Arabia 1992 (amended 2013) art 68. The Federal National Council 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 2009) arts 110(2), (3).

[155] Legislation in Islamic constitutional monarchies and in presidential republics except Iran and Libya requires the consent of the head of state. See Table 3: Legislative and Judicial Powers.

[156] In Afghanistan, Algeria, Bahrain, Egypt, Jordan, Kuwait, Palestine, Qatar, Syria and Yemen a two-thirds vote of the legislature (or its lower house) overrides the ruler's refusal. Smaller majorities can do so in the Comoros, the Maldives, Mauritania and Tunisia. In Djibouti the president can require a second reading, but the constitution does not indicate whether the legislature can then pass a law without the president's consent. See Table 3. In Kuwait a simple majority can enact a bill that failed to command a two-thirds majority in a previous legislative session. Constitution of Kuwait 1962 art 66.

[157] Ottoman Constitution 1876 (amended 1909) art 54; Ottoman Constitution 1876 art 60.

[158] In Libya the Senate's concurrence is only required for laws relating to specified competences: financial system; budget; local government; citizenship and immigration; referendums and elections; natural resources; emergency or martial law; general amnesty; and emblems of the state such as the anthem or flag. Draft Constitution of Libya 2016 art 91.

[159] See Table 3. See also Constitution of Pakistan 1973 (amended 2018) arts 70, 73(1) (except money bills, where the Senate may only make recommendations). 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 30 days, *ibid* 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 2018) art 73(3). The president may ask the parliament to reconsider a measure, but ultimately cannot stop its enactment, *ibid* art 75.

[160] Constitution of Algeria 1989 (amended 2016) arts 8, 91(8) ('any question of national importance'); Constitution of Djibouti 1992 (amended 2010) art 33 ('any Bill of law'); Constitution of Mauritania 1991 (amended 2017) 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').

[161] See Table 3.

One difficult point is whether an assembly may initiate legislation. Islamist writers agree that in principle legislation begins with the executive. The early written Islamic constitutions diverged on this: under the 1876 Ottoman Constitution only the government could initiate legislation,[162] while the 1906 Iranian Constitution let the National Consultative Assembly 'propose any measure which it regards as conducive to well-being of the Government and the People'.[163] Thus, a precedent-based reading might conclude that legislation should begin with the government, but a broader application of Islamic principles could permit an assembly to take the initiative. In most Islamic republics, the president or government and the legislature may each propose laws,[164] while most monarchies reserve the initiative to the monarch. 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.[165]

IV. COURTS AND CONSTITUTIONAL INTERPRETATION

A role for judges is implicit in an Islamic constitutional state. A state's promise to govern by Sharia carries the caveat that its remit under *siyasah Sharia* only goes so far. This implies limits to regulatory power. History and classical *fiqh* offer limited precedent, but if an Islamic state can accept a constitution and a legislative assembly, then a court as arbiter is uncontroversial. Although independent oversight of legislation, executive action and constitutional provisions did not exist in Islamic states before the end of the Ottoman Empire, a judicial role is a natural counterpart to written constitutions and separation of powers. The people and the ruler have always had a contract. Formalising it in an institutional framework implies a role for independent management of that framework. Courts in Islamic states safeguard the bargain and protect Muslims' collective right as citizens to declare law, but also restrict that right to the zone where the caliphs used to regulate under *siyasah Sharia*.

[162] Ottoman Constitution 1876 art 53.

[163] Constitution of Iran 1906 art 15.

[164] In the 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. In Egypt, Malaysia, Palestine and Yemen the power to initiate legislation belongs to each member of parliament, and in Algeria, Iran, Iraq, Somalia and Tunisia to groups of members. The constitutions of Afghanistan, the Comoros, Djibouti, Mauritania and Syria specify only 'members' or 'the members' (or equivalent). The executive's right to propose laws rests with the president in the Comoros, Djibouti, the Maldives and Syria, with the government in Afghanistan, Algeria, Iran, Mauritania, Palestine and Somalia, and with both in Egypt, Iraq, Libya and Tunisia. See Table 3.

[165] The Constitution of the Maldives contains no language to prevent legislators from proposing laws, but only explicitly mentions this as a government competence, although it empowers the People's Majlis to enact legislation. Constitution of the Maldives 2008 (amended 2018) arts 70(b)(2), 132(b).

Some form of constitutional interpretation has long existed in Islamic polities. In 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 Sharia, the unwritten constitution. Since the early caliphate, citizens have enjoyed at least quasi-judicial recourse against unlawful acts of the ruler. The 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'.[166] The eighth/ninth century caliph Harun al-Rashid instituted a chief judge, who wielded great influence through the authority to appoint and supervise judges,[167] but did not act as a top tribunal for interpretation. Only with the sixteenth century Ottoman institution of the Grand Mufti as the *Shaykh al-Islam* was a highest authority recognised for declaring the content of law.

An institutional referee is uncontroversial among Islamists who accept a legislature and constitutions. Asad acknowledges the potential for deadlock between assembly and ruler, and offers as a way out the instruction to obey those in authority: 'then, if you disagree in anything, refer it to God and the Apostle'.[168] This indicates a role for a tribunal of highly qualified jurists, learned in Islamic law and 'fully informed on the affairs of the world', to declare whether an act complies with Sharia and the constitution.[169] Kamali finds this capability already present in the judiciary: unless limited by the government that appointed them, the jurisdiction of Islamic judges encompasses 'all decisions that are not based on a clear text and consensus' and therefore review of statutes and decrees.[170] Mawdudi saw no need for an interpretive institution, preferring the judgment of the caliph, and limiting judicial interpretation to secular matters (a narrow jurisdiction, given the primacy of Sharia in his vision of the state).[171]

The main modern routes of judicial review in court cases, referring questions and appealing rulings, have Islamic antecedents. Referral has long existed, in the prerogative of a *qadi* to stay a case pending a *mufti*'s answer to a question. In the caliphate, *qadis* could and did revisit their predecessors' decisions, providing a reasonably meaningful appeal (because *qadis* were typically appointed for two years or less).[172] With this precedent, and a principle of institutional

[166] Kamali (n 3) 265.
[167] Kamali (n 3) 266 (footnote omitted).
[168] Asad (n 72) 66 (quoting Quran 4:59).
[169] Asad (n 72) 66–67.
[170] Kamali (n 3) 266 (the ruler may also establish a separate institution to supervise statutory instruments).
[171] Seyyed Vali Reza Nasr, *Mawdudi and the Making of Islamic Revivalism* (Oxford University Press, 1996) 90.
[172] Wael B Hallaq, *Sharia: Theory, Practice, Transformations* (Cambridge University Press, 2009) 362–63.

oversight established in the *mazalim* jurisdiction,[173] appeal to a higher court may simply represent a use of administrative systems modelled on European prototypes to realise Islamic principles of justice and accountability. Judicial review of legislation is a newer development. The Ottoman Constitution instituted a legislature and formalised the role of the courts, but did not provide for review of legislation – although the *Shaykh al-Islam* had to issue *fatawa* certifying that the Sultan's ordinances complied with Sharia.[174] Arguably however, in an era of legislation, assigning review power to judges is akin to the role *muftis* played (at least in theory) in restraining the ruler through *fatawa*. Structurally, 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 appeal of finalised decisions. This might reflect the former method's greater familiarity in Islamic tradition.

Constitutional courts are now the norm. The constitutions of all Islamic states except Iran and Saudi Arabia establish an interpretive institution, or direct that a law establish one.[175] Seventeen empower a court of last resort

[173] The right to bring grievances (*mazalim*) to the caliph, against acts of injustice or corruption, did not extend to assertions of erroneous application of the law. Kamali (n 3) 269. In about 870, the Abbasid Caliph al-Muhtadi established a *diwan* to exercise this *mazalim* jurisdiction on the caliph's behalf. Kamali (n 3).

[174] Zubaida (n 22) 60–61.

[175] Constitution of Afghanistan 2004 art 121 (Supreme Court reviews laws and international agreements 'for their compliance with the Constitution'); Constitution of Algeria 1989 (amended 2016) art 186 (Constitutional Council 'rule[s] on the constitutionality of treaties, laws and regulations'), arts 190, 191 (provisions ruled unconstitutional become ineffective); Constitution of Bahrain 2002 (amended 2017) art 106 (establishing a Constitutional Court); Constitution of Brunei-Darussalam 1959 (amended 2006) art 86 (Interpretation Tribunal); Constitution of the Comoros 2018 art 96 ('The Supreme Court is the highest jurisdiction in … constitutional matters'); Constitution of Djibouti 1992 (amended 2010) art 75 ('The Constitutional Council … controls the constitutionality of the laws'); Constitution of Egypt 2014 (amended 2019) art 192 ('The Supreme Constitutional Court is exclusively competent to decide on the constitutionality of laws and regulations'); Constitution of Iraq 2005 art 93 (the Federal Supreme Court interprets the Constitution and oversees the constitutionality of laws and regulations); Constitution of Jordan 1952 (amended 2016) art 59(1) (Constitutional Court oversees 'the constitutionality of the applicable laws and regulations'); Draft Constitution of Libya 2016 art 150(1) (the Constitutional Court oversees 'the constitutionality of laws and the regulations of' the legislature); Constitution of Malaysia 1957 (amended 2010) arts 128(2), 130 (Federal Court jurisdiction includes constitutional questions); Constitution of the Maldives 2008 (amended 2018) art 145(c) (the Supreme Court is 'the final authority on the interpretation of the Constitution'); Constitution of Mauritania 1991 (amended 2017) arts 86, 87 (the Constitutional Council is the final authority on the constitutionality of laws and parliamentary regulations); Constitution of Morocco 2011 art 129 (Constitutional Court); Constitution of Pakistan 1973 (amended 2018) arts 185(2)(f) (Supreme Court hears constitutional questions arising in cases); Basic Law of Palestine 2003 (amended 2005) art 103 (High Constitutional Court); Draft Constitution of Somalia 2012 arts 109B, 109C (Constitutional Court); Constitution of Syria 2012 art 146(1) ('Control over the constitutionality of the laws, legislative decrees, bylaws and regulations'); Constitution of Tunisia 2014 art 120 (Constitutional Court jurisdiction); Constitution of the United Arab Emirates 1971 (amended 2009) art 99 (Federal Supreme Court interprets the Constitution and compatibility of laws and other legal measures with it); Draft Constitution of Yemen 2015 art 327 (Constitutional Court). 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

or constitutional review.[176] A further three assign interpretive authority to a non-judicial body.[177] The jurisdiction of highest courts in Egypt, Iraq and Palestine includes 'the constitutionality of laws and regulations' and constitutional interpretation.[178] The remaining interpretive bodies review legislation for constitutional compatibility,[179] or hear constitutional complaints arising from court cases,[180] the main route of redress for citizens. For legislative review, standing is limited. Only in Somalia may private citizens challenge a law.[181] Elsewhere, with a few exceptions,[182] constitutional courts review legislation on the request of government, head of state or legislature.[183] Constitutional courts

body' for constitutional interpretation to a law. Constitution of Kuwait 1962 art 173; Basic Statute of Oman 1996 (amended 2011) art 70; Constitution of Qatar 2003 art 140. 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 the Law on Judicial Authority, art 6(1). See, eg, Court of Cassation of Qatar, ruling on Petition No 64/2012 (construing 'court judgments' in article 63 of the Constitution as including arbitral awards). In Saudi Arabia, Sharia itself is the constitution, so its interpretation falls to the *ulama*.

[176] Afghanistan, Bahrain, the Comoros, Egypt, Iraq, Jordan, Libya, Malaysia, the Maldives, Morocco, Pakistan, Palestine, Somalia, Syria, Tunisia, United Arab Emirates and Yemen.

[177] Algeria, Brunei, Djibouti and Mauritania. In Brunei the Interpretation Tribunal may consider constitutional questions that the Sultan refers, including upon request of a court. Constitution of Brunei Darussalam 1959 (amended 2011) art 86(1), (2).

[178] Constitution of Egypt 2014 (amended 2019) 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.

[179] Eighteen Islamic constitutions, predominantly of parliamentary republics and the North African states, provide for review of legislation against the constitution: Afghanistan, Algeria, Bahrain, the Comoros, Djibouti, Iran, Jordan, Kuwait, Malaysia, the Maldives, Mauritania, Morocco, Pakistan, Somalia, Syria, Tunisia, the UAE and Yemen. See Table 3.

[180] Constitutions specify that litigants may demand referral of pleas of unconstitutionality in Djibouti (regarding fundamental rights), Iraq, Jordan, Malaysia, Morocco, Somalia, Syria, Tunisia and Yemen. In Afghanistan and the UAE, courts may refer constitutional questions on their own initiative. Decisions may be appealed to the highest constitutional court in Libya, Malaysia and Pakistan. See Table 3.

[181] Draft Constitution of Somalia 2012 art 86(2) (by petition of 10,000 voters).

[182] 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. The *fuqaha*' (*ulama*) on the council certify compatibility with Islam. Otherwise, of constitutions that provide for review of legislation, only in Afghanistan, Kuwait, Malaysia and Pakistan can legislators not request such review. Only in the Maldives does the executive lack this power. In the Maldives the court may also review at its own initiative. Emirates can request constitutional review of laws in the UAE. The draft constitutions of Libya and Yemen provide for such review, but do not specify who may initiate the process. See Table 3.

[183] The governments of Afghanistan, Kuwait, Malaysia and Pakistan can refer laws for review (implicit in Malaysia and Pakistan in the government's general right to ask advice of the supreme court). In Algeria, Bahrain, Jordan, Mauritania, Morocco and Somalia the government or a part of the legislature can do so. The constitutions of Algeria, Bahrain, Somalia, Syria and Tunisia envisage review of draft laws. 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. In Tunisia and Syria review is only possible before enactment, by request of the president or one-fifth of the members of the legislature. The supreme courts of the Comoros, Mauritania and Morocco must review all organic laws. See Table 3.

in 11 Islamic states may address questions raised in a judicial action. Litigants may demand referral of pleas of unconstitutionality in Algeria, Djibouti (if the question concerns fundamental rights), Jordan, Malaysia, Morocco, Somalia, Syria and Tunisia.[184] In Afghanistan and the UAE courts may refer constitutional questions on their own initiative.[185] Decisions may be appealed to the highest constitutional court in Malaysia and Pakistan; Iraq's Constitution and Libya's draft Constitution specify that a law will provide this right.[186]

Islamic governance can integrate a constitutional court or similar authority. Classical Islam offers only limited precedent, but largely because separations of powers did not then exist. Introducing these was the fundamental change. If an Islamic state can accept a constitution and a legislative assembly, then a court as arbiter is uncontroversial. Today, Islamic states that adopt democratic forms or constitutional checks and balances empower judges to monitor the bargain. Most constitutional courts that review legislation do so at the request of the government or chief executive, and are often also available to the legislature. The main access for individual citizens is via a court case. An obvious common feature where citizens cannot raise constitutional challenges is a strong executive – but several such states also have a powerful supreme court, notably Egypt.

V. CONCLUSION

Ultimately an Islamic state is merely a means to the end of correct leadership of the *umma*. This implies duties that any state owes its people, such as protection and sustenance, but an Islamic state should also strive to implement Sharia in the public space.[187] What forms of government can be considered Islamic depends in part on how one views the trust the ruler holds. If it is God-given, then the ruling power is arguably indivisible, beyond simple delegation as to a governor, judge or secretary. If instead 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, separations of powers and parliamentary legislation. However, even caliphs who asserted their divine right to rule had to follow Islamic principles of just, consultative rule, as practiced by the Prophet and the Rashidun caliphs.

Islamic states implement written constitutions without obviously compromising their fidelity to Sharia, including amendment by peaceful means (a sensitive

[184] See Table 3. In Jordan and Syria, the court must first determine that the plea or challenge is 'serious'. Constitution of Jordan 1952 (amended 2016) art 60(2); Constitution of Syria 2012 art 147(2)(a). In Syria, laws approved by referendum are not subject to review, *ibid* art 148.

[185] See Table 3.

[186] See Table 3. 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 2018) 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).

[187] According to Masud, the main purpose of a caliphate is to uphold Sharia. Masud (n 110) 194.

point, given the disputes over the compact of governance that contributed to the first *fitnah*). No modern constitutions precisely reflect historical examples or proposed models of an ideal Islamic state, except for Iran's, which embodies the vision of the Ayatollah Khomeini. Otherwise, Islamic constitutions enact traditional principles of governance to varying degrees. In Brunei, Oman and Saudi Arabia the ruler holds the entire governing power that does not implicate Sharia, as in the classical caliphate. Elsewhere the Ottoman and European influence is more visible, with the mixed model prototyped by Sanhuri in post-Second World War civil codes predominating in the Middle East and Egypt. The constitutions are more heterodox towards the east. Those of Iraq, Malaysia, and especially, Afghanistan and Pakistan, reflect considered attempts to merge Islamic values into pre-existing traditional and legal systems.

The principles the Prophet pronounced and the examples of the caliphate can continue to inform state design. Abu Bakr, Umar, Uthman and Ali adapted governance while maintaining the religious character of the state. Monolithic rule was not particular to Islam, but the worldwide standard for much of history. If Islamic rule derives from the peoples' cession of power to the ruler, then the people may also cede the power piecewise. If the right to rule passed from the Prophet back to the *umma*, the people could choose not to concentrate it in the hands of a caliph, even if a caliph remained the chief religious figure. A new 'ruler', constructed by constitutional agreement and separated powers, with oversight, might be more likely over time to implement enlightened Islamic rule than a succession of autocratic individuals. This recalls 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'.[188] Enacting structures for parliament to hold a ruler accountable binds the ruler to the people and embodies al-Qaradawi's principle that, for now at least, Islam requires the use of democratic tools to achieve just rule.[189] Constitutions and courts reprise the role of the classical *ulama* as the overseers of the law, although today's judicial jurisdiction is broader, as courts in Islamic states usually operate within a general civil court system.

The revelation of the Quran and 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 result cannot be exactly the same as any pre-modern example, but modern structures can incorporate principles established in early Islam. Constitutionalism has ample Islamic precedent. Citizens of an Islamic state can give allegiance to a temporal ruler, even if that ruler is not the leader of the faith.

[188] Zubaida (n 22) 90.
[189] Al-Qaradawi (n 38) 236.

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 early Muslims. However, this was only because it lay outside 'that which was known',[190] not because it was forbidden.

APPENDIX

Table 1 Constitutional Amendment Provisions

	Initiative	Leg vote	Exec assent	Referendum	Type
Afghanistan	president (149)	n/a	n/a	n/a	Presidential
Algeria	president (208)	majority of each chamber (138)	208	208	Presidential
Bahrain	King (35(a)), 15 legislators (92(a))	2/3 (120(a))	35(a), 120(a)	n/a	Monarchy (constitutional)
Brunei	Sultan (85)	n/a	85	n/a	Monarchy (absolute)
Comoros	president, 1/3 legislators (113)	3/4 of members (114) (option)	n/a	114 (option)	Presidential
Djibouti	president, 1/3 legislators (91)	majority of members (91)	if 2/3 of legislature (91)	unless president and 2/3 legislature (91)	Presidential
Egypt	president, 1/5 House of Reps (226)	2/3 House of Reps (226)	n/a	226	Presidential
Iran	Leader (177)	n/a	177	177	Presidential

(continued)

[190] Al-Jabri (n 12) 234.

Table 1 *(Continued)*

	Initiative	Leg vote	Exec assent	Referendum	Type
Iraq	president and govt, 1/5 legislators (126)	2/3 (126)	n/a (126)	126	Parliamentary
Jordan	PM via House of Reps (91)	2/3 each chamber (126(1))	126(1)	n/a	Monarchy (constitutional)
Kuwait	Amir, 1/3 Assembly (174)	2/3 (174)	174	n/a	Monarchy (constitutional)
Libya	president, 1/3 either chamber (216(3))	absolute majority each chamber (216 (4))	n/a	absolute majority (216(6))	Presidential
Malaysia	n/a	2/3 each chamber (159(3))	n/a	n/a	Parliamentary
Maldives	n/a	3/4 (261)	262(a)	262(b)	Presidential
Mauritania	president, 1/3 either chamber (99)	2/3 each chamber (99)	n/a	(100) or 3/5 combined parliament (president's choice) (101)	Presidential
Morocco	King, legislators (172)	2/3 (173–74) (option)	172, 174 (option)	174 (unless King initiated, 172)	Monarchy (constitutional)
Oman	n/a	n/a	n/a	n/a	Monarchy (absolute)
Pakistan	either chamber (239(1))	2/3 (239(2), (3)) (lower house only)	n/a	n/a	Parliamentary
Palestine	n/a	2/3 (120)	n/a	n/a	Presidential
Qatar	Prince, 1/3 Council (144)	2/3 (144)	144	n/a	Monarchy (constitutional)

(continued)

Table 1 *(Continued)*

	Initiative	Leg vote	Exec assent	Referendum	Type
Saudi Arabia	Royal decree (83)	n/a	n/a	n/a	Monarchy (absolute)
Somalia	Federal or state govt, legislator, 40,000 citizens (132(3))	2/3 (132(4)–(8))	n/a	132(10)	Parliamentary
Syria	president, 1/3 legislators (150(1))	3/4 (150(4))	150(4)	n/a	Presidential
Tunisia	president, 1/3 Assembly (143)	2/3 (144)	n/a	president may (144)	Presidential
UAE	govt (144(a))	2/3 (144(c))	144(b)	n/a	Monarchy (absolute)
Yemen	president, 1/3 either chamber (408(1))	2/3 each chamber (410)	n/a	n/a	Presidential

Table 2 Establishing the Executive

	Pres term	Lead govt	Choose ministers	Confidence	Remove govt
Afghanistan	5 ys (61)	Pres (71)	Pres (77)	71	Govt (92) (majority of members)
Algeria	5 ys, renew once (88)	Pres (91)	Pres, after consulting PM (93)	98	Govt (154, 155) (2/3 majority of members)
Bahrain	n/a	Monarch selects PM (33(d))	Monarch, proposed by PM (33(d))	approve policy statement (art 46)	Minister (66(c)) or PM (67(d)) (2/3 vote)
Comoros	5 ys, renew once (52)	Pres (54)	Pres (60)	n/a	n/a

(continued)

Table 2 *(Continued)*

	Pres term	Lead govt	Choose ministers	Confidence	Remove govt
Djibouti	5 ys, renewable (24)	Pres (40)	Pres, proposed by PM (40)	n/a	n/a
Egypt	6 ys, renew once (140)	Pres selects PM (146)	PM (146)	146	Govt, PM, ministers or deputies (131) (majority of members)
Iran	4 ys, 2 consec terms (114)	Pres (134)	Pres (133)	87, 133	Govt (135) (majority of members)
Iraq	Lower hse elects (70) (2/3 majority), 4 ys, renew once (71)	PM (78) from largest bloc (76)	PM (76)	absolute majority (76(4))	PM, ministers (61(8))
Jordan	n/a	Monarch selects PM (35)	Monarch & PM (35)	53(3), (6)	absolute majority (54(2))
Kuwait	n/a	Monarch selects PM (56(1))	Monarch & PM (56(1))	Comment only (98)	Minister (101(2)) or PM (102(2)) (majority of members, Amir concurring)
Libya	5 ys, renew once (114)	Pres appoints PM (117(1)); PM (125)	Pres (117(1)); PM (125)	n/a	Govt 2/3 of House of Reps, minister absolute majority (128)
Maldives	5 ys, renew once (107(a))	Pres (106(b))	Pres (115(g))	129(c)	Minister (101(c)) (majority of members)
Mauritania	5 ys, renew once (26, 28)	Pres (25)	Pres, proposed by PM (30)	74	Govt (74, 75) (majority of members) Pres can dismiss ministers & PM (30)

(continued)

Table 2 *(Continued)*

	Pres term	Lead govt	Choose ministers	Confidence	Remove govt
Morocco	n/a	Monarch (48); selects PM from largest party (47)	Monarch, proposed by PM (47)	n/a	Refuse conf (103)
Palestine	4 ys, 2 consec terms (36)	Pres appoints PM (45)	PM (45)	66	Govt (57(1), 78(1)) (majority of members)
Qatar	n/a	Monarch appoints PM (72); PM governs, overseen by monarch (125)	Monarch, proposed by PM (73, 118)	n/a	Minister but not PM (111) (2/3 vote)
Somalia	Lower hse elects (89), 4 ys (91)	Pres appoints PM (90(d)); PM governs (97)	PM (97)	Simple majority (90(d))	PM or deputies, simple majority (90(e))
Syria	7 ys, 2 consec. terms (88)	PM (118); pres appoints PM (97)	Pres (97)	Discussion only (76)	Govt (75(3), 77(1)) (majority of members). Pres can dismiss ministers & PM (97)
Tunisia	5 ys, renew once (75)	Largest party (89)	PM (89)	89	Govt (97) (majority of members)
Yemen	5 ys, renew once (181)	Pres (203)	Pres (191(3))	Confirm ministers (142(2))	n/a

Table 3 Legislative and Judicial Powers

	Head of State approves or blocks	Leg override	Proposes laws	Both leg chambers	Court review (legisln.)	Court review (case)
Afghanistan	94	2/3 (94)	Govt, MPs (95)	94	Govt or courts refer (121)	Appellate jurisdiction set by a law (116)
Algeria	2nd reading (145)	2/3 of each chamber (145)	PM; 20 legislators of either house (136)	138	Pres, govt, leg group (186, 187)	Plea referral via Supreme Court or Council of State (188)
Bahrain	35(a)	2/3 of each or both chambers (35(d))	Monarch (35(a)), legislators (92(a))	70	Govt, leg group, others; monarch (drafts) (106)	By a law (105(a))
Comoros	2nd reading (64)	absolute majority	Pres, MPs (83)	n/a	Govt, assembly (84), organic laws (87)	By an organic law (96)
Djibouti	2nd reading (34)	unclear if 2nd reading can force president to promulgate	Pres, MPs (58)	n/a	Pres, head of assembly, 10 MPs (79)	Plea referral re: fund. rts (80)
Egypt	123	2/3 (123)	Pres, govt, any MP (122)	n/a	by a law or n/a (192)	by a law (192)
Iran	No	n/a	Govt, groups of 15 MPs (74)	n/a	Guardian Council examines all laws (94, 96)	n/a
Iraq	n/a	n/a	Pres, govt, groups of 10 MPs (60)	n/a	n/a	Appeals (93(3))

Jordan	91	2/3 of each chamber (93(4))	PM (91), 10 members of either chamber (95(1))	91	Govt, leg group (59(2), 60(1))	Plea referral (60(2))
Kuwait	79	2/3 (66)	Monarch (65), MPs (109)	n/a	Govt (173)	by a law (173)
Libya	No (but may propose amendments) (84)	n/a	Pres or PM (83), govt (130(3)), citizens (51)	Specified competences (91)	Jurisdiction, but standing unstated (150)	Appeal, by a law (152)
Malaysia	n/a	n/a	any MP (66(2), 67(1))	66(1)	Head of state – any Const question (130)	Plea referral (128(2)), appeal (128(3))
Maldives	2nd reading (91(a))	majority of members (91(b))	Pres (132(b))	n/a	Leg or Supreme Court (95, 143(a))	art 145(c)
Mauritania	2nd reading (70)	majority of lower hse members (70)	Govt, MPs (61)	66	Govt, leg group (86)	n/a
Morocco	new reading (95)	n/a	Head of Govt, MPs (78)	lower hse adopts final text (84)	Govt, leg group (132)	Plea referral (133)
Pakistan	reconsideration (75(1)(b))	majority of both chambers (75(2))	n/a (govt, impliedly)	70, 73(1)	Only govt refers (186(1))	Appeal (185(2)(f), (3))
Palestine	reconsideration (41(1))	2/3 (41(2))	Govt (70), any MP (56(2))	n/a	by a law (103(2))	by a law (103(2))
Qatar	67(2), 106(1)	2/3 (106(3))	any MP via govt (105(1))	n/a	by a law (140)	by a law (140)

(continued)

Table 3 *(Continued)*

	Head of State approves or blocks	Leg override	Proposes laws	Both leg chambers	Court review (legisln.)	Court review (case)
Somalia	Pres must enact if duly passed (arts 82, 83)	n/a	Govt, 10 MPs, state reps, upper hse committee (80)	2/3 of lower hse can pass (82, 83)	Govt, leg group, petition (86(2), 109C(1))	Plea referral (109(2))
Syria	art 100	2/3 (100)	Pres (112), MPs (74)	n/a	Pres (146(2), 147(1)), leg group (147(1))	Plea referral (147(2)(a))
Tunisia	reconsideration (81)	majority of members, 3/5 for organic law (81)	Pres, govt, groups of 10 MPs (62)	n/a	Govt, leg group (120)	Plea referral (120)
UAE	reconsideration (110(3))	no (110(3))	Govt (110(2))	n/a	Emirate or federal authority (99)	Court referral (99)
Yemen	2nd reading (174)	2/3 lower hse (174)	any member of either chamber (171)	172	Draft laws relevant to rights, elections (327(6))	By a law (328)

Numbers refer to provisions in the Constitution of Afghanistan 2004; Constitution of Algeria 1989 (amended 2016); Constitution of Bahrain 2002 (amended 2017); Constitution of Brunei Darussalam 1959 (amended 2011); Constitution of the Comoros 2018; Constitution of Djibouti 1992 (amended 2010); Constitution of Egypt 2014 (amended 2019); Constitution of Iran 1979 (amended 1989); Constitution of Iraq 2005; Constitution of Jordan 1952 (amended 2016); Constitution of Kuwait 1962; Draft Constitution of Libya 2016; Constitution of Malaysia 1957 (amended 2010); Constitution of the Maldives 2008 (amended 2018); Constitution of Mauritania 1991 (amended 2017); Constitution of Morocco 2011; Basic Statute of Oman 1996 (amended 2011); Constitution of Pakistan 1973 (amended 2018); Basic Law of Palestine 2003 (amended 2005); Constitution of Qatar 2003; Basic Law of Saudi Arabia 1992 (amended 2013); Draft Constitution of Somalia 2012; Constitution of Syria 2012; Constitution of Tunisia 2014; Constitution of the United Arab Emirates 1971 (amended 2009); Draft Constitution of Yemen 2015.

5

Islamic Law and International Law in Islamic Constitutions

One measure of a law's legitimacy is its respect for human rights. For an Islamic state, legitimacy stems from the law's fidelity to Sharia. Because Sharia incorporates a human rights framework that in its substance, if not necessarily in its justifications, mostly meets international expectations, Islamic states achieve much of their de facto compliance with international human rights standards through ensuring that their domestic law complies with Sharia. This chapter details how states incorporate Islamic law systematically into their domestic legal orders.

Under traditional *siyasah Sharia*, the ruler's lawmaking power is only ancillary to the revealed law. Modern constitutions integrate Sharia into justiciable, state-enforceable law by requiring legislation to comply with Islamic law, or instructing courts to apply Islamic law in areas such as family and personal status law, or when 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 respective approaches. The second part looks at how the constitutions and civil codes of some Islamic states instruct courts to apply Islamic law in lieu of on-point legislation, or reserve topics such as personal status and family law to specialised Sharia courts. The third part of the chapter discusses how clauses that constrain legislation to comply with Sharia and laws that instruct courts to apply Islamic law combine to empower courts to protect human rights even before taking international law into account.

I. LIMITING LEGISLATION THROUGH SHARIA

The question of the 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 applied the law by edict, with the *ulama* declaring its content and exercising a measure of oversight of the ruler's compliance with Sharia.[1]

[1] The 1876 Ottoman Constitution did not require that legislation comply with Islam. As caliph and 'the protector of the Muslim religion' (art 4), who had to assent to all laws (art 54), the sultan anyway had the power and the duty to keep temporal laws within the boundaries of Sharia.

It was not until the twentieth century that legislation became a main source of law in majority Muslim states. Today, nearly all Islamic constitutions provide for legislative participation in lawmaking.

Most Islamic constitutions in some way require that laws comply with Sharia. The only exceptions outside North Africa are the Comoros,[2] Djibouti, Jordan and Malaysia. In North Africa, only the constitutions of Egypt and Libya provide for Islamic scrutiny of legislation.[3] In Brunei and Saudi Arabia the point is moot, as the monarchies are absolute and in principle Sharia is already the source of all law.[4] Most other Islamic constitutions implement the idea that the lawmaking power within *siyasah Sharia* is only ancillary to the revealed law. These constitutions enable courts to annul laws that transgress Sharia, by way of provisions that require legislation to be grounded in Islam, or not to contravene Islam. Source of legislation clauses, which require that laws be grounded in Islamic principles, are in place in 13 constitutions.[5] A repugnancy clause, which forbids laws that would contravene Sharia, appears in five constitutions.[6] In either approach, there is a range of ways to phrase the 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 is limited in most countries, as courts tend to adopt a deferential approach to legislative review for Islamic compliance, but quite significant in Pakistan.[7]

A. 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.[8]

[2] In the Comoros, '[t]he State draws on' Islam in its Sunni, Shafi'ite form, but the Constitution does not specifically require legislation to comply with Islamic law.

[3] Judges have however 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. 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.

[4] Basic Law of Saudi Arabia 1992 (amended 2013) art 44 ('The King is the ultimate source of all [state] authorities'); Constitution of Brunei Darussalam 1959 (amended 2011) art 39 (the Sultan makes the laws). In Brunei the Sultan is simultaneously head of state and government, and the chief religious authority.

[5] Bahrain, Egypt, Iran, Iraq, Kuwait, Libya, the Maldives, Oman, Palestine, Qatar, Syria, the UAE and Yemen.

[6] Afghanistan, Iraq, the Maldives, Pakistan and Somalia.

[7] 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.

[8] Nathan J Brown, 'Constitutionalizing Islam in the Arab World' in Robert Fatton and RK Ramazani (eds), *Religion, State and Society: Jefferson's Wall of Separation in Comparative Perspective* (Palgrave Macmillan, 2009) 202–203.

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.[9] 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'.[10] Otherwise, only Libya, Oman, Qatar and Yemen explicitly make Sharia the sole source of legislation.[11] In Egypt it is 'the principal' source.[12] This phrasing resulted from a 1980 amendment to the original 'a' clause, modelled on that of Kuwait's 1962 Constitution.[13] A further seven countries, three in the Arabian Peninsula and three in the Middle East, refer to Sharia as a main source of legislation.[14] 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*'.[15]

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'.[16] This creates quite a 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.[17] This supplied the flexibility for Egypt's Supreme Constitutional Court to uphold the constitutionality of the Personal

[9] 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?' (2013) 28 *American University International Law Review* 733, 755–57.

[10] Constitution of Iran 1979 (amended 1989) art 4.

[11] Draft Constitution of Libya 2016 art 8 (Sharia 'shall be the source of legislation'); Basic Statute of Oman 1996 (amended 2011) art 2 ('Islamic Sharia is the basis for legislation'); Constitution of Qatar 2003 art 1 ('Islamic Law is the main source of [Qatar's] legislations'); Draft Constitution of Yemen 2015 art 4 ('Islamic Sharia is the source of legislation').

[12] Constitution of Egypt 2014 (amended 2019) art 2 ('The principles of Islamic Sharia are the principal source of legislation').

[13] Ran Hirschl, *Constitutional Theocracy* (Harvard University Press, 2010) 115.

[14] Constitution of Bahrain 2002 (amended 2017) 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 (amended 2018) art 10(a) ('Islam shall be the one of the basis of all the laws of the Maldives'); Basic Law of Palestine 2003 (amended 2005) art 4(2) ('the principles of Islamic Shari'a shall be a principal source of legislation'); Constitution of Syria 2012 art 3 ('Islamic jurisprudence shall be a major source of legislation'); Constitution of the United Arab Emirates 1971 (amended 2009) art 7 ('The Islamic Shari'a is a main source of legislation').

[15] Lombardi (n 9) 769 (original emphasis).

[16] Brown (n 8) 205–206.

[17] *Ibid*.

Status Law against a challenge grounded in the SSL clause (having struck down its predecessor in 1985, 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*'.[18] 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.[19]

B. Repugnancy Clauses

Repugnancy clauses in Islamic constitutions provide for declaring the invalidity of laws that 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 mean that the legislation in question cannot be *repugnant* to the *shari'a*'),[20] repugnancy clauses are logically distinct. Laws might arise from sources unrelated to Islam yet contain no provisions repugnant to it.

Pakistan established the first constitutional Islamic repugnancy clause since the 1906–1907 Persian Constitution.[21] 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.[22] The Shariat Court may review existing laws upon petition of any citizen or national or regional government, and since a 1982 amendment, at its own initiative.[23] The more recent constitutions of Afghanistan, Iraq, the Maldives and Somalia also forbid laws that contradict Islam (Iraq and the Maldives also

[18] Hirschl (n 13) 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-Razzaq Ahmad al-Sanhuri, Egyptian Jurist and Scholar 1895–1971' (1988) 3 *Arab Law Quarterly* 182, 212–13.

[19] Brown (n 8) 207–208.

[20] Haider Ala Hamoudi, 'Repugnancy in the Arab World' (2012) 48 *Willamette Law Review* 427, 431.

[21] Supplementary Fundamental Law of Persia 1907 art 27 (legislation may not be 'at variance with the standards of the ecclesiastical law').

[22] Constitution of Pakistan 1973 (amended 2018) arts 203D, 203F. The 1956 Constitution was the first constitution of Pakistan to contain a repugnancy clause. The clause was removed by amendment. The current clause dates to 1973.

[23] *Ibid* art 203D(1). A determination of repugnancy renders the provisions found in violation of Islamic standards void once the judgment takes effect, *ibid* art 203D(3)(b).

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 enacting of laws rather than the laws per se.[24] 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'.[25] This clause does not apply to legislation relating to the personal and citizenship status of non-Muslims.[26] Likewise, Egypt's SSL clause does not apply to the personal status and religious affairs of Christian and Jewish citizens.[27]

The judicially constructed repugnancy rule of Egypt's SSL clause is explicitly stated in article 2 of Iraq's Constitution,[28] and was later adopted in the Maldives and Somalia as well. Article 2 forbids the enactment of any law 'that contradicts the established provisions of Islam'.[29] Rather than following the Egyptian Court in reading 'established 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 norm in question, asserting that reconciling the various interpretations of Islamic law was too complex to resolve without more detailed legislative guidance, and left the law in question to stand pending such guidance.[30] 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.[31] 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

[24] Constitution of Afghanistan 2004 art 3 ('No law shall contravene the tenets and provisions of the holy religion of Islam'); Constitution of the Republic of Iraq 2005 art 2(1)A ('No law may be enacted that contradicts the established provisions of Islam') (art 2(1)B, C protect 'the principles of democracy' and 'the rights and basic freedoms stipulated in this Constitution'); Constitution of the Republic of Maldives 2008 (amended 2018) 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').

[25] Constitution of Pakistan 1973 (amended 2018) art 227(1).

[26] *Ibid* 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).

[27] Constitution of Egypt 2014 (amended 2019) art 3.

[28] Hamoudi (n 20) 439–40.

[29] Constitution of Iraq 2005 art 2(1)A.

[30] Hamoudi (n 20) 441–42. One case concerned a law allowing the state to charge a fee for *waqf* regulation, the other a question of divorce.

[31] Lombardi (n 9) 755–57.

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, when it needed to establish a boundary between *hadd* and ordinary criminal jurisdiction in a 2010 judgment,[32] the Court 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'.[33]

The Shariat Court has exercised its power of review over laws that predated 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,[34] as it has refrained from acting outside the realm of state-established written law. In *Saeedullah Kamzi v Government of Pakistan*,[35] 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 colour of unwritten Islamic law.[36] 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, where the Muslim community has not announced a form of consensus.[37]

C. Defining the Limit

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 the 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'.[38] Read together, argues Rabb, these refer to Islamic law, particularly to settled 'rules that apply to all Muslims, regardless

[32] *Hadd* (singular) and *hudud* (plural) refer to the mandatory punishments specified in the Islamic sources.

[33] *Mian Abdur Razzaq Aamir v Federal Government of Islamic Republic of Pakistan* PLD 2011 FSC 1 [55].

[34] The Court has the power to review 'any custom or usage having the force of law'. Constitution of the Islamic Republic of Pakistan 1973 (amended 2018) art 203B(c).

[35] *Saeedullah Kamzi v Government of Pakistan* PLD 1981 SC 42 (SAB).

[36] Jeffrey A Redding, 'Constitutionalizing Islam: Theory and Pakistan' (2004) 44 *Virgina Journal of International Law* 759, 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'.

[37] *Ibid* 783.

[38] Constitution of Iraq 2005 art 2(1).

of time or place'.[39] 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.[40] Afghanistan's repugnancy clause, like Iraq's SSL clause, refers to Islam the religion. Without a clear link to a clause that refers 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 invoking Sharia as a constraint on legislation raise the issue of how to determine whether 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 perform what amounts to *ijtihad* rather than following rulings of *fiqh*. Three 'a' SSL clauses (ie that specify Sharia as a source of legislation),[41] and four 'the' clauses (ie that specify Sharia as the source of legislation, or the main source),[42] refer simply to Sharia. 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 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.[43] 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 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 Prophet's *sunna*.[44] The Federal Shariat Court accordingly grounds its analysis of Islamic law in these sources, and invites leading Islamic jurists to advise the Court on their applicability to a particular case.

Lacking such specific constitutional guidance, 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 Prophet's *sunna*; text capable of multiple readings will be interpreted

[39] Intisar A Rabb, '"We the Jurists": Islamic Constitutionalism in Iraq' (2008) 10 *University of Pennsylvania Journal of Constitutional Law* 527, 537–38.
[40] *Ibid* 536–37.
[41] Bahrain, Kuwait, UAE.
[42] Libya, Oman, Qatar, Yemen.
[43] Hirschl (n 13) 116.
[44] Constitution of Pakistan 1973 (amended 2018) art 203D(1).

if possible so as to comply with these rules.[45] Second, it should cohere with the agreed priorities of Sharia – 'to promote and protect religion, life, reason, honor, and property' – and should not 'undermine[] human justice and welfare'.[46] The Supreme Constitutional Court's interpretative approach incorporates *ijtihad*, albeit performed by senior civil judges rather than muftis, selecting from available rulings of the *madhahib*.[47] 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 violating this standard, understood as indicating 'general principles of sharia' or 'essential principles of Islam'.[48] 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'.[49]

II. SHARIA IN SECULAR AND RELIGIOUS COURTS

The emergence of legislative assemblies and European-influenced civil law 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 towards 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.

The Ottoman solution was to divide jurisdiction between civil and Sharia courts, the latter holding sway over personal status and family law.[50] The 1876

[45] Mohamed Abdelaal, 'Religious Constitutionalism in Egypt: A Case Study' (2013) 37 *Fletcher Forum of World Affairs* 35, 40.

[46] *Ibid*. 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 the Arab Republic of Egypt 2012 art 219. The 2014 Constitution lacks an equivalent article.

[47] Hirschl (n 13) 108–109.

[48] Lombardi (n 9) 760–61.

[49] Clark B Lombardi and 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' (2006) 21 *American University International Law Review* 379, 413.

[50] Sami Zubaida, *Law and Power in the Islamic World* (IB Taurus, 2003) 133.

Ottoman Constitution reflected this division,[51] as did the 1907 Fundamental Law of Persia, which reserved 'all matters falling within the scope of the Ecclesiastical Law' to *mujtahidun*.[52] Many modern constitutions mirror this approach, assigning certain areas to the exclusive jurisdiction of Sharia courts, while secular courts retain general jurisdiction. Others emulate the 1949 Egyptian Civil Code, by providing for the application of Islamic law in situations where enacted civil laws do not resolve the issue before the court. Modern Islamic constitutions use these two approaches both as alternatives and as complements.

A. Islamic Law in the Hierarchy of National Law

In Islamic states, Sharia forms a natural backdrop against which to interpret statutory law. The issue did not arise in the pre-constitutional Muslim societies: all legal study and education was Islamic, and the only available interpretive contexts for the rulers' edicts were Sharia, local custom or the opinion of the individual jurist however arrived at. The displacement of Islamic law by colonial regimes left subsequent independence constitutions to connect to daily society via a legacy of largely secular civil administrations 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 acceptance of constitutional provisions proclaiming Islamic values. This suggests Sharia is still an appropriate source of law to apply in the absence of an on-point 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 national legal order, the prevailing approach resembles that of the 1949 Egyptian Civil Code, instructing courts to apply 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 Arab Islamic states – indeed in some cases, most prominently Iraq, Sanhuri helped draft the code.[53] 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.[54] Outside the

[51] 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').

[52] Supplementary Fundamental Law of Persia 1907 art 71.

[53] Nabil Saleh, 'Civil Codes of Arab Countries: The Sanhuri Codes' (1993) 8 *Arab Law Quarterly* 161, 163. Absent 'applicable legislative provisions', the Iraqi Code prioritises first custom, then the 'principles of the Islamic Shari'a which are most consistent with' the Civil Code, and finally 'the laws of equity'. Civil Code of Iraq 1951 art 1(2).

[54] 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).

Arabian Peninsula and North Africa, the constitutions of Afghanistan, Iran and the Maldives instruct judges to apply Islamic law in gaps between constitutional or statutory provisions (none of those clauses mention custom).[55] In Somalia, courts 'may' consider Sharia when interpreting fundamental rights provisions of the Constitution.[56]

Sanhuri's model code prioritised 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 national law. Newer codes typically give Islamic law greater prominence, reversing the Egyptian Code's prioritisation of custom over Sharia,[57] or simply omitting custom. This might not however 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.[58] The original Ottoman Civil Code, the *Majalla* manual for the courts that compiled rulings from Hanafi jurisprudence, includes several references to custom as a source of law.[59] And of course Islamic jurisprudence itself recognises *'urf* as a subordinate proof of law.

Like the Ottoman Code installed the Hanafi interpretation, the constitutions or laws of most modern Islamic states specify a school whose rulings judges should apply. The constitutions of Afghanistan, Brunei and Iran indicate respectively the Hanafi, Shafi'i and Twelver Ja'fari schools.[60] Courts in Saudi

[55] Constitution of Afghanistan 2003 art 130 (if not guided by the Constitution or statutory law, courts should apply 'Hanafi jurisprudence' within the limits of the Constitution), art 131 (except they should apply Shia personal status law for followers of that sect, and '[i]n other cases' if the Constitution and laws do not provide guidance); 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 (amended 2018) art 142 ('When deciding matters on which the Constitution or the law is silent, Judges must consider Islamic Shari'ah').

[56] 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').

[57] See, eg, 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).

[58] 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) 176.

[59] *Al-Majalla Al Ahkam Al Adaliyyah* (The Ottoman Courts Manual (Hanafi)) art 36 ('Custom … may be invoked to justify the giving of judgement'), art 45 ('A matter established by custom is like a matter established by law').

[60] Constitution of Afghanistan 2004 art 130; Constitution of Brunei Darussalam 1959 (amended 2011) art 2(1); Constitution of the Islamic Republic of Iran 1979 (amended 1989) art 12. The constitution of the Comoros, although not speaking specifically of courts, states that in general the state should adhere to the Shafi'ite school. Constitution of the Comoros (2018) art 97. Libya's and Yemen's draft constitutions indicate openness to the various schools. Draft Constitution of Libya 2016 art 8 (legislation should be based on Sharia, but 'without being bound to a particular jurisprudential opinion on discretionary matters'); Draft Constitution of Yemen 2015 art 296 (members of

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* before resorting to general principles of Sharia, custom and equity to reach a decision; prior codes had emphasised principles of Sharia.[61] Such references to *fiqh* as a source of civil law entered 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.[62] Codes in North Africa instruct courts to follow the Maliki school, if they specify a school.[63] The Civil Code of Iraq states that if judges apply Islamic law, they should do so 'without being bound by any specific school of thought',[64] and that of Kuwait instructs the judge to adopt the rules of *fiqh* that best suit the public interest under the circumstances.[65] This is unsurprising in light of significant numbers of members of non-majority Muslim sects 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 to the Quran and Prophetic *sunna* evidenced by *ahadith*,[66] indicating there is no preferred *maddhab*.

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 qualified jurist to implement the decisions of a *maddhab* other than the jurist's own.[67] 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

the advisory Ifta Council should 'represent different doctrines of jurisprudence'). The Constitution of the Maldives indicates a preferred approach akin to Pakistan's, defining 'tenet of Islam' to mean the Quran, widely accepted *sunna* of the Prophet 'and those principles derived from these two foundations'. Constitution of the Maldives 2008 (amended 2018) art 274.

[61] Saleh (n 53) 164 (citing Civil Code of Jordan 1976 art 1). The Code also referenced the methodologies of *fiqh* as the preferred means to interpret its provisions, *ibid* (citing Civil Code of Jordan 1976 art 3).

[62] Saleh (n 53) 165 (citing UAE Code of Civil Transactions 1985 art 1).

[63] See, eg, Mauritanian Ordinance 89–126 of 14 September 1986 implementing the Code of Debts and of Contracts, amended by Law 2001–31 of 7 February 2001 art 455 (in matters of testimony, judges should rule according to the Maliki school in the absence of an applicable code provision).

[64] Civil Code of Iraq 1951 art 1(2).

[65] Civil Code of Kuwait 1980 art 2.

[66] Federal Shariat Court (Procedure) Rules 1981 art 31-B(3).

[67] See, eg, Sherman A Jackson, *Islamic Law and the State: The Constitutional Jurisprudence of Shihab al-Din al-Qarafi* (EJ Brill, 1996) 111–12 (the thirteenth century Maliki jurist al-Qarafi argued that a rule of *ijma* forbids the application of a rule of a *maddhab* other than 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).

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 this does not unduly violate tradition. Throughout their history the schools have been identified with the rule of law in particular regions.

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.[68] Innovations such as 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 Muslims 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'.[69] 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 extended beyond 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.

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 lawmaking 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 strong SSL clause can leave a wide margin of discretion for the government and legislature to interpret 'principles of Sharia', when an otherwise sometimes assertive court remains deferential toward the other branches of government when asked to apply Islamic law.[70]

Once the relative standing of Islamic and secular law is established, the question arises of how to derive specific rules within the Islamic tradition. The variations in use in modern Islamic states reflect the 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

[68] Hamoudi uses 'Islamicity' to signify the degree to which legislation reflects a conscious choice to adhere to Islamic values. Hamoudi (n 20) 428.

[69] Mohammed Abed al-Jabri, *Democracy, Human Rights and Law in Islamic Thought* (IB Tauris, 2009) 69.

[70] Hirschl (n 13) 114–15 (noting cases where the Supreme Constitutional Court has ruled expansively in areas concerning civil rights and due process).

rulings of the *madhahib* where available, while many of the more geographically central states adopt the view common to revivalists 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 comports with Islamic legal theory.

B. 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 specialised Sharia courts. The most prevalent such areas are family and personal status law. Where this is done, civil courts retain general jurisdiction. This split harks back to the early caliphate, where the ruler appointed *qadi*s 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'.[71] The *mazalim* tribunals heard claims of injustice relating to public service, including alleged misconduct by Sharia judges, and 'enforced Sharia court decisions that the *qadi* was unable to carry out'.[72] 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 more complex, 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* attempted to bridge this split by bringing secular jurisdiction under Sharia and therefore subject to the interpretations of the *ulama* according to *usul al-fiqh*.[73]

An Islamic state evidently may provide for separated judicial regulation of civil law and Islamic law. The Quran indicates that some acts (or omissions) are *mubah*, ie Sharia neither favours nor disfavours them. In some of these matters a ruler cannot avoid the responsibility to regulate,[74] guided by *maslahah* and the 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

[71] Zubaida (n 50) 54.

[72] Wael B Hallaq, *Shari'a: Theory, Practice, Transformations* (Cambridge University Press, 2010) 55.

[73] Mathieu Tillier, 'Courts' in Emad El-Din Shahin (ed), *The Oxford Encyclopedia of Islam and Politics* (Oxford University Press, 2014) 231–32.

[74] See, eg, Sherman A Jackson, 'Shari'ah, Democracy and the Modern Nation-State: Some Reflections on Islam, Popular Rule and Pluralism' (2003) 27 *Fordham International Law Journal* 88, 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').

to regulate marriage or divorce.[75] 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 jurists, with minimal formal training in civil law. Traditionally, *qadi*s 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 early Abbasid caliphate, where believers enjoyed the right to live by the rule of their preferred *maddhab*.[76]

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 codes, and probably for efficiency as well, many modern Islamic constitutions likewise assign family and personal status to religious law, usually by assigning exclusive jurisdiction over them to Sharia courts.[77] States that leave family and personal status law to Islamic courts often specify the *maddhab* to 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'.[78] By contrast, in Pakistan jurisdiction over all cases remains

[75] Hallaq (n 72) 411.

[76] Realisation of this right could however require relocation to a region within the caliphate where a compatible *maddhab* prevailed. See Jackson (n 67) 72–73, 111–12.

[77] See, eg, 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 2016) art 105 (the Sharia courts also have exclusive jurisdiction over *diya* if both parties to a case are Muslim, or if one is Muslim and the other consents, and over *awqaf*); Basic Law of Palestine 2003 (amended 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. Constitution of Jordan 1952 (amended 2016) art 109. It is the prerogative of the government to recognise non-Muslim communities, thus empowering them to establish tribunals, *ibid* art 108.

[78] Rabb (n 39) 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).

with a unified 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.[79] Some states also reserve jurisdiction over the personal status of followers of minority sects to their own 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 (marriage, divorce, inheritance, and wills) and related litigation in courts of law'.[80] Afghanistan's courts address matters of the personal status of followers of Shia Islam through the application of Shia jurisprudence.[81]

Pakistan demonstrates an alternative approach to maintaining a unified system of jurisprudence without going as far as to make Islamic law the sole law of the land. In Pakistan, Sharia is not confined to particular substantive areas, but rather is applied as needed to keep (or bring) legislation within the realm of what Islam permits. In addition to its power to review legislation for repugnancy, 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.[82] A 2010 decision that joined three petitions challenging the Protection of Women Act 2006 demonstrated the Court's expansive view of this jurisdiction.[83] The Court in *Mian Abdur Razzaq Aamir v Federal Government of Islamic Republic of Pakistan* 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 (even its own) but to exercise *ijtihad*.[84]

It would be conceivable to enact a similar rule pertaining to civil jurisdiction, enabling judicial review to extend into any substantive area where national law might encroach upon 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

[79] Constitution of Pakistan 1973 (amended 2018) art 203H.

[80] 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', *ibid*.

[81] Constitution of Afghanistan 2004 art 131.

[82] Constitution of the Islamic Republic of Pakistan 1973 (amended 2018) art 203DD(1), (2).

[83] *Mian Abdur Razzaq Aamir* (n 33).

[84] *Ibid* [91], [114], [99].

of specialisation (Islamic courts looking at the most developed areas of Islamic law, civil courts at things that came from Europe or that 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 national law, but specialised courts handle for example family matters, criminal prosecutions, small civil claims and so on.

III. THE INTEGRATION OF ISLAMIC LAW AND NATIONAL LAW

Constitutional guarantees that national law will respect Sharia provide a first level of protection of human rights in an Islamic state. 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, the types of constitutional measures discussed here empower courts to protect citizens against rights violations, even absent 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 to courts that specialise in Islamic law. This encourages the formal application of *taqlid*, because of the focus placed on these areas of law by Islamic jurists historically, 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 rulings of *taqlid*, where available, and judges in Sharia courts are often *ulama*, well able to perform traditional *ijtihad*.

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 tip the balance towards 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,[85] this merely represents a shift of responsibility towards the legislature. A judge who applies Sharia-compliant legislation in lieu of applying a rule of *fiqh* or the judge's own *ijtihad* or *ra'y* is still applying Islamic law.

Building Islamic law into the national legal order, whether as a constraint on the legislature or by providing for its application in civil courts, or religious courts with 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 nineteenth and twentieth 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 may follow their own ways.

Given the pluralistic nature of Islamic law, it is 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 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 Organisation of Islamic Cooperation (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.

[85] Abdelaal (n 45) 42.

6

Islamic States and the UN Human Rights Treaties

For the most part, modern Islamic states participate in the international human rights treaty system. Some 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, their existence should not obscure the generally high rate of participation of Islamic states in human rights treaties. Looking across all the UN human rights treaties, most predominantly Muslim states participate fully in the majority of the treaties. Most Islamic states have therefore undertaken to apply the treaties compatibly with their understanding of Islamic law.

At the turn of the twenty-first century, for each of the following treaties: International Covenant on Civil and Political Rights (ICCPR); International Covenant on Economic, Social and Cultural Rights (ICESCR); Convention on the Rights of the Child (CRC); International Convention on the Elimination of All Forms of Racial Discrimination (CERD); Convention on the Elimination of All Forms of Discrimination against Women (CEDAW); and Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), Baderin counted at least 38 Organisation of Islamic Cooperation (OIC) Member States party.[1] Of the OIC Member States that were UN members in 1948, Afghanistan, Egypt, Iran, Iraq, Pakistan and Syria voted for the General Assembly Resolution proclaiming the Universal Declaration of Human Rights (UDHR), while Saudi Arabia abstained.[2] All but seven – Brunei, Malaysia, Oman, Palestine, Qatar, Saudi Arabia and the UAE – are party to the ICCPR and ICESCR. African Islamic states also adhere to the African Union's Human and People's Rights Charter.[3] The League of Arab States' revised Arab Charter

[1] Mashood A Baderin, 'A Macroscopic Analysis of the Practice of Muslim State Parties to International Human Rights Treaties: Conflict or Congruence?' (2001) 1 *Human Rights Law Review* 265, 269 (out of the 57 OIC Member States, 40 'are parties to the ICESCR and the ICCPR, 55 [to] the CRC, 48 [to] the CERD, 41 [to] the CEDAW and 38 [to] the CAT').

[2] UN 'Yearbook of the United Nations 1948–49' (1949) UNYB 1, 535.

[3] 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.

on Human Rights entered into force in 2008, ratified as of 2013 by 12 Islamic states.[4] Some Islamic states qualify their treaty commitments with reservations or declarations that give priority to Islamic law. Many of these have drawn objections as 'incompatible with the object and purpose of the treaty'.[5] This need not produce impasse, but can instead provide a starting point for states to signal to one another their understanding of key treaty principles, and possibly to narrow or eliminate disagreement.[6] Assessing the reservations and objections that remain in force in order to determine exactly which treaty terms operate between pairs of states, however, remains a complex endeavour.

This chapter analyses Islamic states' adherences to the UN human rights treaties, their Sharia-related reservations and treaty partners' objections. Focusing mainly on the ICCPR, the CEDAW and the CRC, which encompass most of the reservations and objections, it locates disagreements over Islamic states' human rights commitments. The first part demonstrates the chapter's analytical approach by applying it to the ICCPR and the ICESCR. It examines the stated reasons for reservations and objections in light of Islamic law and international law to delineate the zone of contention, then proposes by example of Pakistan that by defining their concerns more precisely, states may be able to find interpretations of treaty provisions that both legal traditions can accommodate. The second part of the chapter reviews the adherences of Islamic states to the other main UN human rights treaties: the CRC, ICERD, CEDAW, CAT, International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (ICMW), International Convention for the Protection of All Persons from Enforced Disappearance (CPED) and the Convention on the Rights of Persons with Disabilities (CRPD). It presents, in terms of reservations and objections, the few points of controversy that concern these treaties, other than the CEDAW and the CRC. The third part focuses on the CEDAW, which in terms of reservations and objections between Islamic and non-Islamic treaty partners appears to be the most controversial of the treaties. Applying an abbreviated version of the analysis used on the ICCPR, it argues that in substance the dispute over CEDAW, while apparently broad, mostly

Tiyanjana Maluwa, 'Ratification of African Union Treaties by Member States: Law, Policy and Practice' (2012) 13 *Melbourne Journal of International Law* 1, 23–24. An Islamic state, Egypt, entered one of the two reservations to the Charter (Zambia entered the other). Rachel Murray, *The African Commission on Human and People's Rights and International Law* (Hart Publishing, 2000) 10. Egypt reserved on Islamic law grounds against arts 8 and 18(3) of the Charter, which approximately reflect ICCPR arts 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 effect, given Egypt's subsequent declaration that the entire ICCPR is compatible with Islamic law. Declaration upon ratification by Egypt of the ICCPR and ICESCR (14 January 1982).

[4] Algeria, Bahrain, Iraq, Jordan, Kuwait, Libya, 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' (2013) 26 *Harvard Human Rights Journal* 91, 93.

[5] Vienna Convention art 19(c).

[6] Edward T Swaine, 'Reserving' (2006) 31 *Yale Journal of International Law* 307, 340–41.

pertains to rights within marriage. The fourth part of the chapter completes the chapter's main analysis by arguing that the disagreement over the CRC reduces to the question of whether a Muslim child (or indeed, anyone) may renounce Islam as their religion. A concluding part summarises the issues of Islamic and international law that occupy the zone of potential conflict across all these treaties, asking in such cases whether either or both legal traditions can flex to accommodate the other.

I. THE INTERNATIONAL BILL OF RIGHTS

Most Islamic states are party to the ICCPR and ICESCR, some with reservations based on Sharia. Analysis of these reservations against objections by treaty partners shows that while some reservations lack meaningful effect, and some objections seem questionable as a matter of treaty law, other objections do cast doubt on the validity of the reservations they refer to. These areas of apparent discord might be narrower than reservations and objections indicate. A brief study of Pakistan's ICCPR reservations shows that international norms can flex to accommodate Sharia-based concerns, once the reservations are narrowly focused on those concerns. The reservations and objections having mostly been resolved through state actions, the states party to the ICCPR showed by signalling acceptance of Pakistan's remaining reservations that the interpretation of an international treaty can expand to accommodate injunctions of Sharia that the law of an Islamic state party incorporates.

Unresolved reservations and objections render the exact terms of some human rights treaty commitments of Islamic states uncertain. Of the 19 Islamic states party to the ICCPR and ICESCR, seven entered reservations or declarations rooted in Islamic law.[7] 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.[8] 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,[9] but this is not true of any operative set of Sharia-based reservations to the ICCPR. Egypt did not enter reservations, but made a general declaration '[t]aking into

[7] Out of Afghanistan, Algeria, Bahrain, Djibouti, Egypt, Iran, Iraq, Jordan, Kuwait, Libya, 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. Sudan also ratified the ICCPR, without substantive reservations. The Comoros signed but did not ratify the ICCPR and ICESCR.

[8] 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 CRC to 'Islamic laws and the internal legislation in effect', while Pakistan's is far more precise).

[9] Abiad (n 8) 75.

consideration the provisions of the Islamic Sharia and the fact that they do not conflict with the text'.[10] Algeria, Bahrain, Kuwait, the Maldives, Mauritania and Pakistan based reservations or interpretive declarations regarding provisions of the ICCPR on Islamic 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.[11] 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 regarding children, drew objections from western states and a finding of invalidity from the Committee on the Elimination of Discrimination Against Women.[12] These typify the disagreements that can arise in the course of efforts by Islamic states to join international treaties without encroaching upon Islamic norms in their domestic legal orders.

Judging by the provisions they reserve against, Islamic states' greatest concerns regarding the compatibility of the international bill of rights with Sharia relate to equal treatment based on sex or religion, and to freedom of religion. Reservations or declarations to the ICCPR focus on article 18, which guarantees 'freedom of thought, conscience and religion', and articles 23 and 3, which require equal 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. Kuwait reserved against it in its entirety, while the others specified article 23(4) regarding 'equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution'.[13] Kuwait further stated that it would apply article 3 subject to national law, which in principle conforms to Islamic law.[14] Bahrain declared that articles 3, 18 and 23 do 'not affect[] in any way the prescriptions of' Sharia. Construed as a reservation, this attracted objections citing for example lack of specificity or improper reference to national law, but was ultimately not accepted for deposit by the Secretary-General, in agreement with objections that it was submitted after ratification and thus void under

[10] Declaration upon ratification by Egypt of the ICCPR and ICESCR (14 January 1982).

[11] Abiad (n 8) 73–79.

[12] Abiad (n 8) 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'); (at 74) (citing the Committee's 1987 report and further opinions).

[13] 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.

[14] 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.

international treaty law.[15] Pakistan entered extensive reservations based on Islamic law, but withdrew nearly all of them in September 2011 under economic pressure from the EU,[16] substituting narrower reservations to articles 3 and 25. Otherwise, states have not cited Islamic law as grounds for reservations to the ICCPR or ICESCR.

A. Treaty Partners' Objections

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.[17] 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'.[18] 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,

[15] 'A State may, *when signing, ratifying, accepting, approving or acceding to a treaty*, formulate a reservation'. Vienna Convention art 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'), 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), 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 also objected 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.

[16] Lorenz Langer, *Religious Offence and Human Rights: The Implications of Defamation of Religions* (Cambridge University Press, 2014) 364.

[17] 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), 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 art 4(2) of the ICCPR does not permit derogations from art 18.

[18] Objection registered by Slovakia (21 November 2007).

the Netherlands and Sweden noting the invocation of Sharia.[19] 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.[20] Pakistan's original reservations affecting articles 3, 6, 7, 12, 13, 18, 19, 25 and 40 drew many objections, rendered largely moot when Pakistan sharply narrowed its reservations.[21] 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).[22] Except for these reservations and objections, the terms of the ICCPR are not subject to open disagreement by parties over concerns that relate to Islamic law.

Islamic states party to the ICCPR and ICESCR have indicated through acceptance of treaty terms that they see international human rights standards as mostly compatible with Sharia. Possible exceptions are 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 which 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 article. Bahrain's reservations are inoperative, as the UN Secretary-General did not accept their deposit.

[19] 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), 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).

[20] Objections registered by Finland (25 July 1997), Germany (10 July 1997), Netherlands (22 July 1997) (reason unspecified), Norway (22 July 1997) and Sweden (23 July 1997).

[21] 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), 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.

[22] 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 art 23(4) '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').

This 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 national law. Disagreements 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.[23] Kuwait's subordination 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.[24]

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).[25] 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,[26] and fewer than half the Islamic states have ratified or acceded to it.[27] In any event, states evidently disagree on whether the reservations of 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 relate to, or might simply be severed from the treaty, leaving the reserving state bound by its obligations towards (at least) the objecting states as if it had not entered the reservation.[28]

[23] UN Depositary Notification (2011) 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'.

[24] See, eg, Mashood A Baderin, *International Human Rights and Islamic Law* (Oxford University Press, 2003) 160 (similarly, Kuwait's reservation against art 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').

[25] Vienna Convention art 19(c).

[26] Swaine (n 6) 307–66.

[27] 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.

[28] Ryan Goodman, 'Human Rights Treaties, Invalid Reservations, and State Consent' (2002) 96 *American Journal of International Law* 531, 531.

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.[29] Accordingly, at least between these states it is questionable whether the disputed provisions are binding.

B. A Middle Ground: Pakistan's ICCPR Reservations

The interplay of reservations and objections can help to isolate and reduce 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, might 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.[30] 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 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 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. Removing such references may, based on their plain text, entirely remedy the vagueness objections of the Czech Republic, Greece, Hungary, Slovakia and Spain.[31] Reservations to the ICCPR often

[29] Conversely, the objections registered by the USA appear to accept the reservations as having modified the treaty terms. See, eg, 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').

[30] Abiad (n 8) 77–79.

[31] Objections registered by Czech Republic (20 June 2011) (references to the constitution or Sharia in reservations to arts 3, 6, 7, 18 and 19 or to 'law relating to foreigners' regarding arts 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

describe their scope by reference to legal codes and constitutional provisions,[32] a standard 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 12 states' objections.[33] Of the remaining objections that the scope of Pakistan's reservations is insufficiently clear, Austria and Belgium considered reference to national laws per se insufficient, with the UK specifying individual 'constitutional provision[s]' as well, and the Netherlands stating a blanket objection to reservations based in national, constitutional or Sharia law as unclear.[34] 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 that the reservations were so extensive as to call into question Pakistan's engagement with the ICCPR as a whole.[35]

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').

[32] 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 (at 217).

[33] 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 arts 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').

[34] 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'), Netherlands (30 June 2011), UK (28 June 2011) ('general reference to a constitutional provision, law or system of laws without specifying their contents').

[35] Objections registered by Denmark (28 June 2011) (reserving against arts 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) (arts 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'), Netherlands (30 June 2011) (the reservations to arts 3, 6 7, 18, 19 and 25 'raise[] concerns as to the

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.[36] 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.[37] 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 appears 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 extension of 'GSP+' status under the Generalised System of Preferences after the partial withdrawal could also signal acquiescence in the revised reservations, as that decision required the consent of all the EU Member States in the European Council.[38] The Federal Shariat

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').

[36] Vienna Convention art 27. Objections registered by the Czech Republic (20 June 2011) ('references to [Pakistan's] domestic law' violate art 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, 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.

[37] Objections 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').

[38] Council of the European Union, 'Council Conclusions on Pakistan' (3016th Foreign Affairs Council Meeting, Brussels, 18 July 2011) 1, 1 (noting Pakistan's intent 'to formally withdraw many of its reservations'), 2 ('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

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 the reservation. At the same time, that Court's requirement that laws be justified based not on juristic rulings but on the Islamic proofs 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 once entered into must be honoured, even if their terms contradict Sharia.

II. UN HUMAN RIGHTS TREATIES

A review of Islamic states' reservations to the other UN human rights treaties reinforces the impression of civil equality and religious conversion as the most challenging aspects of the UN human rights system, from an Islamic point of view. All Islamic states are parties to the CRC. All except the Comoros, Mauritania and the UAE have adhered to the CRC's optional protocol on children in armed conflict; all but Somalia to the optional protocol on the sale of children, child prostitution and child pornography; and the Maldives and Morocco have signed the optional protocol on a communication procedure. All Islamic states except Brunei and Malaysia are parties to the ICERD. All except Iran, Palestine and Somalia are parties to the CEDAW.[39] All but Iran, Malaysia and Oman are parties to or have signed the CAT.[40] Algeria, Egypt, Libya, Mauritania, Morocco and Syria are parties to the ICMW. The Comoros has signed but not yet ratified it. Iraq, Mauritania, Morocco and Tunisia have adhered to the CPED, which Algeria, the Comoros and the Maldives have signed but not yet ratified. All Islamic states but Somalia are parties to the CRPD.[41] Most of the reservations grounded in or traceable to Islamic law pertain to the CEDAW and CRC. The rest are Saudi Arabia's

of the International Conventions listed in the EU's GSP regulation should be pursued by Pakistan'). Council Regulation (EC) 732/2008 of 22 July 2008 applying a scheme of generalised tariff preferences for the period from 1 January 2009 to 21 December 2011 and amending Regulations [2008] OJ L211/1, 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').

[39] The Maldives and Tunisia also acceded to the optional protocol, which recognises the competence of the Committee to 'receive and consider communications' from individuals claiming their rights were violated.

[40] Brunei signed the CAT on 22 September 2015 but has not yet ratified. The Maldives, Mauritania, Morocco, Palestine and Tunisia have acceded to the optional protocol, which establishes a subcommittee to monitor incarceration facilities.

[41] Afghanistan, Mauritania, Morocco, Saudi Arabia, Syria, Tunisia and Yemen are parties to the optional protocol, recognising the competence of the Committee to 'receive and consider communications from or on behalf of individuals or groups' alleging violations. Algeria, Jordan, Qatar and the UAE have signed but not yet ratified the protocol.

general reservation to the ICERD,[42] Qatar's reservation to, and the UAE's declaration regarding, article 1 of the CAT, which defines torture, and several reservations to the CRPD.

Saudi Arabia's ICERD declaration elicited seven objections, which raised concerns regarding Saudi Arabia's commitment to the object and purpose of the treaty, stated that the reservation is unclear and of uncertain extent, and cited the rule against invoking national law to escape treaty commitments.[43] However, it is not clear that the declaration would have any substantive effect, given the Prophet's admonitions against racial discrimination. The Yemen Arab Republic entered controversial reservations to ICERD article 5(c) and (d)(iv), (vi) and (vii), which pertain to political participation, but these did not purport to be based on Sharia and in any event may have expired in 1990 upon the unification of Yemen.[44]

Of the points of controversy around CAT that might relate to Sharia, only the definition of torture (article 1) appears to be subject to a current disagreement. The UAE purports to exclude 'sanctions applicable under national law',[45] and Qatar would exclude punishments sanctioned by Sharia.[46] Both reservations attracted numerous objections.[47] Pakistan initially entered extensive

[42] '[The Government of Saudi Arabia declares that it will] implement the provisions [of the above Convention], providing these do not conflict with the precepts of the Islamic Shariah' (23 September 1997).

[43] Objections registered by Austria (9 February 1998) (doubtful commitment to the object and purpose of the treaty; unclear which provisions the reservation relates to, and its extent), Finland (6 February 1998) (doubtful commitment to the object and purpose of the treaty; unclear which provisions the reservation relates to, and its extent), Germany (3 February 1998) (doubtful commitment to the object and purpose of the treaty), Netherlands (3 February 1998) (incompatible with the object and purpose of the treaty), Norway (6 February 1998) (reservation of 'unlimited scope and undefined character'; impermissible to invoke domestic law), Spain (18 September 1998) (reservation of 'unlimited scope and undefined nature'; impermissible to invoke domestic law), Sweden (27 January 1998) (unclear which provisions the reservation relates to, and its extent).

[44] The Yemen Arab Republic acceded to the ICERD in 1989. Australia, Belgium, Canada, Czechoslovakia, Denmark, Finland, France, Germany, Italy, Mexico, the Netherlands, New Zealand, Norway, Sweden and the UK objected to its reservations. The People's Democratic Republic of Yemen had acceded in 1972, without reservations to these articles. According to the foreign ministers of the precursor states, the newly formed Republic of Yemen assumed responsibility for the treaty 'formalities' entered into by both states, as of the earliest adherence in cases where both states became party to a treaty. Letter of 19 May 1990 of the Ministers of Foreign Affairs to the Secretary-General of the United Nations.

[45] Declaration on accession, 19 July 2012.

[46] General reservation of 11 January 2000, narrowed on 14 March 2012 to specify articles 1 and 16. Because the general reservation cited 'the precepts of Islamic law and the Islamic religion', a similar concern presumably underlies the narrower reservation.

[47] Objections to Qatar's reservation registered by Denmark (21 February 2001) (general nature; object and purpose), Finland (16 January 2001) ('general reference to national law'; invoking internal law to avoid treaty commitments), France (24 January 2001) (indeterminate scope), Germany (23 January 2001) (object and purpose), Italy (5 February 2001) (object and purpose), Luxembourg (6 April 2000) (general reference to 'both Islamic law and the Islamic religion'; vague; object and purpose), Netherlands (19 January 2001) (invoking national law to limit responsibilities), Norway (18 January 2001) ('unlimited scope and undefined character'), Portugal (20 July 2001) (invoking internal law to avoid treaty commitments; object and purpose), Spain (14 March 2000) ('general reference

reservations, to articles 3, 4, 6, 8, 12, 13, 16, 28 and 30, citing Sharia and its Constitution as the overriding sources of law regarding articles 4, 6, 12, 13 and 16, and national extradition laws for article 3. Treaty partners objected, particularly to the latter group of reservations, which Pakistan duly withdrew in 2011. Pakistan's remaining reservations, to article 8 (extradition for torture offences), article 28 (competence of the Committee against Torture) and article 30 (International Court of Justice jurisdiction over disputes), are much less controversial and do not implicate Sharia.[48]

Islamic states' reservations to the CRPD consist of a scattering of disparate reservations, and a shared alternative view of article 12(2), which recognises a right to 'legal capacity'. Brunei and Iran entered general reservations, based on Brunei's Constitution and 'the beliefs and principles of Islam', and Iran's 'applicable rules'. Malaysia reserved against article 15 (freedom from torture or cruel, inhuman or degrading treatment or punishment) and article 18 (liberty of movement and nationality) and declared that its constitutional interpretation of non-discrimination and equality of opportunity comports with CRPD articles 3(b), 3(e) and 5(2) and that the recognition of the right guaranteed in article 30 of participation in cultural life, recreation, leisure and sport 'is a matter for national legislation'. Egypt, Kuwait and Syria declared their understanding of 'legal capacity' as conferring rights, but not promising the ability to actually exercise those rights.[49] Kuwait entered reservations to article 18(1)(a), concerning the right to acquire and change nationality, and article 23(2), concerning upholding and assisting in fulfilling rights and responsibilities of guardianship and similar obligations towards children. Kuwait also declared that it interprets article 19(a) on the freedom to choose living arrangements and article 25(a) regarding reproductive health rights as not permitting or

to Islamic law and religion'), Sweden (27 April 2000) (vague), UK (9 November 2001) ('general reference to national law'). Objections to the UAE's reservation registered by Austria (31 January 2013) ('reference to national law'), Belgium (23 July 2013) ('referring to national law'), Czech Republic (15 July 2013) ('limit[s] the scope of the Convention'; object and purpose), Finland (22 July 2013) ('general reference to national law'; invoking internal law to avoid treaty commitments), Germany (22 July 2013) (deference to 'national laws'), Ireland (18 July 2013) ('general reference to domestic laws'), Netherlands (16 July 2013) ('subject to national legislation'), Norway (24 July 2013) (object and purpose), Poland (17 July 2013) ('general nature and … reference to national law'), Portugal (19 July 2013) (object and purpose), Romania (2 July 2013) (invoking internal law to justify failure to perform a treaty), Sweden (7 March 2013) (vague), Switzerland (1 July 2013) (reference to 'national law'). Qatar's reservation, which also encompasses article 16 (requiring states party to 'undertake to prevent' state actors from carrying out acts of cruel, inhuman or degrading treatment that do not amount to torture), represents a refinement of its earlier general reservation to the CAT. No treaty partners have updated their objections. The UAE's reservation was phrased as a declaration.

[48] Article 28(2) explicitly provides the option for states to opt out of the Committee's scope of competence by reserving against art 28(1). Article 30(2) operates similarly with respect to article 30(1).

[49] See, eg, Egypt, declaration upon signature, 4 April 2007 (interpreting 12(2) to mean 'that persons with disabilities enjoy the capacity to acquire rights and assume legal responsibility ('ahliyyat al-wujub) but not the capacity to perform ('ahliyyat al-'ada'), under Egyptian law').

recognising 'illicit relations outside legitimate marriage'. Libya entered a reservation, phrased as a declaration, against article 25(a), which it 'interprets … in a manner that does not compromise the Islamic sharia and national legislation'.

The reservations of Egypt, Kuwait and Syria to article 12(2) reflect a broader controversy over the concept of legal capacity. Article 12(2) promises to 'recognize that persons with disabilities enjoy legal capacity on an equal basis with others'. Disagreement arose while drafting the treaty over whether 'legal capacity' incorporates both the right to legal capacity, and the right to be able to exercise it, which would include necessary assistance. The final language reflects that both aspects are included.[50] A group of Arab states, including 19 Islamic states, notified the drafting committee and the General Assembly that they nonetheless understood 'legal capacity' to mean 'the capacity of rights and not the capacity to act'.[51] Syria's reservation explicitly took this view, while Egypt's and Kuwait's embraced its substance. Treaty partners have raised no objections to most of the reservations against discrete articles, but have objected to Brunei and Iran's general reservations,[52] to Libya's article 25(a) reservation,[53] and to Malaysia's reservations, particularly those against articles 15 and 18.[54] Thus, although as Kanter argues,[55] the *traveaux preparatoires* demonstrate that article 12(2) promises both a right to legal capacity and a right to exercise that capacity, as a matter of treaty law there is arguably room for derogation. Otherwise, treaty partners could be expected to have objected to the reservations of Egypt, Kuwait and Syria that reflected the interpretive view put forward in the letter of the Permanent Representative of Iraq.

[50] Arlene S Kanter, *The Development of Disability Rights Under International Law: From Charity to Human Rights* (Routledge, 2015) 255–56.

[51] Letter from the Permanent Representative of Iraq to the United Nations, 5 December 2006, 'on behalf of Algeria, Bahrain, Comoros, Djibouti, Egypt, Iraq, Kuwait, Lebanon, Libyan Arab Jamahiriya, Mauritania, Morocco, Oman, Palestine, Qatar, Saudi Arabia, Somalia, Sudan, Syrian Arab Republic, Tunisia, United Arab Emirates and Yemen'.

[52] Objections registered to Brunei's general reservation by Austria (3 February 2017), Belgium (11 April 2017), Czech Republic (20 December 2016), Germany (12 April 2017), Hungary (13 April 2017), Italy (24 April 2017), Latvia (28 April 2017), Netherlands (13 April 2017), Norway (17 April 2017), Peru (17 April 2017), Poland (22 February 2017), Portugal (21 March 2017), Romania (22 March 2017), Sweden (26 October 2016), Switzerland (27 February 2017), UK (10 April 2017). Objections registered to Iran's general reservation by Austria (1 November 2010), Belgium (28 June 2010), Czech Republic (28 July 2010), France (30 March 2010), Germany (1 November 2010), Latvia (22 October 2010), Mexico (22 October 2010), Netherlands (14 June 2016), Portugal (2 November 2010), Slovakia (4 November 2010), Switzerland (15 April 2014).

[53] Objections registered by Denmark (27 February 2019) and Greece (5 March 2019), both stating that the scope of the reservation is 'general' and 'indeterminate', thus incompatible with the treaty's object and purpose.

[54] Objections registered by Austria (24 June 2011), Belgium (28 June 2011), Germany (3 August 2011), Hungary (1 August 2011), Netherlands (14 June 2016) (arts 3(b), 3(e), 5(2) 15, 18), Portugal (26 July 2011), Slovakia (18 July 2011), Sweden (6 July 2011), Switzerland (15 April 2014) (art 15). Except as noted, the states objected specifically to Malaysia's reservations to arts 15 and 18.

[55] Kanter (n 50) 253–56.

III. THE CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN (CEDAW)

CEDAW is a locus of considerable apparent discord between Islamic states and western, mostly European, states regarding human rights. All Islamic states except Iran and Somalia are parties to CEDAW. All Islamic states party but Afghanistan, the Comoros, Djibouti, Palestine and Yemen have made at least one reservation or declaration traceable to Islamic law. These have drawn objections from treaty partners. Most of these states also opted out of article 29(1), which mandates arbitration of disputes upon demand of either party.[56] In recent years, several Islamic states have refined or withdrawn CEDAW reservations, reducing the scope of disagreement. Islamic states' fealty to Sharia calls into question only some of their commitments under CEDAW. This part focuses on those points, which should not obscure the fact of considerably larger areas of agreement.

Brunei, Oman, Pakistan and Saudi Arabia entered general reservations to CEDAW based on national law or Sharia. The bulk of Islamic states' reservations to particular articles pertain to articles 2, 9, 15 and 16. Under article 2, states commit to undertake constitutional, legislative and practical measures to achieve equality and non-discrimination against women. Article 9 promises equal rights for men and women regarding nationality, for themselves and for their children. Article 15 guarantees equality before the law, generally and particularly with regard to contract rights and freedom of movement and residence. Article 16 mandates equality in marriage and family. Most of this section discusses reservations to these articles, and treaty partners' corresponding objections.

Otherwise, only Qatar's declarations that it interprets article 1's prohibition of discrimination as not intended to 'encourage family relationships outside legitimate marriage' as understood in Islamic law and Qatari legislation, and that the article 5(1) reference to modify[ing] the social and cultural patterns of conduct of men and women' is not intended to 'encourag[e] women to abandon their role as mothers and their role in child-rearing', garnered objections.[57] Malaysia's declaration that it interprets article 11, which binds states to try to eliminate discrimination against women in employment, as pertaining to 'equality between men and women only' attracted no objections. Mauritania's Sharia-based reservation to article 13(a), which promises equal rights to family benefits, presumably remains under objection by the 11 states that objected to the general reservation it replaced.[58]

[56] Algeria, Bahrain, Brunei, Egypt, Iraq, Kuwait, Morocco, Oman, Pakistan, Qatar, Saudi Arabia, Syria, UAE. Not Jordan, Libya, Malaysia, the Maldives, Mauritania. Tunisia withdrew its reservation to art 29(1) in 2014.

[57] Slovakia objected to these declarations on the grounds that their application would inevitably result in discrimination against women. Spain stated that they have no legal force.

[58] Austria, Denmark, Finland, France, Germany, Ireland, the Netherlands, Norway, Portugal, Sweden and the UK. The objections are discussed further, below.

Articles 2, 9, 15 and 16 are more controversial. Of the 24 Islamic states party to CEDAW, 16 have reservations to one or more of these articles. Eight have withdrawn at least one such reservation, which may indicate that on closer analysis there is less tension between their interpretations of Islamic law and the treaty than at first seemed likely. These issues may encompass a significant proportion of the concerns that led some Islamic states to enter general reservations to CEDAW or to article 2's injunctions to implement the rights that CEDAW protects. Most objections to Islamic states' reservations to articles 2, 9, 15 and 16 cite their vagueness; that they disable fundamental provisions; that they would inevitably result in discrimination against women; the impropriety of recourse to national or religious law; or simply that they violate the treaty's object and purpose. The next four sections discuss reservations on a per article basis, but only the objections that relate to each article on its own. Most objections cited multiple articles, out of 2, 9, 15 and 16. These are covered in the subsequent section. The part concludes with a discussion of what the patterns of reservations, objections and revisions of reservations may reveal about the scope of disagreement concerning CEDAW and Sharia.

A. General Reservations and Article 2 Reservations

Under article 2, states commit to undertake measures, such as legislation, constitutional amendments and institutional protections, to ensure the rights CEDAW promises. Reserving against article 2 is thus arguably tantamount to a general reservation, as it qualifies the entire obligation to implement those rights.[59] It is difficult to say that states that enter a general reservation to CEDAW or to article 2 have seriously engaged with the treaty. This does not mean they have not undertaken to reconcile Sharia and CEDAW's substantive rules; it is simply hard to tell as a matter of treaty law. Therefore objections to these reservations appear on their face to be well-founded. Most objections did not isolate article 2, but broadly objected to reservations that implicated it along with other articles.

Three absolute monarchies, Brunei, Oman and Saudi Arabia, entered Sharia-based general reservations. Pakistan made its accession 'subject to the provisions of' its Constitution.[60] Algeria, Bahrain, Egypt, Libya, Morocco and Syria entered reservations against all of article 2. These vary in how specifically they indicate alternative sources of law. Brunei cited its Constitution and

[59] See, eg, objections of France (21 July 2003) and Sweden (11 July 2003) to Syria's reservation to art 2. France considered the reservation 'a reservation of general scope that renders the provisions of the Convention completely ineffective'. Sweden's objection stated that 'a general reservation to [art 2] seriously raises doubts as to' Syria's commitment to the object and purpose of CEDAW.

[60] This was presented as a declaration, but functions as a reservation. Malaysia also phrased a reservation in general terms, but then specified the articles it considered raise concerns with respect to Sharia or the Malaysian Constitution. The reservation therefore functions as a set of reservations to specific articles.

'beliefs and principles of Islam'; Oman, Sharia and 'legislation in force'; and Saudi Arabia, 'the norms of Islamic law'. These drew respectively 21, 20 and 12 objections,[61] most stating essentially that the vagueness and breadth of the reservations left treaty partners uncertain about their scope and the reserving states' commitment to the object and purpose of the treaty.[62] Pakistan's declaration attracted eight objections, on similar grounds.[63] Of the Islamic states that reserved generally against article 2, Syria gave no reasons and Algeria referenced its Family Code, while Bahrain, Egypt and Morocco cited Sharia.[64] Libya's reservation is also based on Sharia, but concerns only the inheritance of estates.[65]

Reservations to discrete provisions of article 2 raise fewer concerns. Only a few states objected to Morocco's and Qatar's reservations relating to article 2(a), which preserve constitutional rules of male succession to the hereditary throne.[66] Iraq and the UAE reserved against article 2(f), which commits

[61] Hungary and Latvia objected to Brunei's reservation to art 9(2), but not to the general reservation. Latvia objected to Oman's reservations to specific articles, but not to the general reservation.

[62] Objections registered to Brunei's general reservation by Austria (18 December 2006), Belgium (30 April 2007), Canada (14 June 2007), Czech Republic (11 April 2007), Denmark (6 October 2006), Estonia (4 December 2006), Finland (27 February 2007), France (13 June 2007), Germany (19 December 2006), Greece (15 June 2007), Ireland (19 December 2006), Italy (15 June 2007), Netherlands (11 April 2007), Norway (21 March 2007) ('invoking general principles of internal or religious law may create doubts about the commitment of the reserving State to the object and purpose'), Poland (7 June 2007), Portugal (30 January 2007), Romania (8 February 2007), Slovakia (11 May 2007), Spain (13 June 2007), Sweden (12 February 2007), UK (14 June 2007). Objections registered to Saudi Arabia's general reservation by Austria (21 August 2001), Denmark (10 August 2001), Finland (8 October 2002), France (26 June 2001), Germany (19 January 2001) (the reservation 'raises doubts as to the commitment' of Saudi Arabia to the treaty), Ireland (2 October 2001), Netherlands (18 September 2001) (the reservation, 'by invoking national law, may raise doubts as to the commitment of this State to the object and purpose'), Norway (9 October 2001), Portugal (18 July 2001), Spain (22 February 2001), Sweden (30 March 2001), UK (6 September 2001). Objections registered to Oman's general reservation by Austria (5 January 2007), Belgium (30 April 2007), Czech Republic (12 January 2007), Denmark (6 October 2006), Estonia (4 December 2006), Finland (27 February 2007), France (13 February 2007), Germany (28 August 2006), Greece (29 January 2007), Hungary (7 February 2007), Ireland (19 December 2006), Italy (9 July 2007), Netherlands (19 July 2006), Poland (1 March 2007), Portugal (30 January 2007), Romania (8 February 2007), Slovakia (27 February 2007), Spain (23 February 2007), Sweden (6 February 2007), UK (28 February 2007). Unless otherwise noted, the reservations asserted in essence that the reservation addressed was too vague to allow treaty partners to understand its scope and effect.

[63] Objections registered by Austria (5 June 1997), Denmark (23 March 1998), Finland (6 June 1997), Germany (28 May 1997), Netherlands (30 May 1997), Norway (6 June 1997), Portugal (23 July 1997) and Sweden (13 August 1997).

[64] Objections to these reservations are discussed below. Morocco noted that in differentiating rights of men from those of women, its Code of Personal Status follows Sharia and its objective 'to strike a balance between the spouses in order to preserve the coherence of family life', which means certain provisions cannot be infringed.

[65] Libya's reservation states that art 2 will be 'implemented with due regard for the peremptory norms of the Islamic Shariah relating to determination of the inheritance portions of the estate of a deceased person, whether female or male'.

[66] Objection registered to Morocco's reservation by the Netherlands (14 July 1994) (noting the invocation of Sharia). Objections registered to Qatar's reservation by Hungary (15 April 2010) (inevitable discrimination), Ireland (28 April 2010) (inevitable discrimination), Italy (15 April 2010) (core provision), Latvia (28 January 2010) (unclear; core provision), Mexico (10 May 2010) (inevitable

states to 'modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women'. Iraq also reserved against 2(g), which requires the repeal of 'penal provisions that discriminate against women'. The UAE, like Libya, tied its reservation to the Islamic rules of inheritance. Iraq provided no details. All 14 objections to the UAE's reservation included 2(f) in their scope. Four states entered pro forma objections to Iraq's reservations.[67]

General reservations and article 2 reservations may function as opt-outs, which reserving states can apply to any CEDAW provision based on their interpretation of the superseding body of law. A closer analysis of what CEDAW provisions conflict with which sources of national law might begin to alleviate these concerns. A few reservations, such as those of Libya, Morocco and the UAE, are specific enough to be understood as relating to particular rights, such as those guaranteed in articles 9(2), 15(4) and 16. Algeria's reservation, based on its Family Code, might not be as challenging to interpret as the others, as civil legislation is usually subject to less nuance than Islamic law. All of these reservations should however be susceptible to analysis, because governments advised by experts in Islamic law can locate potential conflicts with Sharia. As a matter of treaty law it might not be simple to refine article 2 reservations: they could originally have attached to articles that state substantive rules, but now this would amount to entering new reservations after ratification.

B. Article 9

Another cluster of reservations centres on article 9(2), which requires states to 'grant women equal rights with men with respect to the nationality of their children'. This attracted 14 reservations from Islamic states, four of them since withdrawn,[68] leaving Bahrain, Brunei, Jordan, Kuwait, Malaysia, Oman, Qatar, Saudi Arabia, Syria and the UAE with active reservations. The reservations of Kuwait, Qatar and the UAE reference national law, with Malaysia doing so by implication.[69] Brunei, Oman and Saudi Arabia's addition of a specific

discrimination), Norway (6 May 2010) (core provisions), Slovakia (28 July 2009) (inevitable discrimination). Of all the objections to Qatar's reservations, those of Austria, the Czech Republic, Finland, the Netherlands, Poland, Romania, Spain and Sweden referenced specific articles but not art 2(a). Several other states entered general objections that did not refer to specific articles referenced in Qatar's reservation. For rules of royal succession, see Constitution of Morocco (2011), art 43; Constitution of Qatar (2003), art 8.

[67] Objections registered by Germany (3 March 1987), Mexico (4 December 1986), Netherlands (23 July 1990), Sweden (3 March 1987).

[68] Algeria (2009), Egypt (2008), Iraq (2014) and Morocco (2011) have refined their reservations so as to no longer refer to art 9(2).

[69] Kuwait cited its Nationality Act, 'which stipulates that a child's nationality shall be determined by that of his father'. Malaysia did not elaborate on its art 9(2) reservation, but indicated when withdrawing other parts of its reservations in 1998 'that its reservation [against article 9(2)] will be reviewed if the Government amends the relevant law'. Qatar indicated that its citizenship law takes

article 9(2) reservation to a general reservation based on Sharia may support the inference that rules regarding paternal inheritance of nationality are severable from Sharia. Bahrain, Jordan, Oman and Saudi Arabia entered reservations to article 9(2) without explanation. Syria specified a concern regarding 'the grant of a woman's nationality to her children'. Somewhat anomalously, Jordan's reservation attracted far fewer objections than the others.

Article 9 seems less controversial than articles 2, 15 and 16, and relatively decoupled from Sharia. Three of the four states that noted specific articles in their objections to Kuwait's reservation omitted article 9.[70] While most states that objected to Islamic states' reservations implicating articles 2, 9, 15 and 16 noted all articles (or none) in their objections, six objections to the UAE's reservation specifically omitted article 9(2).[71] This might reflect the more detailed tenor of the UAE's reservations, versus the relatively sparse wording of those of Bahrain, Oman, Qatar and Syria. The UK consistently did not object to article 9(2) reservations.

Only Brunei and Saudi Arabia reserved against article 9(2) without mentioning other provisions. Brunei's article 9(2) reservation, reinforcing its general reservation based on Islam and the national constitution, drew 21 objections. Of these, ten stated that implementing the reservation would necessarily result in discrimination against women;[72] six cited article 9(2)'s status as a fundamental CEDAW provision;[73] four provided no specific grounds, other than object and purpose;[74] and Greece objected that it is too vague.[75] Most objections to Saudi Arabia's similar reservation considered article 9(2) fundamental to CEDAW,[76] that the reservation was inherently discriminatory,[77] or both.[78] The Netherlands simply challenged its compatibility with CEDAW's object and purpose.[79]

precedence. The UAE reserved against all of article 9, stating that 'the acquisition of nationality' is subject to national law.

[70] Austria, Belgium and Portugal.

[71] Denmark, France, Greece, Latvia, the Netherlands and the UK.

[72] Objections registered by Austria (18 December 2006), Czech Republic (11 April 2007), Denmark (6 October 2006), Estonia (4 December 2006), Germany (19 December 2006), Hungary (24 April 2007), Italy (15 June 2007), Latvia (6 December 2006), Romania (8 February 2007), Sweden (12 February 2007).

[73] Objections registered by Belgium (30 April 2007), Canada (14 June 2007), Finland (27 February 2007), Portugal (30 January 2007), Slovakia (11 May 2007), Spain (13 June 2007).

[74] Objections registered by France (13 June 2007), Ireland (19 December 2006), Netherlands (11 April 2007), Poland (7 June 2007).

[75] Objection registered by Greece (15 June 2007) ('does not specify the extent of the derogation').

[76] Objections registered by Austria (21 August 2001) ('important provision of non-discrimination'), Finland (8 October 2002) ('one of the fundamental obligations under the Convention').

[77] Objections registered by Denmark (10 August 2001), France (26 June 2001), Spain (22 February 2001).

[78] Objections registered by Germany (19 January 2001), Ireland (2 October 2001), Norway (9 October 2001), Portugal (18 July 2001). The Swedish and British objections did not raise article 9(2), addressing only the general reservation of Saudi Arabia to CEDAW.

[79] Objection registered by the Netherlands (18 September 2001).

C. Article 15

Article 15, equality before the law, is also in relatively little dispute in terms of reservations and objections. Most reservations concern article 15(4), on equality in freedom of movement and choice of residence. Of six operative reservations by Islamic states to article 15(4), those of Bahrain, Oman, Qatar and Syria drew most of the objections. Bahrain, Oman and Syria's reservations state no reasons. Qatar's says article 15(4) 'is inconsistent with the provisions of family law and established practice'. Algeria's reservation requires that 15(4) be interpreted compatibly with article 37 of its Family Code, but a 2005 amendment to that Code repealed a provision conditioning the husband's obligation to support the wife on her continued residence in 'the matrimonial home',[80] apparently removing the conflict. Algeria's Constitution now also unequivocally guarantees freedom of residence.[81] Morocco indicated that article 15(4) should be interpreted compatibly with articles 34 and 36 of its Code of Personal Status, which at the time spelled out marital responsibilities including cohabitation,[82] but was subsequently superseded.[83] Even before their respective legislative amendments, Algeria's and Morocco's reservations attracted few objections, all of which refer generally to the treaty's object and purpose.[84] Jordan withdrew its article 15(4) reservation in 2009.

Two outlying reservations hint at closer compatibility between CEDAW and Islamic law. Qatar reserved against article 15(1), on general equality before the law, as incompatible with Islamic law 'in connection with matters of inheritance and testimony'.[85] The UAE's reservation concerns article 15(2), which relates to legal capacity particularly as to contracts, property and proceedings. In the UAE's view, the requirement of 'identical legal capacity' between men and women 'conflict[s] with the precepts of the Shariah regarding legal capacity, testimony and the right to conclude contracts'. As with Pakistan's reservation to ICCPR

[80] Amended by Law no 05-02 of 27 February 2005 (JO no 15, page 19). The repealed provision had also required husbands with multiple wives to treat the wives equitably. Article 37 now only provides that spouses each retain ownership of their own property unless they otherwise agree. Property predating the marriage remains with its original owner. The spouses may agree to shared ownership of property obtained during the marriage.

[81] 'Every citizen enjoying all civil and political rights shall have the right to freely choose the place of residence and to move within the national territory'. Constitution of Algeria 1989 (amended 2016) art 55.

[82] Royal decrees of 22 November and 18 December 1957 and 25 January, 20 February and 4 April 1958, art 34(1) (requiring marital cohabitation).

[83] Approximately three months after Morocco adhered to CEDAW, in September 1993, the Code of Personal Status was updated to remove the requirement of cohabitation. Law no 93-74 of 12 July 1993, promulgated by royal decree on 10 September. See Bérénice Murgue, 'La Moudawana: les dessous d'une réforme sans précédent' (2011) *Les Cahiers de l'Orient* no 102 15, 18.

[84] Objections to Algeria's reservations registered by Denmark (24 March 1998), Germany (19 June 1997), Netherlands (1 July 1997), Norway (3 July 1997), Portugal (14 August 1997), Sweden (4 August 1997). Objection to Morocco's reservations registered by the Netherlands (14 July 1994).

[85] The UAE's reservation to art 2(f) also raised a Sharia-based concern related to inheritance.

article 3, the concerns regarding testimony are potentially narrow: Pakistan's evidence law applies the Quran's equating of the testimony of two women with that of one man specifically to forward-looking written financial transactions, arguably accepted by treaty partners.[86] It may be that Qatar and the UAE could similarly divide their reservations into discrete concerns. Furthermore, the fact that the UAE assessed its engagement with article 15 on the basis of Sharia yet chose not to reserve against article 15(4) may hint that the latter concern can be averted within Islamic law.

D. Article 16

Article 16, 'relating to marriage and family relations', attracted reservations from 14 Islamic states, more than any other CEDAW article. These include states whose relatively specific or detailed reservations and adherences to other articles, and refinements of reservations, indicate an effort to engage with CEDAW as a whole. Seven Islamic states reserved against the entire article, Algeria citing its Family Code and Bahrain, Egypt, Iraq, the Maldives, Mauritania and the UAE referencing Sharia.[87] The wording of some of these reservations indicates concerns that are narrower than the article. Article 16(1)(c), concerning equal 'rights and responsibilities during marriage and at its dissolution', seems to be the most contentious. The reservations of Egypt and the UAE reflect this. Under the interpretation of Sharia stated by the UAE, husbands may divorce at will, but wives require a judicial decision and a showing of harm to divorce; the husband must make 'payment of a dower and of support after divorce' while 'the wife has … full rights to her property and is not required to pay her husband's or her own expenses out of her own property'. Egypt's reservation is substantially the same.[88] Iraq's reservation hinted at a similar purpose.[89] Morocco's reservation to article 16, withdrawn in 2011, also shared this focus.[90]

Six Islamic states reserved against sub-provisions of article 16. Malaysia, Oman and Qatar indicated concerns about the compatibility of subsection 16(1)(a),

[86] See discussion of Pakistan's ICCPR reservations, above.

[87] The Maldives 'reserves its right to apply article 16 … without prejudice to the provisions of the Islamic Sharia'. Mauritania 'approved' the provisions of the article which are 'not contrary to Islamic Sharia and … in accordance with our Constitution'.

[88] Egypt acceded to article 16 'without prejudice to the Islamic Sharia's provisions whereby women are accorded rights equivalent to those of their spouses so as to ensure a just balance. … [T]he husband shall pay bridal money to the wife and maintain her fully and shall also make a payment to her upon divorce, whereas the wife retains full rights over her property and is not obliged to spend anything on her keep'.

[89] Iraq acceded to article 16 'without prejudice to the provisions of the Islamic Shariah according women rights equivalent to the rights of their spouses so as to ensure a just balance between them'.

[90] Like the article 16 reservations based on this concern that are still operative, Morocco's withdrawn reservation discussed the balance between a wife's property rights against her husband and a husband's right to divorce without the intervention of a Sharia judge.

which promises the 'same right to enter into marriage',[91] with Islamic law. Article 16(1)(c) drew reservations from Jordan, Malaysia, Oman, Qatar and Syria, citing Islamic law; Jordan and Syria mentioned offsetting divorce rights of men with financial rights of women. Article 16(1)(d), requiring equal rights between parents regarding their children, subject to the best interest of the child, elicited reservations from Jordan and Syria, without stating a reason. Libya also reserved against articles 16(1)(c) and (d), but phrased the reservation to specifically protect rights guaranteed to women under Sharia.[92] Subsection (f) attracted reservations from Kuwait, Malaysia, Oman, Qatar and Syria. Syria's reservation did not cite grounds. Kuwait referred to Sharia. Malaysia and Oman referred to Sharia and, respectively, the constitution and national legislation. Qatar's reservation stated that subsection (f) 'is inconsistent with the provisions of Islamic law and family law' and that 'relevant national legislation is conducive to the interest of promoting social solidarity'. Jordan and Malaysia entered reservations against article 16(1)(g) on equal 'personal rights … including the right to choose a family name, a profession and an occupation'. Neither stated grounds, beyond Malaysia's general reference to Sharia and its Constitution. Syria's Sharia-based reservation to article 16(2), which bans child marriage, is an outlier that attracted 14 objections.[93]

Withdrawals that implicate article 16 may clarify the concerns underlying reservations. After withdrawing general reservations in 1999 and 2014 respectively, the Maldives and Mauritania retained reservations against article 16.[94] This suggests that that article may raise concerns relating to Sharia. Treaty partners did not update their objections after Mauritania narrowed its reservation to articles 13(a) and 16. Finland and Germany reacted to the Maldives' refinement of its reservation to apply only to article 7(a) (concerning the right to vote and to be eligible for elected office) and article 16, Finland welcoming the changes but

[91] Malaysia's reservation indicates a conflict between art 16(1)(a) and either the Constitution or Malaysia's interpretation of Sharia. Oman views the provision as incompatible with either Sharia or 'legislation in force' and Qatar sees it as 'inconsistent with the provisions of Islamic law'.

[92] Agreeing to implement articles 16(1)(c), (d) 'without prejudice to any of the rights guaranteed to women by the Islamic *Shariah*'.

[93] Objections registered by Austria (14 August 2003) (specifying the art 16(2) reservation as vague, noting Sharia reference), Denmark (27 May 2003) (inevitable discrimination), Estonia (1 April 2004) (specifying the art 16(2) reservation as vague, noting Sharia reference), Finland (17 June 2003) ('general reference to religious or other national law'), France (21 July 2003) (no reason specified), Germany (25 August 2003) ('essential provisions'), Greece (4 March 2004) (specifying the art 16(2) reservation as 'of unlimited scope' and noting the Sharia reference), Italy (2 September 2003) (specifying that the art 16(2) reservation 'may limit [Syria's] responsibilities' under CEDAW, noting Sharia reference), Netherlands (27 May 2003) (specifying that the art 16(2) reservation 'seeks to limit [Syria's] responsibilities' under CEDAW, noting Sharia reference), Norway (5 April 2004) ('core provisions'; vague due to Sharia reference), Romania (3 December 2003) (object and purpose), Spain (31 July 2003) (specifying the art 16(2) reservation as vague due to its reference to Sharia), Sweden (11 July 2003) (specifying the art 16(2) reservation as vague due to its reference to Sharia), UK (26 June 2003) (vague).

[94] Libya likewise refined a general reservation to focus on art 16(c), (d), but the refinement appears to be incapable of obviating any rights guaranteed by those provisions.

restating its objection (citing a lack of clarity and recourse to domestic law to avoid treaty obligations) and Germany rejecting them as an attempt to add a new reservation.[95] Otherwise, presumably the objections to the general reservations still apply regarding article 16. Nine states objected to the Maldives' original reservation, five referring generically to the treaty's object and purpose,[96] and the rest citing the fundamental importance of the provisions, improper reference to internal law, or that implementing it would inevitably result in discrimination against women.[97] For similar reasons, 11 states objected to Mauritania's original general reservation.[98] Finally, Malaysia narrowed its article 16 reservation to 16(1)(a), (c), (f) and (g). Since these sub-provisions attract most of the discrete reservations to article 16(1), they may be the parts most likely to conflict with Sharia.

E. Objections to Reservations Regarding Articles 2, 9, 15 and 16

Reservations by Bahrain, Kuwait, Oman, Qatar, Syria and the UAE attracted most of the objections that concern specific CEDAW articles. All these states reserved against aspects of articles 2, 9, 15 and 16, except Kuwait which only reserved against articles 9(2) and 16(1)(f) and Oman which did not reserve against article 2. Most objections to these reservations are of similar types: their scope or content is not clear; the provisions are fundamental to the treaty; the reservations would inevitably result in discrimination; references to national or religious law are per se impermissible or render the scope of the reservations unclear; or simply that the reservations run counter to the treaty's object and purpose.

[95] Communications to the Secretary General by Finland (17 August 1999) and Germany (16 August 1999). Finland is the only state to explicitly refine its objection to match the reservation's focus on article 16.

[96] Objections registered by Austria (26 October 1994), Canada (25 October 1994), Germany (24 October 1994), Netherlands (14 July 1994), Portugal (26 October 1994).

[97] Objections registered by Denmark (12 February 1997) ('central provisions'; 'internal law may not be invoked as justification for failure to perform treaty obligations'), Finland (5 May 1994) ('unlimited and undefined'; internal law), Norway (25 October 1994) (internal law), Sweden (26 October 1994) (inevitable discrimination).

[98] Objections registered by Austria (13 February 2002) (noting general references to national law and Sharia), Denmark (21 February 2002) ('unlimited scope and undefined character', noting references to Islamic law and the Constitution), Finland (20 May 2002) (general reference to 'religious or other national law'), France (17 June 2002) (noting references to Sharia and the Constitution), Germany (14 March 2002) (noting references to Sharia and the Constitution), Ireland (13 June 2002) (noting references to 'religious law' and the Constitution), Netherlands (8 February 2002) (noting references to national law and Sharia), Norway (31 May 2002) ('general reference to national law'), Portugal (4 March 2002) (general reference to national law), Sweden (21 January 2002) (unlimited scope, reference to legislation and Sharia), UK (28 November 2001) ('general reference to national law').

As summarised in the chart below, stated reasons for objections are inconsistent. They appear to reflect more the views of the objecting state than the nature of the reservations. For example, when evaluating the same sets of reservations, Austria and Sweden tended to object that the reservations would inevitably sanction discrimination against women, whereas Norway and Spain saw the provisions as fundamental to CEDAW and thus not open to reservation. One common theme is that reservations based on Sharia tend to be seen as vague or unlimited; this holds true even for the UAE's reservations, which stated the rules of Sharia that are seen to be at odds with articles 2(f), 9, 15(2) and 16. Exceptionally, Latvia detailed its reasons for objecting to Qatar's reservations in such a way as to invite clarification at least in part: the article 2(a) reservation might refer to the inheritance of the throne, or have broader application; and the reservations against articles 9, 15 and 16 could infringe basic principles of equality, freedom of movement and preserving human rights within marriage. Otherwise, few of these objections went beyond pro forma language, and other than the UAE, the reserving states did not specify their Sharia concerns.

Table 1 CEDAW Reservation and Objection Groups

	Bahrain 2, 9(2), 15(4), 16	**Kuwait** 9(2), 16(1)(f)	**Oman** 9(2), 15(4), 16(1)(a), (c), (f)	**Qatar** 2(a), 9(2), 15(1), (4), 16(1)(a), (c), (f)	**Syria** 2, 9(2), 15(4), 16(1)(c), (d), (f), (g), 16(2)	**UAE** 2(f), 9, 15(2), 16
Austria	Sharia; 9, 15 disc; 2, 16 vague	16 o/p	disc	9, 15, 16 disc, fund	2, 9, 15, 16(1) disc; 16(2) vague b/c Sharia	disc
Belgium	n/a	16 o/p	fund	vague b/c natl, Sharia; 9, 15, 16 fund	n/a	n/a
Canada	9, 15 disc; 2, 16 vague	n/a	n/a	n/a	n/a	n/a
Czech Rep	n/a	n/a	disc	9, 15, 16 disc; vague b/c Sharia, natl	n/a	n/a
Denmark	9, 15 disc; 2, 16 vague	fund, natl	disc	n/a	2 fund; 9, 15, 16 disc	2, 15, 16 vague b/c Sharia

(continued)

Table 1 *(Continued)*

	Bahrain 2, 9(2), 15(4), 16	**Kuwait** 9(2), 16(1)(f)	**Oman** 9(2), 15(4), 16(1)(a), (c), (f)	**Qatar** 2(a), 9(2), 15(1), (4), 16(1)(a), (c), (f)	**Syria** 2, 9(2), 15(4), 16(1)(c), (d), (f), (g), 16(2)	**UAE** 2(f), 9, 15(2), 16
Estonia	n/a	n/a	disc	vague b/c natl	2 fund; 9, 15, 16(1) disc; 16(2) vague b/c Sharia	n/a
Finland	vague b/c relig/natl	9 natl; 16 unlim, vague	fund	vague b/c relig/natl; 9, 15, 16 disc, fund	2, 9, 15, 16(1) vague b/c Sharia, natl; fund; natl	vague b/c relig/natl; natl; fund
France	2, 16 vague b/c Sharia; 9, 15 unspec	n/a	unspec	n/a	2 unlim; 9, 15, 16 unspec	2, 15, 16 unlim; 9 unspec
Germany	2, 16 o/p; 9, 15 disc	n/a	disc	n/a	fund	2, 15, 16 vague b/c Sharia; disc
Greece	2, 16 unlim b/c Sharia	n/a	vague/ unlim	n/a	2 fund; 16(2) unlim b/c Sharia	2 fund; 2, 15, 16 unlim b/c Sharia
Hungary	n/a	n/a	disc	disc	n/a	n/a
Ireland	n/a	n/a	o/p	disc, vague b/c relig	n/a	n/a
Italy	n/a	n/a	n/a	9, 15, 16 disc; 2, 16 fund	2, 9, 15, 16(1) fund; 16(2) vague b/c Sharia	n/a
Latvia	n/a	n/a	9 disc; 15, 16 fund	2 vague, fund; 9, 15, 16 fund	n/a	2, 15, 16 vague b/c natl; o/p
Mexico	n/a	n/a	n/a	disc	n/a	n/a
Netherlands	2, 16 o/p b/c Sharia; 9, 15 o/p	o/p	o/p	9, 15, 16 vague b/c Sharia, natl	2, 9, 15, 16(1) o/p; 16(2) Sharia	2, 15, 16 vague b/c relig
Norway	n/a	natl	n/a	fund	fund; vague b/c Sharia	2 fund; 9, 15, 16 unspec

(continued)

Table 1 *(Continued)*

	Bahrain 2, 9(2), 15(4), 16	**Kuwait** 9(2), 16(1)(f)	**Oman** 9(2), 15(4), 16(1)(a), (c), (f)	**Qatar** 2(a), 9(2), 15(1), (4), 16(1)(a), (c), (f)	**Syria** 2, 9(2), 15(4), 16(1)(c), (d), (f), (g), 16(2)	**UAE** 2(f), 9, 15(2), 16
Poland	n/a	n/a	o/p	9, 15, 16 fund, natl, vague b/c Sharia	n/a	o/p
Portugal	n/a	16 o/p	fund	o/p	n/a	fund; vague b/c. Sharia, natl
Romania	n/a	n/a	disc	9, 15, 16 disc	o/p	n/a
Slovakia	n/a	n/a	o/p	2, 9, 15, 16 disc	n/a	n/a
Spain	n/a	n/a	fund	9, 15, 16 fund, vague b/c Sharia, natl	fund; 16(2) vague b/c Sharia	fund; 16 vague b/c Sharia
Sweden	2, 16 vague b/c Sharia; 9, 15 disc	disc	disc	9, 15, 16 disc; vague b/c Sharia, natl	2 fund; 9, 15, 16(1) disc; 16(2) vague b/c Sharia	vague b/c natl, Sharia; fund
UK	2, 15, 16 vague b/c refers to another system of law	n/a	15, 16 unspec	n/a	vague	2, 15, 16 vague b/c refers to another system of law

List of abbreviations and terms:
disc – inevitably discriminatory
fund – fundamental provisions
natl – reference to national law
o/p – object and purpose
relig – reference to religious law
Sharia – reference to Sharia
unlim – unlimited scope
unspec – no reason specified
vague – vague or unclear or similar
b/c – because

The remaining reservations to articles 2, 9, 15 and 16 attracted relatively little attention from treaty partners. Jordan, Kuwait and Malaysia have reservations against parts of articles 9 and 16. Only Sweden objected to Jordan's reservations to articles 9(2) and 16(1)(c), (d) and (g), as against the object and purpose of CEDAW. Austria and the Netherlands objected to Malaysia's reservations against articles 9(2) and 16(1)(c), (f) and (g).[99] Eight states objected to Kuwait's reservation against articles 9(2) and 16(1)(f), which differed from Jordan's and Malaysia's by indicating superseding sources of law, respectively the Nationality Act and Sharia. Algeria has reservations to articles 2, 15(4) and 16 in favour of its Family Code. Six European states objected,[100] citing incompatibility with CEDAW's object and purpose.[101] Morocco's remaining reservations pertain to articles 2 and 15(4), in favour of its Code of Personal Status. The sole objection came from the Netherlands, citing object and purpose and noting the Sharia connection regarding article 2.[102] Egypt and Iraq have reservations to articles 2 and 16, and withdrew reservations to article 9. Germany, Mexico, the Netherlands and Sweden objected to the original sets of reservations, citing incompatibility with object and purpose.[103] Libya retains reservations to articles 2 and 16(c), (d) following withdrawal of its general CEDAW reservation, which had attracted seven objections.[104]

Objections that attach reasons to specific articles often group articles 2 and 16 together, and articles 9 and 15. Reservations to articles 9(2) and 15(4) tend to be said to be inherently discriminatory, which cannot be within the purpose of an anti-discrimination treaty. Objections regarding articles 2 and 16 also often provide the same reason for both, but the reason varies from one objection to another. Reservations that are specific enough to inform treaty partners of particular concerns may draw fewer objections than broad reservations that omit concrete reasons. Reservations that refer to Sharia seem to get

[99] Objections registered by the Netherlands (21 July 1998) (incompatibility with object and purpose) and reiterated by Austria (24 June 2011) (inevitable discrimination).

[100] Algeria withdrew a further reservation to art 9(2) on 15 July 2009. The reservation had cited the Nationality Code and the Family Code.

[101] Objections registered by Denmark (24 March 1998), Germany (19 June 1997), Netherlands (1 July 1997) (also objecting to invocation of national law), Norway (3 July 1997) (invocation of 'internal or religious law'), Portugal (14 August 1997) and Sweden (14 August 1997).

[102] Objection registered by the Netherlands (14 July 1994).

[103] Objections to Egypt's reservations registered by Germany (10 July 1985), Mexico (19 July 1986), Netherlands (23 July 1990), Sweden (17 March 1986) (apparently not actually objecting, but stating that it could do so 'as a matter of principle'). Objections to Iraq's reservations registered by Germany (3 March 1987), Mexico (4 December 1986), Netherlands (23 July 1990), Sweden (12 March 1987). Mexico did not object to Egypt's art 2 reservation, despite its being broader than Iraq's.

[104] Objections registered by Denmark (3 July 1990) (invoking 'internal law as justification for failure to perform a treaty'), Finland (8 June 1990) (object and purpose), Germany (10 July 1985) (object and purpose), Mexico (11 January 1985) (inevitably discriminatory), Netherlands (23 July 1990) (object and purpose), Norway (16 July 1990) (object and purpose; noting also vagueness due to Sharia reference), Sweden (17 March 1986) (inevitably discriminatory). None of these states updated their objections after Libya refined its general reservation to focus on arts 2 and 16 on 5 July 1995.

more objections. With the exceptions of Jordan and Morocco, reservations that implicate multiple articles usually attract more objections than do narrower reservations.[105] The specificity of Morocco's reservations, including reference to the Code of Personal Status, may have made them more palatable to treaty partners. The timing of Jordan's ratification, just after the 1991 Gulf war, and the relative narrowness of its reservation, may have influenced treaty partners not to object.

F. Patterns of CEDAW Reservations and Objections

Reservations can indicate points where Sharia and international law might clash. In addition to general reservations to CEDAW or to article 2's requirements for implementing measures, which may show that the states have yet to deeply engage with how CEDAW and Sharia interrelate, there seems to be significant disagreement around articles 9(2), 15(4) and 16(1) which govern respectively inheritance of nationality, the right to free movement and residence, and rights and duties within marriage. Of these, articles 9(2) and 15(4) seem of less concern, evidenced by many fewer objections to article 9(2) reservations and only six reservations to article 15(4). The article 15(4) reservations of Algeria and Morocco no longer have any effect, due to legislative and constitutional changes, which suggests they could be withdrawn. Article 16(1) is the main locus of controversy. This resembles the pattern regarding the ICCPR, where articles 23 and 23(4) relating to marriage elicited a high proportion of the reservations and objections that concerned Islamic states party.

Numerous Islamic states party to CEDAW, predominantly in the Maghreb and Middle East, have reduced or withdrawn reservations. In 1995, Libya recast its general reservation to indicate instead Sharia-related concerns regarding inheritance of estates in the context of article 2, and protecting women's rights guaranteed by Sharia that might be affected by article 16(c) and (d). In 1999, the Maldives refined its Sharia-based general reservation to apply to articles 16 and 7(a), the latter reservation withdrawn in 2010. Kuwait, the only other Islamic state to reserve against article 7(a), withdrew that reservation in 2005.[106] Malaysia withdrew its article 7(b) reservation in 2010, leaving no Islamic states reserving against article 7's guarantee of equal participation in voting and holding public office. In 2014 Mauritania narrowed its general reservation based on Sharia and its Constitution to articles 13(a) and 16, and Tunisia withdrew its

[105] Only Sweden (14 July 1994) objected to Morocco's reservations to articles 2, 15(4), 9(2) and 16(1)(c), (d) and (g), as inevitably discriminatory against women. Only the Netherlands (14 July 1994) objected to Morocco's reservations to articles 2, 15(4), 9(2) and 16, the latter two of which Morocco withdrew in 2011.

[106] Austria, Belgium, Finland and Portugal had specifically objected to Kuwait's reservation to art 7(a).

reservations to articles 9(2), 15(4), 29(1) and parts of 16(1), leaving it in essentially full adherence.[107] Egypt in 2008, Algeria in 2009 and Iraq in 2014 withdrew reservations to article 9(2). Morocco withdrew reservations to articles 9(2) and 16 in 2011, leaving reservations to articles 2 and 15(4).[108] Jordan withdrew its article 15(4) reservation in 2009. Malaysia's reservations, refined in 1998 and 2010, still encompass article 9(2) and most of article 16(1), so may not allay objecting states' concerns.[109] At least formally, disagreement between Islamic states and other states party has narrowed with these changes.[110]

In the twenty-first century, Islamic states have moved measurably closer to unreserved adherence to CEDAW. Withdrawals, the phrasing of remaining reservations, and patterns of objections suggest they could move closer still, without compromising Sharia. The withdrawals may show that on reflection Islamic states perceive more limited potential for conflict with Sharia or national law that at first seemed likely. The fact that different states withdrew Sharia-based reservations to different provisions, for example article 9(2) on nationality or article 15(4) on residence, may indicate that more such refinements are possible.[111] The bulk of the remaining article 9 reservations do not obviously relate to Sharia. The relatively few points of controversy concerning article 15 may be susceptible to resolution through more focused readings of Islamic law,

[107] A general reservation based on the 'General Provisions' chapter of the 1959 Constitution, which dealt largely with state symbols and individual rights, remains. Objections to Tunisia's reservations registered by Germany (15 October 1986), Netherlands (23 July 1990), Sweden (17 March 1986). All related to articles 9, 15 and 16.

[108] The reservation to article 16 had referred to the Islamic balancing of divorce with property rights.

[109] Malaysia initially reserved against articles 2(f), 5(a), 7(b), 9 and 16. Discord has lessened at least to the extent of the articles for which reservations were withdrawn, two of which, 2(f) and 5(a), Finland and the Netherlands had cited as particularly close to CEDAW's object and purpose. Malaysia's reservation now reads as a general Sharia-based reservation, but specifying that the only areas of concern are articles 9(2), 16(1)(a), (c), (f) and (g). Objections registered by Austria (24 June 2011) (reservations to arts 9 (2), 16 (1)(a), (f), (g) would inevitably result in discrimination against women), Denmark (9 December 2005) ('central provisions'; invoking internal law to justify failure to perform a treaty), Finland (16 October 1996) ('general reference to religious and national law'; invoking internal law to justify failure to perform a treaty; arts 2(f) 5(a) are 'fundamental provisions'), France (20 July 1998) (object and purpose), Germany (8 October 1996) (object and purpose), Netherlands (15 October 1996) ('general principles of national law and the Constitution'; reservations to arts 2(f), 5(a), 9 and 16 are 'incompatible with the object and purpose of the Convention'), Norway (16 October1996) ('general principles of internal or religious law'; invoking internal law to justify failure to perform a treaty), Sweden (25 October 1996) (object and purpose; possibly inevitable discrimination (the UN archive is not entirely clear on this)). On 21 July 1998 the Netherlands acknowledged Malaysia's first refinement of its reservations, particularly with respect to articles 5(a), 16(1)(a) and 16(2), and 'declare[d] that it assumes that Malaysia will ensure implementation of the rights enshrined in the above articles and will strive to bring its relevant national legislation into conformity with the obligations imposed by the Convention'.

[110] In addition to the changes described in this paragraph, Bahrain updated the language of its reservations in 2014, reiterating its reservation to article 9(2) and recasting the reservations to articles 2, 15(4) and 16 to specify implementation 'without breaching the provisions of the Islamic Shariah', but stated that these editorial updates reflected no substantive changes.

[111] Having already changed its Family Code in a way that removed the apparent conflict with article 15(4), Algeria could withdraw its reservation to that article without changing its domestic laws or practice.

or may not implicate Sharia at all. Partial withdrawals, and the phrasing of reservations, suggest that Islamic states with broad reservations to article 16 or 16(1) could refine those reservations. In view of all these changes, it may be possible for more Islamic states to join the treaty with reduced hesitations due to Sharia, and for current Islamic states party to revisit their own reservations. Especially where Islamic states have withdrawn or otherwise resolved differing aspects of similar reservations, those states could mutually test the resilience of their remaining reservations by exchanging and discussing their interpretations of Sharia. Similarly, the increased specificity of the reservations may enable international partners to revisit their objections.

Even after refining reservations as far as possible, incompatibilities may remain between Islamic states' views and prevailing interpretations of CEDAW. These may look less intractable if treaty partners consider tolerating carve-outs for certain rules of property or testimony. Disagreement over the compatibility of CEDAW with Sharia runs mostly between EU states and Islamic states, which suggests a potential accommodation analogous to the reconciliation of Pakistan's ICCPR reservations. There may also be opportunities in Islamic law to work around incompatibilities. Measured by numbers of reservations and corresponding objections, most of the disagreement resolves into questions of divorce and marital property, and paternal inheritance of nationality. Inheritance of estates may also present a point of friction. Whether offsetting the right to initiate divorce with financial entitlements can ever be construed as equality is a subjective judgement. However, according to some of the main schools of Islamic law, women can freely contract. This could include deciding whether to assent to the sums proposed in the marriage contract, or insisting that the husband surrender the right of *talaq*, discretionary divorce.[112] Inheritance rules in the Quran similarly reflect a balancing effort within a broader system of property rights and family law. In contrast, the concept of nationality post-dates the revelation of Sharia. The rule that a child's nationality follows that of the father might be more relevant to a society built around extended families than in a modern administrative state. Islamic states could consider whether it is intrinsic to Sharia, or merely reflects their particular administrative choices.

IV. THE CONVENTION ON THE RIGHTS OF THE CHILD (CRC)

Disagreement between Islamic states and CRC treaty partners is concentrated around adoption and, especially, freedom of religion. These manifest respectively in reservations to articles 20 and 21, and article 3 of the optional protocol on the sale of children, child prostitution and child pornography (OPSC), and to article 14. These, alongside general reservations, account for most of the

[112] Professor Sherman A Jackson presented this argument during a lecture in winter/spring 2007 that the author attended.

CRC reservations that raised Islamic concerns. Otherwise, only article 2 (non-discrimination), article 7 (rights to a name, nationality and parental care) and article 17 (access to information and media) were subject to reservations by more than one Islamic state. Algeria reserved against articles 13 and 16, regarding freedom of expression and privacy, citing national laws relating to matters such as public order or decency, and oversight of publications intended for children. Malaysia retains reservations against article 28(1)(a) on providing free primary education, and article 37 regarding criminal punishments, both with reference to Malaysia's Constitution and national laws.[113]

Ten Islamic states entered general reservations to the CRC.[114] Four of these have been refined or withdrawn and three more are arguably of limited scope. Iran and Saudi Arabia now have blanket reservations that reference Islamic law.[115] Nine European states objected to both, and Italy objected to Iran's.[116] Mauritania raised a general reservation at signature, but did not affirm it on ratification, implicitly withdrawing it. At ratification, Kuwait replaced its general reservation made upon signature with a reservation to article 21, citing Sharia and 'local statutes in effect'; similarly, the Maldives restated its general reservation concerning adoption to apply only to articles 14 and 21. Pakistan in 1997 and Djibouti and Qatar in 2009 withdrew general reservations, the latter substituting reservations to articles 2 and 14. Somalia and Syria highlighted article 14 under general Sharia-based reservations, Somalia citing articles 20 and 21 as well.[117] Seven states objected to Syria's reservation.[118]

[113] Malaysia withdrew further reservations to arts 22, 28(1)(b)–(e), (2), (3), 40(3), (4), 45.

[114] Djibouti, Iran, Kuwait, the Maldives, Mauritania, Pakistan, Qatar, Saudi Arabia, Somalia and Syria. Qatar made a general reservation based on Sharia to the OPSC, but withdrew it on 18 June 2008.

[115] Iran's reservation cites 'Islamic Laws and the international legislation in effect'. Saudi Arabia's reservation applies to 'all such articles as are in conflict with the provisions of Islamic law'.

[116] Objections to Iran's reservation registered by Austria (6 September 1995) (vague), Denmark (16 November 1995) ('unlimited scope and undefined character'), Finland (5 September 1995) (internal law), Germany (11 August 1995) (vague), Ireland (5 September 1995) (vague), Italy (25 September 1995) ('unlimited scope and undefined character'), Netherlands (undated) ('general principles of national law'), Norway (5 September 1995) ('general principles of national law'), Portugal (13 December 1994) ('general principles of National Law'), Sweden (1 September 1995) ('general principles of national law'). Objections to Saudi Arabia's reservation registered by Austria (3 March 1997) (vague), Denmark (10 February 1997) (vague, unlimited scope; noting the reference to Islamic law), Finland (5 September 1995) (invocation of 'internal law as justification for failure to perform a treaty'), Germany (12 February 1997) ('general principles of national law'), Ireland (13 March 1997) (object and purpose), Netherlands (3 March 1997) ('general principles of national law'), Norway (13 March 1997) ('broad scope and undefined character'), Portugal (30 January 1997) ('general principles of National Law'), Sweden (18 March 1997) ('general principles of national law').

[117] Somalia reserved against arts 14, 20, 21 'and any other provisions … contrary to the General Principles of Islamic Sharia'. Syria reserved against CRC provisions that 'are not in conformity with' national legislation and principles of Sharia, highlighting article 14 specifically as concerns freedom of religion. Afghanistan declared upon signature that at ratification it might enter reservations grounded in Sharia 'and the local legislation in effect', but in the event did not do so.

[118] Objections registered by Denmark (16 November 1995) ('unlimited scope and undefined character'), Finland (24 June 1994) ('may not invoke … internal law as a justification for failure to perform

Somalia's reservation drew 20 objections,[119] considerably more than any other general reservation to the CRC by an Islamic state. This might reflect its recent provenance, upon Somalia's ratification in 2015.

Article 14, on freedom of thought, conscience and religion, is the most controversial article in the CRC between Islamic states and other states party, judged by reservations and objections. The concern is with permitting a child to change religion. In addition to Somalia and Syria raising it under general reservations, ten Islamic states entered reservations against article 14.[120] Most of these encompass other articles as well, except for Syria and Oman, which mention only article 14,[121] and Iraq and Morocco, which specify article 14(1). The reservations of Iraq, Jordan, Syria and the UAE refer to Sharia, and that of the Maldives to the constitutional rule that all citizens must be Muslims. Morocco's interpretive declaration to article 14(1) is nuanced, stating 'that Islam, the State religion, shall guarantee freedom of worship for all' and referencing the Family Code for the right of children to receive from their parents

a treaty'), Germany (21 September 1994) (vague), Italy (18 July 1994) (too broad), Netherlands (6 February 1995) ('general principles of national law'), Norway (25 October 1994) ('general principles of national law'), Sweden (29 March 1994) ('general principles of national law'). Syria responded to Germany's objection via a communication of 6 May 1996 to the Secretary-General, indicating that Syrian law does not recognise adoption due to Sharia-based concerns, providing instead for foster care that does not involve assimilation to a family's bloodlines.

[119] Objections registered by Austria (31 March 2016) (unclear due to Sharia reference), Belgium (9 May 2016) (unclear due to Sharia reference), Bulgaria (27 September 2016) (essential provisions; unclear due to Sharia reference), Czech Republic (17 May 2016) (essential provisions; unclear due to Sharia reference), Finland (26 April 2016) (object and purpose, noting Sharia reference), France (29 September 2016) (object and purpose), Germany (11 December 2015) (object and purpose), Hungary (26 August 2016) (unclear due to Sharia reference; essential provisions), Ireland (25 May 2016) (object and purpose, particularly arts 14, 20 and 21), Italy (23 September 2016) (objecting only to arts 14, 20 and 21 reservations, for object and purpose), Latvia (23 March 2016) (art 14: fundamental; arts 20, 21: object and purpose; also noting vagueness due to Sharia reference), Moldova (30 September 2016) (object and purpose; unclear due to Sharia reference), Netherlands (8 March 2016) (object and purpose, noting Sharia reference), Norway (29 September 2016) (unclear due to Sharia reference; arts 14, 20 and 21 are 'essential elements'), Poland (28 September 2016) (object and purpose), Portugal (28 September 2016) (object and purpose, unclear due to Sharia reference), Romania (3 May 2016) (object and purpose; vague), Sweden (18 April 2016) ('general references to national or religious law', Switzerland (6 July 2016) (unclear due to Sharia reference; also objecting to art 14 and 20 reservations), UK (30 September 2016) (unclear, 'general reference to a system of law').

[120] Brunei, Jordan, Malaysia, the Maldives, Oman, Qatar and the UAE specified article 14 as a whole. Iraq and Morocco (interpretive declaration) reserved against article 14(1) only, and Algeria against article 14(1) and (2).

[121] Oman's lone reservation to the optional protocol on children in armed conflict references its CRC reservations. Objections registered by Finland (15 November 2005), Germany (17 November 2005), Hungary (undated), Norway (2 December 2005) (object and purpose), Poland (1 December 2005), Spain (2 December 2005), Sweden (5 October 2005), UK (17 August 2005). Apart from Norway, all objections in some way stated that the general reference to Sharia and national law did not allow treaty partners to understand the scope and content of the derogations, ie they were vague. Oman refined its CRC reservation in 2011, to refer only to the article 14 recognition of a child's right to freedom of religion.

'religious guidance and education based on good conduct', replacing a general Sharia-based reservation to article 14.

Adoption appears to be receding as a concern. Article 20 commits states to provide 'special protection and assistance' to children deprived of their family environment. Article 21 imposes boundaries around adoption, such as that 'the best interests of the child' must remain paramount. The issue is whether Islamic law permits the introduction into a family of a biologically unrelated person. In clarifying its reservation to these articles, since withdrawn, Syria indicated that the concern lay with possibly mingling unknown bloodlines into families via full legal adoption in the western sense.[122] Considering that article 21 only regulates states that legally permit adoption, it seems superfluous for Islamic states to reserve against it.[123] Nonetheless, Brunei, Jordan, Kuwait,[124] the Maldives, Somalia and the UAE have reservations concerning article 21; Brunei, Jordan and Somalia, article 20 as well. Egypt, Oman and Syria have withdrawn reservations to articles 20 (Egypt) and 21 (all). Egypt also withdrew a general reservation relating to adoption. Brunei narrowed its reservations to article 20(3) and 21(b)–(e), implicitly accepting a state duty to care for children left without families, and retaining its reservation regarding international adoption. The references to adoption in article 3 of the OPSC drew pro forma reservations and objections, but the provisions concerned appear not to apply to states that do not permit adoption, which would make the issue moot.[125] Arguably, out of articles 20 and 21 only article 20(3), with its recognition of the institution of adoption, potentially conflicts with Islamic law. Article 20(3) does not however commit states to permit adoption, but only recognises it as a type of surrogate care arrangement that states may provide for, alongside for example Islamic *kafalah*.[126]

[122] Syrian laws 'do not recognize the system of adoption, although they do require that protection and assistance should be provided to those for whatever reason permanently or temporarily deprived of their family environment and that alternative care should be assured them through foster placement and kafalah, in care centres and special institutions and, without assimilation to their blood lineage (nasab), by foster families, in accordance with the legislation in force based on the principles of the Islamic Shariah' (communication to the Secretary-General 'with regard to the objection by the Government of Germany to [Syria]'s reservations made upon ratification', 6 May 1996). Syria withdrew its reservation to arts 20 and 21 on 13 June 2012.

[123] See, eg, Latvia's objection to Somalia's reservation, arguing that articles 20 and 21 'provide only general principles, leaving the issues of practical implementation up to the State Parties'.

[124] Kuwait's article 21 reservation linked adoption to the potential for 'abandoning the Islamic religion'.

[125] Malaysia and Syria entered reservations to article 3(1)(a)(ii) and Kuwait, Syria and the UAE to article 3(5). All elicited objections. However, article 3(1)(a)(ii) bars '[i]mproperly inducing consent' for adoption and article 3(5) refers to 'persons involved in the adoption of a child', which would have no effect in states that do not legally recognise adoption. Oman made a reservation referring to its CRC reservations, which attracted objections, but this also appears to be moot because Oman's reservations have since been narrowed to focus only on article 14 CRC, dealing with freedom of religion, a topic unrelated to this optional protocol.

[126] Sharia requires the protection and support of orphans and abandoned children. *Kafalah* is a contract by which a family commits to house and care for a child until the age of majority, but without formally recognising the child as a member of the host family. See, eg, Usang M Assim and Julia Sloth-Nielsen, 'Islamic *kafalah* as an Alternative Care Option for Children Deprived of a Family Environment' (2014) 14 *African Human Rights Law Journal* 322, 328–29. *Kafalah* is recognised in

Beyond articles 14, 20 and 21, only CRC articles 2, 7 and 17 attracted reservations from more than one Islamic state. Malaysia and Qatar reserved against article 2, non-discrimination; Malaysia and the UAE against article 7, concerning rights to registration, a name and nationality; and Algeria and the UAE against article 17, access to mass media. Qatar presumably perceives a potential Sharia issue with article 2, as its reservation against article 2 (and 14) remains after withdrawing a general reservation based on Sharia. The article 17 reservations specified restricting media to protect traditions or values.[127] In its article 7 reservation the UAE stated that 'acquisition of nationality law is an internal matter'.[128] In objecting, the Netherlands stated that it assumes the UAE will implement article 7 in compliance with 'the relevant international instrument' as well as national law, and Italy omitted to object to the article 7 reservation. No other states that objected to the reservations of Malaysia, Qatar or the UAE raised articles 2, 7 or 17.

Most objections to Islamic states' CRC reservations did not distinguish among articles. They tended to cite the invocation of national or religious law, as in itself grounding an objection or as leading to unlimited or unclear scope; impermissibility of reserving against key provisions; or simply that the reservations run against the treaty's object and purpose. Patterns are inconsistent. For example, no states objected to Algeria's, Iraq's or the Maldives' reservations, although they cover articles 14 (all) and 21 (Maldives), which had raised concerns when other states reserved against them. Similar sets of reservations received considerably different numbers of objections, with Jordan's reservations that named articles 14, 20 and 21 drawing three, while Somalia's reservations to those articles attracted 20.[129] Geostrategic factors may have been influential; for example, Jordan and Kuwait, whose article 21 reservation also drew three objections,[130] acceded to the CRC around the time of the 1990–91 Persian Gulf war. Brunei and Malaysia, by contrast, saw ten objections to their

the CRC as an alternative to adoption, a compromise Islamic states secured based on 'cultural and religious factors' (at 325).

[127] Algeria's reservation refers to its Penal Code, which among other relevant rules prohibits the media from presenting topics 'contrary to Islamic morality, national values or human rights or [that] advocate racism, fanaticism and treason'. The UAE's reservation accepts article 17 'in light of the requirements of domestic statutes and laws' and in 'such a manner that the country's traditions and cultural values are not violated'.

[128] Kuwait also declared that it understands article 7 as 'signify[ing] the right of the child who was born in Kuwait and whose parents are unknown (parentless) to be granted the Kuwaiti nationality as stipulated by the Kuwaiti Nationality Laws' (declaration on ratification, 21 October 1991).

[129] Objections to Jordan's reservation registered by Finland (9 June 1993) ('invoke general principles of national law as justification for failure to perform its treaty obligations'), Ireland (undated) ('general principles of national law'), Sweden (20 September 1991) ('general principles of national law'). The objections to Somalia's reservations are listed in n 117, above.

[130] Objections to Kuwait's reservation registered by Czechoslovakia (7 June 1991) (invoking internal law to justify 'failure to perform a treaty'), Ireland (undated) ('invoking general principles of national law'), Portugal (15 July 1992) ('invoking general principles of National Law').

reservations in 1995.[131] Reservations that refer broadly to Sharia also seem to attract more objections: 11 states objected to Qatar's reservations in 1995;[132] only five objected to Oman's 1996 reservations and three to those of the UAE, both of which named specific articles, without general reference to Sharia or national law.[133] Syria's reservation to article 14, alongside an overarching general Sharia reservation, attracted only seven objections, but again the political situation may have played a role (Syria signed the CRC in 1990 and ratified it in 1993).[134] The 20 objections to Somalia's reservation may be most indicative of the international community's view of general invocations of Sharia, as ratification and the subsequent objections came recently, in 2015.

Especially in the twenty-first century, Islamic states have continued to refine their reservations to the CRC. Maintaining Sharia as a priority while stating a

[131] Objections to Brunei's reservation registered by Austria (3 March 1997) (unclear), Denmark (10 February 1997) ('unlimited and undefined character', national law to justify failure to perform; noting the reference 'to the beliefs and principles of Islamic law'), Finland (20 March 1997) ('general reference to national law'), Germany (12 February 1997) ('general principles of national law'), Ireland (13 March 1997) (object and purpose), Italy (23 December 1996) ('general principles of national law'), Netherlands (3 March 1997) ('general principles of national law'), Norway (4 March 1997) ('unlimited scope and undefined character'), Portugal (30 January 1997) ('invoking general principles of National Law'), Sweden (13 August 1997) ('general principles of national law'). Objections to Malaysia's reservation registered by Austria (18 June 1996) (unclear), Belgium (1 July 1996) (object and purpose), Denmark (2 July 1996) ('central provisions of the Convention'; invoking 'internal law' to justify 'fail[ing] to perform treaty obligations'), Finland (14 June 1996) ('central provisions'; invoking 'internal law' or 'national policies' to justify 'failure to perform its treaty obligations'), Germany (20 March 1996) ('general principles of national law'), Ireland (26 June 1996) (object and purpose), Netherlands (25 June 1996) ('general principles of national law'), Norway (27 June 1996) ('very broad scope and undefined character'), Portugal (4 December 1995) ('invoking general principles of National Law'), Sweden (26 June 1996) ('general principles of national law').

[132] Objections registered by Austria (18 June 1996) (unclear), Belgium (1 July 1996) (object and purpose), Denmark (16 November 1995) ('unlimited scope and undefined character'), Finland (14 June 1996) ('central provisions'; invoking 'internal law' or 'national policies' to justify 'failure to perform its treaty obligations'), Germany (20 March 1996) ('general principles of national law'), Italy (14 June 1996) ('general principles of national law'), Netherlands (11 June 1996) ('general principles of national law'), Norway (14 June 1996) ('unlimited scope and undefined character'), Portugal (11 January 1996) ('invoking general principles of National Law'), Slovakia (9 August 1993) (invoking 'internal law [to justify] failure to perform a treaty'), Sweden (29 March 1994) (objecting to Qatar's reservation made on signature).

[133] Objections to Oman's reservation registered by Finland (6 February 1998) ('general reference to national law'; invoking internal law to justify failure to perform treaty obligations), Germany (28 January 1998) ('general principles of national law'), Netherlands (10 February 1998) ('general principles of national law'), Norway (9 February 1998) ('unlimited scope and undefined character'; fundamental rights and 'unspecified reference to domestic law'), Sweden (9 February 1998) ('general principles of national law'). Objections to the UAE's reservation registered by Austria (16 November 1998) (unclear), Italy (2 April 1998) ('general principles of national law'), Netherlands (6 April 1998) ('general principles of national law', and presuming that the UAE would follow international conventions regarding birth registration, acquisition of nationality and other matters covered by CRC art 7(1)).

[134] Objections registered by Denmark (16 November 1995) ('unlimited scope and undefined character'), Finland (24 June 1994) (invocation of 'internal law as justification for failure to perform a treaty'), Germany (21 September 1994) (unclear), Italy (18 July 1994) ('too comprehensive and too general'), Netherlands (undated) ('general principles of national law'), Norway (25 October 1994) ('general principles of national law'), Sweden (29 March 1994) ('general principles of national law').

narrower specific issue suggests that in other areas, in the view of these states, the CRC does not interfere with Sharia. Oman and Malaysia withdrew the only reservations of Islamic states to articles 9 and 30 (Oman, in 2014) and articles 22, 28(b)–(e), 40, 44 and 45 (Malaysia, in 2010). Other refinements indicate freedom of religion as the only major point of friction between Islamic states and treaty partners. Kuwait (on ratification, 1991) and Qatar (2009) replaced general reservations that cited Sharia with reservations that focused on the possibility of a child's turning from Islam. Similarly, Pakistan's 1997 withdrawal of a general reservation that raised Islamic law also suggests that its institutions responsible to maintain the constitutional standing of Islamic law see no inherent conflict with the CRC. At the same time, these refinements alongside the persistence of Islamic states' widespread reservations to article 14 imply that apostasy is a significant question. The concern over adoption having been reduced by withdrawals, and now arguably confined to acknowledging the institution in article 20(3), represents almost the entire substantive disagreement between Islamic states and other states party over the CRC.

V. CONCLUSION

This chapter mapped the human rights related disagreements between Islamic states and the international community, as reflected in UN treaty adherences, reservations and objections. Unsurprisingly, the main issues are equality within marriage, and apostasy. These account for disputed views of articles 3, 23 and 18 ICCPR; article 16 CEDAW; and article 14 CRC. Outside of these articles, most points of controversy concern only a few states, or are ephemeral upon analysis, such as the question of adoption. Algeria, Kuwait, Libya, Malaysia, Mauritania, Qatar, Saudi Arabia and the UAE each have at least one further contested reservation that few or no other Islamic states share,[135] possibly indicating that the underlying concerns reflect particularities of the reserving states' legal systems rather than something intrinsic to Sharia.

Some gaps remain in the coverage of Islamic states by UN human rights treaties, reflected in non-adherence, or in general reservations traceable to Islamic law. Brunei and Malaysia are not parties to the ICCPR, ICERD or CAT,[136] and Brunei has general reservations to CRPD and CEDAW. Iran is not party to CAT or CEDAW and has general reservations to CRPD and CRC. Oman, Palestine, Qatar, Saudi Arabia and the UAE have not joined the ICCPR. Saudi Arabia also

[135] Algeria: CRC arts 13, 16, 17. Kuwait: CRPD arts 18(1)(a), 23(2), and declarations regarding arts 19(a), 25(a). Libya: CRPD art 25(a). Malaysia: CRPD arts 15, 18, and declarations regarding arts 3(b), (e), 5(2), 30; CRC arts 2, 7, 28(1)(a), 37. Mauritania: CEDAW art 13(a). Qatar: CRC art 2, and declarations regarding CEDAW arts 1, 5(1). Saudi Arabia: general reservation to ICERD. UAE: CRC arts 7, 17.

[136] Brunei signed CAT (22 September 2015) but has not yet ratified it.

has general reservations to ICERD and CRC, and, along with Oman, to CEDAW. Pakistan reserved generally against CEDAW, in favour of its Constitution. Somalia is party to neither CRPD nor CEDAW and entered a general reservation to CRC (which refers also to articles 14, 20 and 21, concerning religious freedom and adoption). Djibouti also has a general reservation to CRC. Palestine's non-adherence to CEDAW and Syria's general CRC reservation, which also referenced article 14, are the only other points of non-participation of Islamic states in UN human rights treaties other than ICMW and CPED. Algeria, Bahrain, Egypt, Morocco and Syria did however reserve against article 2 of CEDAW, the provision that requires action to implement the treaty in domestic law and practice.

A relatively few specific areas of disagreement might concern Sharia. Nearly all Sharia-related reservations concern adoption, apostasy, corporal punishment, divorce, inheritance of estates and of nationality, legal capacity, male inheritance of a hereditary throne or reserving high office to only Muslims. Some may be easily resolved: no provision requires states to institute adoption, and treaty partners appear largely content to leave inheritance of nationality and monarchy to national regulation. Corporal punishment and rules of legal standing are more problematic, but to a limited extent: only Qatar and the UAE reserved against the definition of torture, while Iran, Malaysia and Oman have not acceded to CAT; and the disagreement over legal capacity might be reduced if Qatar and the UAE, the two states with CEDAW reservations in this area, adopted Pakistan's narrow reading of the Quranic rule equating a man's evidence to that of two women for written, forward looking financial agreements.

This leaves apostasy, divorce and inheritance of estates. Apostasy arises around articles 18 ICCPR and 14 CRC, accounting for about a third of the Sharia-based reservations and objections regarding the ICCPR, and for the majority of disputed points of the CRC. The balancing of a husband's sole right to pronounce divorce versus a wife's property claims lies behind most of the remaining contested reservations, concerning article 23 or 23(4) ICCPR and article 16(1) CEDAW. Apostasy arises in reservations to article 18 ICCPR and article 14 CRC. These two concerns are widespread: the majority of Islamic states that have adhered to CRC have reservations regarding freedom of religion, and similarly with CEDAW and equal rights within marriage. Only three states, Libya, Qatar and the UAE, raised reservations regarding inheritance, but it does appear to be a point of difficulty, because the Quran itself explicitly and precisely specifies rules of inheritance. Across the treaties as a whole, the reservations of Algeria, Kuwait, Malaysia and Mauritania are notable for their tendency to cite specific provisions, but did not raise CEDAW article 15(4) or CRC articles 20 or 21.[137] This might indicate that on close review, those provisions can be construed compatibly with Sharia. Brunei, Iran, Malaysia,

[137] Algeria formally has a reservation to article 15(4) CEDAW, but it is moot in light of current national law. See discussion above.

Saudi Arabia and Somalia have tended more than other states to take blanket measures such as general reservations or simply not adhering to a particular treaty. Reservations to specific CEDAW articles are concentrated around the Arabian Peninsula, plus Syria. CEDAW and CRC have attracted a disproportionate share both of general reservations and of reservations to specific articles; the specific reservations may highlight the main Sharia related concerns, thus indicating opportunities to refine general reservations so international partners may better understand their extent.

Over time, Islamic states have drawn closer to full adherence to the UN human rights treaties. This manifests in new accessions, as well as refinement or withdrawal of reservations. Pakistan moved considerably towards accommodation in 2011, withdrawing most of its reservations to the ICCPR and CAT. CEDAW and CRC have seen numerous shifts. Since 1999, all reservations to CEDAW article 7 (voting and access to office) have been withdrawn, as well as a significant fraction of the reservations to article 9(2) (nationality), article 15(4) (marital cohabitation) and article 16(1) (rights within marriage). Refinements have left only Iran and Saudi Arabia with general Sharia-based reservations to CRC. Alongside withdrawals of some article 20 and 21 reservations, and of all Islamic states' reservations to further articles except 14, this reduces the zone of CRC dispute to adoption and apostasy. With the bulk of CEDAW reservations relating to divorce, marital property rights and inheritance of estates, Islamic states and their international treaty partners seem now to have isolated the areas of contention between Sharia and international law.

The next chapter looks at human rights through the lens of Islamic international law, that is, the collective understanding of Islamic states of their international obligations. Reservations to international treaties may raise legitimate concerns, but referring to Islamic law does not automatically disable a right. Islamic law recognises rights of the *umma* that governments may not violate. At least to the extent that the substance of those rights coincides with that recognised in international treaties, a reservation in the name of Islamic law might not be capable of disabling a right recognised by 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, international human rights law can displace Islamic law at most to the extent of their treaty commitments. Absent such commitments, an Islamic state might nonetheless find common ground with international norms through exploring alternative interpretations of the Islamic injunctions. The common declarations and agreements of Islamic states regarding the obligations imposed by Sharia supply a framework for this exercise.

7

Islamic International Human Rights Law

In addition to participating in the UN human rights treaty system, Islamic states endorse a set of international Islamic human rights documents. These developed in the second half of the twentieth century, largely in an effort to construct Islamic interpretations of the rights described in the UN system. Like the international system, the Islamic human rights regime centres on an aspirational document, the Universal Islamic Declaration of Human Rights (UIDHR) as well as interstate institutions and agreements, most prominently the Organisation of Islamic Cooperation (OIC) and its 1990 Cairo Declaration on Human Rights in Islam, agreed by the 19th Conference of Foreign Ministers. While it lacks the Cairo Declaration's state imprimatur, the UIDHR has won respect as a correct statement of universal rights inherent in Islam. It describes Islamic human rights as per the collective understanding of an international conference of 'eminent Islamic scholars and representatives of Islamic movements'.[1] Together, these instruments show a consensus baseline understanding among Islamic states of their human rights obligations.

The international Islamic documents complete the framework of law that determines how to interpret a human rights guarantee made by an Islamic state. This chapter uses that framework to identify and analyse the main points of apparent discord between Islamic states and international human rights standards. The first part presents the UIDHR and the Cairo Declaration as the core of an emerging consensus of Islamic states over how to implement their obligations under international human rights law, arguing that the resulting body of rules binds Islamic states to obligations closely similar to those spelled out in the UN treaties. The second part assesses the relationships among the three components of the book's analytical framework – Sharia, UN treaties and the international consensus of Islamic states – to locate points of real discord. It examines intersections of Sharia with the UN treaties, focusing on Islamic states' treaty reservations; draws out the relationship between Sharia and the international Islamic instruments; and compares those instruments with the

[1] CG Weeramantry, *Islamic Jurisprudence: An International Perspective* (Palgrave Macmillan, 1988) 122.

international bill of rights, arguing that examining some apparent conflicts, for example regarding the freedom of association, in the simultaneous light of international law and Islamic law shows them to be largely illusory. The final part identifies the remaining points where interpretations of Sharia operative in Islamic states collide with international norms. It proposes that in these areas, Islamic states could build on the work of modern Islamic scholars, and revisit their conclusions of Islamic law in light of changed circumstances.

I. AN ISLAMIC HUMAN RIGHTS CONSENSUS

Islamic human rights declarations aim not to supplant the UN 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'.[2] 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',[3] 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 compels them to protect human rights. That far at least, international law and the Islamic instruments agree. However, it remains debatable whether they are entirely compatible in how they understand the content of those rights.

The Cairo Declaration and the UIDHR describe specific rights. Their formulation (as presented in English) closely resembles that of the Universal Declaration of Human Rights (UDHR) and similar instruments. They also cover many of the same substantive areas as the UDHR, such as rights to life and freedom;[4] freedom of expression;[5] civil equality, justice and non-discrimination;[6] asylum;[7] and the right to participate in public administration.[8] In describing rights, however,

[2] Charter of the Organisation of Islamic Cooperation 2008 (OIC Charter) arts 1(7), 1(14).

[3] *Ibid* art 15. See Ioana Cismas, 'Introductory Note to the Statute of the OIC Independent Permanent Human Rights Commission' (2011) 50 *International Legal Materials* 1148, 1157–58 (specifying the Commission's objectives and mandate).

[4] Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) (UDHR) art 3; Organisation of the Islamic Conference (OIC), 'Cairo Declaration on Human Rights in Islam' (5 August 1990) Annex to Res 49/19-P (Cairo Declaration) arts 2 (life), 20 (freedom from arbitrary arrest, torture or non-consensual medical experimentation); Islamic Council of Europe, 'Universal Islamic Declaration of Human Rights' (19 September 1981) (UIDHR) arts 1 (life), 2 (freedom).

[5] UDHR art 19; Cairo Declaration art 22; UIDHR art 12.

[6] UDHR art 7; Cairo Declaration arts 1, 19(a); UIDHR arts 3, 4.

[7] UDHR art 14; Cairo Declaration art 12; UIDHR art 9.

[8] UDHR art 20 (association), art 21 (participation); Cairo Declaration art 23(b) (participation); UIDHR art 11 (participation), art 14 (association).

the UIDHR and the Cairo Declaration hew closely to the Islamic proofs and the conclusions of *fiqh*. The UIDHR draws explicitly on Quranic verses and the most widely referenced *hadith* collections.[9] The Cairo Declaration's specification of Sharia as 'the only source of reference 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 drawing no conceptual distinction between what the international framework classifies as 'first generation' rights, many of them universally accepted, such as prohibitions against torture or racial discrimination, and '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 UN instruments. The Cairo Declaration does not reflect all the rights described in the UIDHR, although it is arguably a more authoritative statement of law because of its endorsement by the OIC Council of Foreign Ministers.[10] As a joint statement of representatives of states that hold a range of views on how to interpret and apply Sharia in national law, it may not have been feasible to come to a consensus on all points. The Cairo Declaration omits freedom of association and a worker's right to leisure, both of which the Universal Declarations promise.[11] Unlike the Universal Declarations,[12] the Cairo Declaration does not explicitly recognise a right to freedom of worship, but like the UIDHR it restates the Islamic rule that 'there is no compulsion in religion'.[13]

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 UN human rights treaties, 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 Arabic version.[14] The bulk of these, however, appear in the preamble, and in English serve mostly to package

[9] Each article of the UIDHR is cross-referenced to at least one Quranic verse or well-established *hadith*.

[10] 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, Mark Ellis and Benjamin Glahn (eds), *Islamic Law and International Human Rights Law* (Oxford University Press, 2012) 48.

[11] UDHR arts 20, 24; UIDHR arts 14, 17.

[12] UDHR art 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'); UIDHR art 13 ('Every person has the right to freedom of conscience and worship in accordance with his religious beliefs').

[13] Cairo Declaration art 10; UIDHR art 10(a).

[14] See, eg, Ann Elizabeth Mayer, *Islam and Human Rights: Tradition and Politics*, 4th edn (Westview Press, 2007) 89; Jacques Waardenburg, *Islam: Historical, Social and Political Perspectives* (Walter de Gruyter, 2002) 173.

the document's operative articles in secular rather than Islamic justifications.[15] This may merely indicate that the authors aimed to present the rights to two audiences with differing value sets regarding what could be a compelling reason to recognise 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.[16]

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*'.[17] 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 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.[18] This may overstate the risk. Civil 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. Where a judicial authority or another independent body is competent to review laws or administrative acts for compliance with Islamic standards, it should be possible at least to predict which rulings of Islamic law might limit the rights described in the international Islamic instruments.

Beyond these concerns, the Islamic international instruments have attracted relatively little detailed analysis. Mayer has been their leading critic, citing especially their unequal treatment of women and non-Muslims (compared to male Muslims), and restrictions on religious and expressive freedom. In Mayer's view,

[15] 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. Waardenburg, *ibid* 173.

[16] Mashood A Baderin, *International Human Rights and Islamic Law* (Oxford University 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').

[17] Mayer (n 14) 80. Under the UIDHR, this potentially affects the rights to life (art 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 (20(d)) rights (at 90–91).

[18] Mayer (n 14) 80–81.

the Cairo Declaration's main guarantee of 'equality in "dignity" and "obligations" is not intended to signify equality in "rights"'.[19] 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.[20] 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.[21] 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.[22]

Mayer considers that the Cairo Declaration does not 'offer[] any guarantee of freedom of religion'.[23]

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 'categories on the basis of which it is impermissible to discriminate'.[24] 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 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'.[25] 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 peoples of the book, leaving others' freedom of worship unprotected.[26] Article 13 of

[19] Mayer (n 14) 102; See Cairo Declaration art 1(a) ('All human beings … are equal in terms of basic human dignity and basic obligations and responsibilities').

[20] Mayer (n 14) 138; See Cairo Declaration art 6.

[21] Mayer (n 14) 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).

[22] Mayer (n 14) 163.

[23] Mayer (n 14) 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').

[24] Mayer (n 14) 106 (citing article 3(a) of the Arabic version of the UIDHR).

[25] Mayer (n 14) 106–107 (citing article 11 of both the English and the Arabic versions of the UIDHR).

[26] Mayer (n 14) 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 Arabic version cites Quran 109:7, 'For you your religion, and for me my religion' in the *sura* '*al-kafirun*' (*kafirun* is a pejorative term that means 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*'.[27] The UIDHR's protection for expression is also flawed, argues Mayer, because especially 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'.[28]

Mayer is correct that there are significant differences of nuance, emphasis and justification between the rights pronounced in the Islamic instruments and those specified in the UDHR, but that does not in itself show that such Sharia-based interpretations would carry much greater risk of disabling them than do the scope for interpretation or derogation accorded to states by the international bill of rights. While Islamic law 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 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 practice their beliefs,[29] as it was revealed in Mecca, in the form of a conversation acknowledging that neither interlocutor had succeeded in persuading the other – the appearance of this verse as support for the UIDHR's promise of freedom of religion reinforces the impression that, as in Mecca, Muslims should accept that not everyone who hears their message will heed it. Likewise, the concern that allowing Sharia to limit expression could result in broad or vague scope for restricting speech deserves careful scrutiny in light of how Islamic law relates to expression.

The international Islamic instruments define a minimum standard of human rights that Islamic states should protect. In Islamic states that do not adhere to the main UN human rights treaties, this Islamic international regime is the main supranational promise of rights. If its protections fall short of international standards, then identifying the specific rights concerned and the reasons

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').

[27] Mayer (n 14) 179 (citing Quran 109:6).

[28] Mayer (n 14) 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]*').

[29] '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"'.

for the discrepancies is the first step towards finding ways to bridge such gaps that do not violate fundamental precepts of either Islam or international law. Conversely, it is possible that Sharia binds states that adhere to both regimes to extend greater protection to human rights in some areas than international law requires. Which of these is true in a given state depends upon the ranking in the constitutional order of legislation, Islamic principles, treaties and international law, and on the state's preferred methods of interpreting Islamic law. Ultimately, modern Islamic constitutions incorporate most of the rights recognised in international instruments, whether stating them directly or importing them through reference to Islamic law or international standards. 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 international treaties.

II. HUMAN RIGHTS COMMITMENTS OF ISLAMIC STATES: A THREE LAYER ANALYSIS

Islamic states share a baseline understanding of their core human rights duties. All Islamic states endorsed the Cairo Declaration, which along with the UIDHR has gained respect as correctly capturing the rights found in Sharia. These obligations are further supplemented in League of Arab States members by the binding commitments of the Arab Charter on Human Rights. For Islamic states that participate in the UN treaties, the Islamic human rights documents pronounce a second layer of human rights norms. For the rest, they provide a reasonably comprehensive alternative set of standards. In aggregate, nearly all Islamic states subscribe to rules that reflect nearly all provisions of the international bill of rights. Even Islamic states that do not incorporate Islamic law deeply in their constitutional orders should give this backdrop of shared norms its due weight, as evidence of customary law. In addition to international treaties and international Islamic human rights standards, Islamic states should also protect the core human rights inherent in Sharia, the most basic level of human rights protection in an Islamic state.

When an 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 'as far as possible' make 'decisions compatible with' the fundamental rights provisions of the Constitution,[30] and may use international law and jurisprudence to interpret those provisions.[31] In the Maldives, courts must 'consider international

[30] Draft Constitution of Somalia 2012 art 40(3).

[31] *Ibid* 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').

treaties' when 'interpreting and applying' the fundamental rights chapter of the Constitution.[32] When contemplating limitations on rights or 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'.[33]

Sharia-based reservations to human rights treaty provisions, even if they are effective, do not necessarily negate the rights described: Sharia itself might protect those rights. Beyond its role in the domestic legal order, Sharia shapes Islamic states' 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 international Islamic human rights documents. The rules and methods of Islamic law also provide an alternative means to interpret rights guarantees that the UN treaties and the Islamic international documents appear to treat differently.

A. Sharia and International Human Rights Treaties

All Islamic states have undertaken human rights treaty obligations. The UN treaties state most of the positive international human rights law that binds Islamic states. Of the seven Islamic states that are not party to the International Covenant on Civil and Political Rights (ICCPR), Palestine, Qatar, Saudi Arabia and the UAE have ratified the Arab Charter, which 'is based on many of the norms stipulated in' the ICCPR and International Covenant on Economic, Social and Cultural Rights (ICESCR).[34] Other than a reference to the Cairo Declaration in its preamble and a reference to Sharia as a source of 'positive discrimination … in favor of women',[35] this Charter does not explicitly engage with Islamic law. Nonetheless, it helps to bridge international and Islamic standards, as it is framed essentially in international law terms but reflects the shared cultural background of the Arab region, including Islam.[36] This leaves Brunei, Malaysia and Oman as the only Islamic states not party to any treaty that addresses the main rights described in the international bill of rights. Of these, Brunei and Malaysia joined the Association of Southeast Asian Nations (ASEAN) Human Rights Declaration, '[r]eaffirming [their] commitment to the' UDHR.[37] Beyond the international bill of rights, all Islamic states are party to at least some of the other UN human rights treaties.

[32] Constitution of the Maldives 2008 (amended 2018) art 68.

[33] *Ibid* art 16(c).

[34] Mohamed Y Mattar, 'Article 43 of the Arab Charter on Human Rights: Reconciling National, Regional, and International Standards' (2013) 26 *Harvard Human Rights Journal* 91, 96.

[35] Arab Charter on Human Rights 2004 (Arab Charter), 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'); ibid art 3(3). Arab Charter references are based on the translation provided in Mohammad Amin Al-Midani, Mathilde Cabanettes and Susan M Akram, 'Arab Charter on Human Rights 2004' (2006) 24 *Boston University International Law Journal* 147.

[36] Mattar (n 34) 96.

[37] ASEAN Human Rights Declaration (18 November 2012), preamble.

The influence of Sharia on Islamic states' international human rights commitments is most noticeable in reservations and declarations. Their level of involvement in treaties suggests Islamic states are willing to pursue the stated human rights aims of the UN, even 'whilst at the same time (through reservations and derogations), tak[ing] exception to their expression'.[38] Yet once reservations are analysed alongside the objections raised against them, their effect hardly pervades Islamic states' participation in the UN treaties. Across all states party, Bunn-Livingstone counted 910 reservations to six main UN human rights treaties, more than half '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'.[39] On the whole, Islamic states' rates and depth of participation in these treaties is not far out of line with that of states generally. At some points, it remains unclear whether a particular Islamic state fully recognises a particular right described in the treaties. But each such point merits analysis to determine the existence and extent of any conflict, not dismissal as an inherent incompatibility between Sharia and international law (though such incompatibilities may exist). Reservations that reflect Sharia concerns cluster in a few areas, most prominently equality between the sexes and freedom of worship. Otherwise, the only serious discord between Sharia and international law revealed by reservations to UN human rights treaties concerns the definition of torture in article 1 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which the reservations of Qatar and the UAE indicate could conflict with *hadd* corporal punishments.

i. Equality

A significant number of the reservations taken by Islamic states against the UN human rights treaties concern civil equality, especially equal rights between men and women. The most contentious area seems to be rights within marriage, particularly the right to pronounce divorce. Other points of discord include inheritance of property and nationality and hereditary rule; freedom of movement; and giving evidence, all of which at least one Islamic state has cited as grounds for a reservation concerning women's rights. At the level of UN treaties, the only other obvious disputes regarding equality centre on the practice of forbidding non-Muslims to serve as head of state or government, and on whether equality before the law for a person with a disability includes equal capacity to act on their legal rights.

[38] Cavanaugh (n 10) 48.

[39] Sandra L Bunn-Livingstone, *Juricultural Pluralism vis-à-vis Treaty Law* (Martinus Nijhoff, 2002) 296 (36% of states party to the Convention on the Rights of the Child (CRC) entered reservations, 'the IICESCR, 27%, ICCPR, 36.43%, ICERD, 33%, CPPCG, 21%, and CEDAW, 34.8%'. Out of the reservations, 57.1% cited 'domestic jurisculture', 20.1% international law, and 12.4% religious or similar concerns).

Differences in how Islamic law and international law understand equality appear to implicate a limited number of UN treaty provisions, almost all of them found in the ICCPR, Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) and Convention on the Rights of Persons with Disabilities (CRPD). Kuwait, Mauritania and Pakistan have Sharia-based reservations to the ICCPR, implicating article 3 (equality between men and women in access to ICCPR rights), article 23 (marriage and family) and article 25 (participation in public affairs). But the conflict is narrower than it at first appears, because the Kuwaiti reservations might not be based on Sharia, and Pakistan's reservations have arguably been accepted. This would leave a minimum zone of controversy over equality in the ICCPR consisting of Mauritania's reservation concerning article 23(4), equal rights between spouses. Islamic states also entered about a dozen reservations to the analogous provision in CEDAW, article 16(1)(c),[40] with treaty partners objecting. There may be some inconsistency here regarding Bahrain, Egypt, Iraq, Jordan, the Maldives and Syria, which are parties to both treaties and reserved against article 16 of CEDAW (Jordan and Syria specified article 16(1)(c)) but not against ICCPR article 23.

Lesser controversies attach to CEDAW article 9(2) (inheritance of nationality) and article 15(4) (rights of movement and residence), and to article 12(2) of the CRPD (legal capacity). Article 12(2) may present not a conflict between Sharia and international law, but an unrelated disagreement (the Arab Group's letter to the drafting committee did not mention Sharia) or a permissible derogation (no states objected to article 12(2) reservations by Egypt, Kuwait and Syria). Likewise, the disagreements over CEDAW articles 9(2) and 15(4),[41] while real, are limited in scope. Article 9(2) seems tenuously related to Sharia, for example because the institution of nationality postdates the revelation of Sharia, and in any case Islamic states' article 9(2) reservations attracted relatively few objections. Around article 15, the relationship is not clear. No Islamic states reserved against article 15(4) with explicit reference to Sharia, and the two that referenced specific national legislation have since changed that legislation. Otherwise, one Islamic state reserved against each of article 15(1), equality before the law (Qatar), and article 15(2), legal capacity, testimony, and the right to contract (UAE). For both articles 9 and 15, the zone of contention is shrinking as Islamic states withdraw or restate reservations. Nevertheless, there may still be a concern that Sharia could restrict women's freedom to choose their residence guaranteed by article 15(4). Finally, Kuwait's reservation to ICCPR

[40] Bahrain, Egypt, Iraq, Libya, the Maldives, Mauritania and the UAE cited Sharia in reservations to article 16, with Algeria citing its Family Code. The wording of several of these reservations indicates a concern regarding rights within marriage, ie the subject of article 16(1)(c). Jordan, Libya, Malaysia, Oman, Qatar and Syria raised article 16(1)(c) in their reservations. Libya's article 16(1)(c) reservation appears capable only of enhancing rights.

[41] Concerning a child's inheritance of parents' nationality, and freedom of movement and choice of residence.

article 25(b), which would reserve voting rights and elected office to men, is grounded in Kuwaiti law not Islamic law. It is in any case questionable whether Islamic law can bar women from elections.[42]

After identifying treaty provisions where international and Islamic views of equality might diverge, the language of reservations can provide a further guide to the underlying issues of law. The more specifically reservations attach to particular articles and the more explicitly they state their concerns, the more useful they are in focusing attention on substantial disagreements. For example, in reserving against ICCPR provisions that promise equality between the sexes, Kuwait cited national law while Mauritania referred to Sharia. Treaty partners objected to both. Kuwait's reservation subjects article 3 to 'the limits set by Kuwaiti law', which would essentially nullify it.[43] Similarly, although its reservation against article 23 (family and marriage) cites 'personal-status law, which is based on Islamic law', the effect is potentially unbounded because in case of 'conflict with Kuwaiti law, Kuwait will apply its national law'. Although Sharia is part of Kuwaiti law, it would be difficult to disaggregate its effect within such a broad and malleable reservation. Mauritania, by contrast, grounded its reservation to article 23(4) explicitly in Sharia, implying it is possible to interpret Islamic law as compatible with the phrasing of article 23(1)–(3). Baderin also considers that article 23(1)–(3), in emphasising protection of the family unit and the right to marry and form families, closely matches Islamic family law.[44] However article 23(4), promising equality within the marriage, does seem potentially at odds with Sharia.

Having narrowed the inquiry to a set of UN treaty provisions that might implicate Sharia, it becomes simpler to seek applicable Islamic law. The pattern of reservations to CEDAW article 16(1)(c), the counterpart to ICCPR article 23(4), draws attention to Islamic rules of divorce and marital property. Reservations to article 16 by Egypt, Iraq, Morocco (repealed in 2011) and the UAE refer to balancing the right of husbands to unilaterally pronounce divorce with financial obligations owed by husbands to wives before, during and (in case of divorce) after marriage. This invites broader consideration of the differential system of property rights between men and women in Islam, which for example also affects rules of inheritance.[45] In reserving against article 15(2), the UAE

[42] Baderin (n 16) 162.

[43] Kuwait's reservation, phrased as 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').

[44] Baderin (n 16) 133. This view relies on an interpretation of Sharia that does not require women to have the consent of a male relative in order to marry.

[45] Qatar's reservation to CEDAW article 15(1) and the UAE's reservation to article 2(f) state that the provisions violate the rules of inheritance found in Sharia. Libya's article 2 reservation indicates the same concern.

raised conflicts with Sharia 'regarding legal capacity, testimony and the right to conclude contracts', which may also need some analysis of Islamic law and treaty law to resolve. There are several reservations to article 16(1)(f), requiring equal rights in institutions such as guardianship or adoption, but it is not clear if they reflect concerns over equality, or simply objections to the institution of adoption per se.[46] The patterns visible in these more detailed and specific reservations may also be a guide to the concerns behind broader reservations that subject entire provisions or even treaties to pre-emption by Sharia. It is then a matter for the individual Islamic state to explore and express the rule in question according to its own constitutional order, including its methodology for discovering and applying Islamic law.

In areas of clear conflict, it may be possible to find alternative interpretations of Sharia that more closely reflect international human rights language. However, Pakistan's ICCPR reservations show by example that where equality is concerned, international treaties can also admit at least some Sharia-based derogations. Pakistan's narrowed reservation to article 3 appears to have gained the acquiescence of the states party to the ICCPR, meaning that Sharia (as implemented in the Law of Evidence and the Personal Law) can justify limited deviations from the article 3 rule of equal treatment of the sexes. The only distinction 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.[47] Otherwise, male and female testimony are equal.[48] 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.[49] The Personal Law makes Sharia the effective law between Muslims in matters such as family, marriage and inheritance.[50] In Pakistan this means the injunctions of Islam as revealed in the Quran and the Prophet's *sunna*. While referring generally to Sharia is not as explicit as the language the Law of Evidence provides, in most of the topics the Personal Law assigns to Sharia, states commonly allow canon law to apply between coreligionists. The other point where a derogation seems to have been accepted is Pakistan's reservation to ICCPR article 25 (voting and participation in public affairs) in favour of its constitutional rule excluding non-Muslims from the offices of head of state or government.

[46] Oman's reservation specifically references adoption, while Kuwait and Qatar cite Islamic law and Malaysia and Syria do not give reasons for their article 16(1)(f) reservations.

[47] Qanun-e-Shahadat Order 1984 art 17(2)(a).

[48] *Ibid* art 17(2)(b).

[49] Quran 2:282.

[50] West Pakistan Muslim Personal Law (Shariat) Application Act 1962 art 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').

It may be possible to resolve most of the Sharia-based differences regarding equality that relate to the UN treaties. Kuwait's reservations to ICCPR articles 3, 23 and 25 go beyond Sharia to encompass any national law, making their content difficult to assess. By contrast, Pakistan's more limited and specific reservations seem to have addressed the objections that its original ICCPR reservations were too extensive or vague. Acquiescence in its remaining reservations would acknowledge that while Islamic states have some flexibility to interpret Sharia, they might not easily forego adherence to a literal dictate of the Quran (the evidence rule) or violate consensus (a Muslim head of state). It would also indicate the possibility of allowing Sharia to displace at least some treaty provisions in the realm of family and personal status law. Arguably, questions of nationality and hereditary rule are not controversial between international law and Sharia, neither being of critical importance to both traditions. Views of the freedom of residence vary across Islamic states, which may indicate an opportunity to reach a consensus as to whether recognising women's freedom to choose their residence is at odds with Sharia. This would reduce the question of the compatibility of the UN human rights treaties with Islamic law as interpreted by the Member States of the OIC to a discussion about the Islamic balancing of differentiated property and divorce rights between men and women that apparently underlies reservations to ICCPR article 23(4) and CEDAW article 16.

ii. Apostasy

In treaty terms, apostasy represents a narrower question than equality, but it may be more challenging to resolve. After civic equality, the right to freedom of thought, conscience and religion presents the most contested point between Islamic states and treaty partners across the UN human rights treaties. This is visible in reservations to article 18 ICCPR and article 14 of the Convention on the Rights of the Child (CRC). The main concern appears to be with sanctioning apostasy from Islam. The Maldives and Mauritania entered reservations against article 18 ICCPR. Mauritania's reservation invokes Sharia, while that of the Maldives references its Constitution, which incorporates Islamic law. Concerns over the freedom to renounce Islam also arise in all CRC reservations by Islamic states that cite specific articles.[51] In their reservations, Iraq and Jordan stated explicit concerns about a child changing its religion. Oman's and Syria's reservations also raised the freedom of religion. Algeria referenced domestic legislation requiring that 'a child's education is to take place in accordance with the religion of its father'. The reservation of the Maldives cited the constitutional rule that all citizens must be Muslims.

[51] Algeria, Brunei, Iraq, Jordan, Malaysia, the Maldives, Morocco, Oman, Qatar, Somalia, Syria and the UAE mentioned article 14 or its sub-provisions in their reservations. Kuwait's article 21 reservation linked adoption to the potential for 'abandoning the Islamic religion'.

Both Islamic and international law largely leave people free to decide matters of belief for themselves. Nonetheless, the disagreement over the reservations to ICCPR article 18 and CRC article 14 is starker and more squarely based on questions of interpreting Islamic law than is that over the equality related provisions of the ICCPR and CEDAW. According to Baderin, while some dissent persists, the mainstream view even among traditionalist Islamic scholars is 'that Islamic law prohibits the compulsion of anyone in matters of faith'.[52] 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 punish those who renounce Islam.[53] The effect of the Maldivian reservation against article 18 is not immediately clear. The 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'.[54] Only Muslims may become citizens, but citizenship cannot be revoked.[55] This leaves open the possibility of punishment short of revoking citizenship for apostasy, which might be permissible in the Shafi'ite interpretation of Islam that prevails in the Maldives, but is probably objectionable 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.

iii. Effect of Sharia on Treaty Reservations

Reference to Sharia need not mean denial of a right. Rather, it requires 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. If states 'cite Sharia as justification for their limited acceptance of international human rights instruments … without isolating and identifying the specific Islamic norm that is perceived to be in conflict with the reserved provisions', treaty partners and other stakeholders are left 'in a difficult position in knowing how to deal with this broad and undefined subject'.[56] However, 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

[52] Baderin (n 16) 122.
[53] Baderin (n 16) 124.
[54] Constitution of the Maldives 2008 (amended 2018) art 19.
[55] *Ibid* art 9(d), (b).
[56] Nisrine Abiad, *Sharia, Muslim States and International Human Rights Treaty Obligations: A Comparative Study* (British Institute of International and Comparative Law, 2008) 79–80.

principles of Islamic law and values'.[57] While the latter terminology on its own or against the 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',[58] in Pakistan the Federal Shariat Court is receptive to arguments built on the Quran and *ahadith*. This makes it possible to 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 interpret Sharia, the more easily treaty partners can understand their concerns about acceding fully to international human rights instruments.

B. Sharia and International Islamic Instruments

Unlike the 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 an accommodation between conflicting understandings of basic rights in the Islamic instruments and their national interpretations of Sharia. But the treaty commitments of Islamic states help to show their understanding of what human rights oriented promises they can make under Sharia, and the role of Islamic law in the interpretation of the UIDHR and the Cairo Declaration helps to show how Islamic states collectively understand human rights. Islamic law is central to both the latter instruments: the UIDHR is 'based on the Qu'ran and the Sunnah',[59] and the preamble to the Cairo Declaration unambiguously frames it in terms of revealed Islamic law.

In addition to the grounding of the Arab Charter, Cairo Declaration and UIDHR in Islamic principles, Sharia affects the content of the latter two declarations. Yet the UIDHR and the Cairo Declaration approach Sharia differently to each other. Notwithstanding the strong invocations of Islam in its preamble and the firm grounding of its provisions in the Islamic proofs, the UIDHR reads as a human rights document that expresses restrictions and limitations by referring to Sharia. The Cairo Declaration, by contrast, explicitly subordinates all the rights it describes to Sharia, and refers to Sharia as its sole source for authoritative interpretation.[60] The Arab Charter represents a waypoint between Islamic law and international law, as it explicitly invokes the values and instruments of the international bill of rights, as well as the Cairo Declaration.[61]

[57] *Ibid* 60–70.
[58] *Ibid* 70.
[59] UIDHR, preamble.
[60] Cairo Declaration arts 24, 25.
[61] Arab Charter, preamble ('Reaffirming the principles of the Charter of the United Nations and the Universal Declaration of Human Rights, as well as the provisions of the United Nations

It also serves to commit some Islamic states that are not party to the ICCPR – Palestine, Qatar, Saudi Arabia and the UAE – to uphold 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,[62] which may make little difference in practice with regard to those states that participate more or less fully in the UN treaty system,[63] but which represents 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 most visible in how they invoke Sharia to describe or to limit those rights. It also manifests in some of the choices of rights to protect, which appear unusual to the internationally oriented observer alongside more widely recognised rights. These include 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 the Cairo Declaration does, probably due to the latter document's saving clause acknowledging the supremacy of Sharia on 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 that non-Muslims may choose to be governed either by Islamic personal status law or by the law of their own communities, a right not recognised for Muslims.

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 be expressed in terms familiar to the international community. In the relatively few areas where it overtly invokes Islam, the Charter arguably exceeds international standards. For example the Charter includes non-discrimination protections, as do most international instruments, but further 'imposes a positive obligation to implement the principle of equality'.[64] 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.[65] Mattar concludes that the Charter expresses

International Covenants on Civil and Political Rights and Economic, Social and Cultural Rights and the Cairo Declaration on Human Rights in Islam').

[62] Mattar (n 34) 124–25.

[63] States party may not interpret any part of the Charter 'as impairing the rights and freedoms protected by [their] own laws, or as set out in international or regional instruments of human rights that [they] have signed or ratified'. Arab Charter art 43.

[64] Mattar (n 34) 102.

[65] Arab Charter art 3(3).

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.[66]

Recourse to Sharia as the basis of an international agreement is ambiguous, because of the range of approaches states take in interpreting Islamic law. Most Islamic states either follow a preferred *maddhab*, or, like Pakistan, provide rules for interpreting and applying the Islamic proofs in 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 local law. This can have a harmonising effect, as Islamic states converge toward mutually acceptable interpretations of Sharia. 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.[67] In promoting an alternative system of human rights instruments, Islamic states are experimenting with an amalgamation of the Islamic and international laws of human rights. Allowing states the flexibility to interpret the rights within their own preferred understanding of Islam sacrifices a degree of clarity, but invites wider participation by refraining from enforcing a particular interpretation that might repel some states. Mutual agreement on the basic rights promised by Islam at least suggests it could be possible to evolve the values encapsulated in the UIDHR and the Cairo Declaration into binding Islamic instruments, or statements of principle to help guide Islamic states in defining the boundaries of their participation in the UN treaties.

C. Islamic and International Human Rights Instruments

Islamic and international human rights declarations broadly agree on a set of basic rights. Nearly every right laid out in the UDHR also finds expression in the UIDHR or the Cairo Declaration. Disregarding for the moment whether they are phrased in Islamic or secular terms and the caveats they sometimes apply, 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 and torture. While the two frameworks may clash on certain points, in most matters of core human rights, applying international or Islamic standards would reach

[66] Mattar (n 34) 108–109.
[67] Mattar (n 34) 116–18.

the same results. If Islamic law and international human rights law are not compatible, the incompatibility is at least limited to discrete conflicts, rather than general.

Where Islamic and international human rights rules diverge, it rarely involves one set of instruments denying a right the other guarantees. More often it is a matter of one instrument 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 that homes will not be entered without permission.[68] The ICCPR allows states to restrict 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'.[69] Both documents permit restricting expression to protect public morals,[70] a term that is susceptible to different interpretations between Islamic and western cultures. These indicators of discord between the two regimes may signify actual conflict, or simply differences in terminology and approach that, within their respective 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 seems not to protect 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 permit; interpretive guidance – the Islamic documents and the international bill of rights provide 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.

i. Example: Freedom of Association

Viewed against a backdrop of *fiqh* and the Islamic proofs, 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

[68] Cairo Declaration art 18(c).

[69] ICCPR art 19(3)(b); Cairo Declaration art 22(d).

[70] ICCPR art 19(3)(b) ('For the protection of … public health or morals'); Cairo Declaration art 22(c) ('undermine moral and ethical values').

the right to establish associations 'meant to enjoin what is right *(ma'roof)* and to prevent what is wrong *(munkar)*' approximates the internationally recognised right of association.[71] 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 the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), for example, which permit states to constrain the right to association by law when that is in the public interest.[72] 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 Sharia itself, thus making its statement in an international instrument redundant for an Islamic state.

The Arabic version of the UIDHR, however, frames the article differently, as '*haqq al-da'wa wa'l-balagh*, or the right to propagate Islam and to disseminate the Islamic message'.[73] This appears to Mayer 'to result in a curb on the associational freedom of non-Muslims'.[74] The apparently discriminatory aspect is not easily dismissed, but it is at least not unlimited – 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 promises. 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'.[75]

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 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 apart from 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

[71] UIDHR art 14(a).

[72] ICCPR art 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 (adopted 4 November 1950, entered into force 3 September 1953) 213 UNTS 221 (ECHR) art 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').

[73] Mayer (n 14) 109–10.

[74] Mayer (n 14) 110.

[75] Baderin (n 16) 132 quoting Mohammad Hashim Kamali, *Freedom of Expression in Islam* (Islamic Texts Society, 1997) 73ff.

is likely limited to the question of association for purposes that might 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 two traditions than appears at first from the lack of an explicit guarantee of a general right of association in the Islamic international instruments.

III. RECONCILING ISLAMIC LAW AND INTERNATIONAL HUMAN RIGHTS LAW

Islamic states undertake to let both Sharia and international human rights norms guide their lawmaking and governance. The OIC Charter reflects this: 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'.[76] Baderin argues that 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'.[77] Whether Islamic law or international law predominates in a given context may not matter if applying either would lead to the same result. Where they diverge, it may be more productive to utilise the flexibilities of Islamic and international law to find rulings acceptable to both, than to argue for one or the other to predominate.

Even after applying those limitations an international instrument can permit, and utilising the flexibility of the *fiqh* to select among permissible rulings, there appear to be 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.[78] 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'.[79] In such matters an Islamic state wanting to apply Sharia in full faith might be able to reduce the scope of conflict with international norms to one of principle rather than practice,[80] so that the discrepancy need not actually infringe the rights of any specific individual.

[76] OIC Charter art 2(7).

[77] Baderin (n 16) 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').

[78] Baderin (n 16) 219.

[79] Baderin (n 16) 60–61.

[80] For example, Egypt sidesteps the question of whether Sharia permits child marriage by requiring a licence for civil recognition of a marriage, and extending that licence only to persons of at least 18 years of age.

A. Flexibility of Islamic Law

If seemingly intractable conflicts between Sharia and international norms do arise, an Islamic state might still find a resolution, if it could recast its understanding of Islamic law. 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. 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.[81]

Under *siyasah Sharia*, in the areas that fall within the ruler's lawmaking 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'.[82] 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).[83] Where rigid application of traditional *fiqh* rulings would yield suboptimal results in terms of the broader aims of Sharia, all the main schools except the Shafi'ite recognise the principle of *istihsan*, which allows jurists to selectively apply lesser or minority rulings if to do so would better uphold the *maqasid al-Sharia*. Since these interests are compatible with the goals of international human rights standards, a jurist might eschew received *fiqh* in cases where it is possible to reason to a result more conducive to serving these aims, which 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 developed to *ijtihad* in light of modern circumstances. As well as 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.[84] In this approach, Quranic verses affirming rights and dignity in all humans could take precedence over even specific instructions, for instance, that of Quran 9:29 to fight unbelievers until

[81] Weeramantry (n 1) 120.

[82] Baderin (n 16) 43.

[83] 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) 331.

[84] 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) 102–103.

they submit to the *dhimmah* contract.[85] Although the latter type of abrogation would be controversial among classical jurists, the idea of updating rulings to changed circumstances is not radical. Moosa cites the fourteenth century Hanbali jurist 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'.[86] Any reinterpretation that would challenge the words of the Quran, *ahadith* or *ijma* would however be controversial.

B. Interpreting Sharia for Islamic International Law

Islamic states may be able to move their expression of human rights closer to standard international understanding by experimenting with new public expressions of traditional principles. The institutions of Islamic consultation and 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 legal experts or authorities in the state. At the international level, the OIC, the Arab League and other institutions provide forums for Islamic states, jurists and civil society 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 feed into the national legal orders of Islamic states.

The pluralistic nature of Islamic jurisprudence allows or even at times requires selecting among differing opinions of the *mujtahidun*. The justice system of an Islamic state could 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 encourage standardisation of the laws of Islamic states. Treaty participation and declarations of common principles can, over time, either 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.

The first approach, choosing among rulings, is arguably at times necessary in Islamic law, 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

[85] *Ibid* 103.

[86] Ebrahim Moosa, 'The Dilemma of Islamic Rights Schemes' (2001) 15 *Journal of Law and Religion* 185, 210–11.

other Sunni schools in that women may make their own marriage contracts,[87] which would eliminate one possible source of friction with article 23 of the ICCPR requiring equality in marriage. However, the rules 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 proved) ruling over a stronger one if to do so would 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 *qadi*s everywhere to choose between rulings, merely by issuing one.[88] Instead, they would require *tarjih*, resolving the difference in favour of the opinion of the jurist with the greatest reputation for learning and piety.[89] *Takhyir* is therefore a relatively weak doctrine on which to base a re-interpretation of Islamic law aimed at reaching a ruling more compatible with western understanding of an international norm. 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 towards 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 it 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 *maqasid al-Sharia*, so '[w]hen the justifications attaching to certain legal provisions change then the legal rule may also change'.[90] 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

[87] 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').

[88] 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) 115–16.

[89] *Ibid* 117.

[90] Baderin (n 16) 45–46.

lower court to give equal weight to the testimony of non-Muslim citizens.[91] Allowing civil courts to refer questions to authorities qualified to conduct *ijtihad* is a time-tested means of enabling Islamic law to evolve to ensure that the revelations of the proofs remain relevant to a changing society. An Islamic state can also codify such updated rulings of Islamic law to ensure consistent application. The state may not remove the prerogative of the *mujtahidun* to arrive at 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 law. Where laws must conform to the Quran and the Prophet's *sunna*, it is in principle possible to apply purposive reasoning to revisit even literal readings such as the evidence rule that underlies Pakistan's article 3 ICCPR reservation.[92]

In addition to these doctrinal tools to help human understanding of Sharia keep up with an evolving society, Islamic states can elect to agree on 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 slavery in the proofs of law and in historical Muslim practice, today's Islamic states have agreed to categorically ban slavery.[93] Slavery was an institutional fact of the Prophet's time, the abolition of which was literally 'unthinkable'.[94] But Islam certainly tended towards its elimination, as the Quran 'considers manumission a work of worship', and 'a number of eminent Companions' had previously been slaves.[95] Today, abolition 'is completely in keeping with the teachings of Islam'.[96] Promising to uphold mutually agreed norms is one way treaties and other declarations provide for Islamic states to shape modern

[91] Baderin (n 16) 46–47.

[92] The context of the verse that equates the evidence of one man to that of two women when attesting to a written, forward looking financial transaction, makes clear that the underlying concern is the possibility of a woman being unable to read well (despite the fact that some women, such as the Prophet's first wife Khadija, were highly successful in business and therefore must have read and written fluently). With literacy today being far more widespread than in seventh century Arabia, one might argue that Sharia no longer requires this particular rule.

[93] ICCPR art 8; African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) (1982) 21 ILM 58 (African Charter) art 5; Arab Charter art 10(1); Cairo Declaration art 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' (art 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. UIDHR preamble (g) (ii), (iii). Among Islamic states only Brunei, Malaysia and Oman are not party to at least one of the ICCPR, African Charter or Arab Charter, but all of them endorsed the Cairo Declaration.

[94] Mohammed Abed al-Jabri, *Democracy, Human Rights and Law in Islamic Thought* (IB Tauris, 2009) 234.

[95] *Ibid* 234–35.

[96] *Ibid* 235.

Islamic law. Islamic documents can also state ideals and encourage states to choose interpretations that align with international standards, as for example the UIDHR declares forced marriage forbidden.[97]

At some points, the Quran applies different treatment to men than to women. This is facially at odds with the principle of equality under Sharia, as well as with its understanding in the UN treaty framework. Baderin identifies as key concerns relating to the ICCPR 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'.[98] 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'.[99] 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 a 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.[100] In the remaining aspects, polygamy, inheritance and divorce, the Islamic proofs and *usul ul-fiqh* appear able to support interpretations that comport with secular understandings of international 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 four and requiring absolutely equal treatment of the wives (arguably impossible).[101] 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'.[102] 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

[97] Mayer (n 14) 125; See UIDHR art 19(i) ('No person may be married against his or her will').
[98] Baderin (n 16) 138.
[99] Ziba Mir-Hosseini, 'Women in Search of Common Ground: Between Islamic and International Human Rights Law' in Emon, Ellis and Glahn (eds) (n 10) 300 (presenting conclusions of the Musawah movement and a group of reformist Muslin thinkers it consulted).
[100] Baderin (n 16) 144–45.
[101] Al-Jabri (n 94) 236–37.
[102] Al-Jabri (n 94) 237.

would gain the right to pronounce divorce.[103] 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'.[104]

Islamic inheritance law, another point of apparent divergence with the principle of equality, 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'.[105] 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 women often married into different tribes, full female inheritance would result in tribes claiming one another's wealth, and 'conflict to no end'.[106] 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'.[107] 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'.[108]

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.[109] 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'.[110] The same rights of stipulation that can prevent polygamy could support this (as a condition of the marriage contract, the wife could demand that 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* and *maslahah*; or courts could require the husband to provide compensation if he pronounces

[103] Baderin (n 16) 142–43.
[104] Baderin (n 16) 143.
[105] Baderin (n 16) 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.
[106] Al-Jabri (n 94) 236.
[107] Al-Jabri (n 94) 236.
[108] Baderin (n 16) 148.
[109] See, eg, al-Jabri (n 94) 203.
[110] Baderin (n 16) 150.

talaq without just cause, as is done for example in Algeria, Iran, Morocco and Syria.[111]

As they related to polygamy, inheritance and divorce, the Quranic rules modified the institutions of seventh century Arabian society towards greater equality. The residual rules from the 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 rights to public assistance; 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 can 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 acquiesced 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 ICCPR article 18 stated the concerns based on Islamic law 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.[112] Acceptance of this view by Islamic states, demonstrated by withdrawing reservations to article 18, would weaken the force of arguments that the international interpretation of equality is incompatible with 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.

IV. CONCLUSION

This book has proposed a way to specify the meaning of an Islamic state's promise to uphold a right, made through a constitutional clause or treaty

[111] Baderin (n 16) 151–52.
[112] Moosa (n 86) 201–202.

commitment. That meaning will depend on the plain words of the provision and on any derogations or caveats the state indicates. It will also depend on the degree to which the state defers to international forums or institutions in interpreting rights guarantees, and on how that state incorporates Sharia and its chosen approach to deriving rulings of Islamic law. How these factors interact, and the institutional environment that determines how claims of violations might be addressed, the way its constitution assigns lawmaking, government and judicial powers, and the choices it reflects regarding the prioritisation of national, international and Islamic legal regimes.

Without presuming to evaluate the relative merits of the ways in which the constitutions and the international undertakings of Islamic states define and protect human rights, this book has also supplied a detailed data set to support such evaluations. It has presented the structures of government and means of integrating Islamic law specified in every Islamic constitution, and analysed every commitment of Islamic states under UN human rights treaties. It has also provided a guide to locating the necessary resources and analytical methods by which to assess a given state's obligations to its citizens and others in its jurisdiction under Sharia, and in the shared understanding of modern Islamic states.

Precisely what an Islamic state agrees to by making a treaty commitment depends on the treaty's text, interpreted according to international law, but also on how that state interprets and applies Sharia and on Islamic states' consensus understanding of international human rights. The constitutional relationship between international law, Sharia and national law translates those commitments into enforceable law. A state's constitution or legal code will indicate whether national, international, or Islamic law takes priority if a question arises which those regimes would address differently. It will also make apparent how questions of Islamic law are answered in that state's legal order; some states invite analysis of the Quran and *sunna*, while others defer to the canons of one or more of the *madhahib*. Particularly in the latter inquiry, the role of Islamic jurists remains essential, as they hold the deepest available understanding of Sharia, and live under an obligation to share their understanding whenever asked.

It is entirely possible that, on specific points, Islamic states' interpretation of human rights might not comport with international law. It might even emerge upon analysis that some of those interpretations are deficient. However, to make such a claim requires careful analysis, and a willingness to approach the point at issue from both the international and the Islamic side simultaneously. This book has demonstrated that viewing points of apparent disagreement through these diverse fields of law seems to reduce the number of actual disagreements, and to clarify their contours. Divorce and apostasy, for example, still seem problematic, but concerns over adoption, citizenship and succession appear much less so.

Ultimately, this book seeks to start a conversation. It began as a project to analyse certain specific internationally recognised rights as defined in Islamic constitutions. The first iterations of the underlying research exposed

the needs for a pattern of analysis and for a detailed data set. In that sense, this book does not presume to propose any answers. Rather, it has tried to systematically rephrase the questions posed at the project's outset. In that rephrasing, it has highlighted some opportunities for easy legal reform, where the apparent discord between Islamic and international understanding of certain rights appears to be a matter of misunderstanding or divergent phrasing, rather than disagreement over the substance of a right. The analytical framework the book proposes might also facilitate a productive dialogue regarding those differences that remain.

Over time, Islamic and international standards of human rights can continue to converge. Through their standing as states, and that of the OIC as the second largest international organisation by membership after the UN, and from the status of Islamic law as one of the world's major legal traditions, Islamic states can both influence the international understanding of human rights, and establish a new, shared Islamic consensus. To take just one example, the modern international Islamic instruments and the workings of the OIC have established that, unlike in the classical era, slavery is now reprehensible and forbidden. At the same time, Islamic states' engagement with international treaty law has continued to increase in the twenty-first century. This convergent tendency indicates an opportunity for Islamic states and the rest of the international community to discuss and move towards mutually acceptable understandings regarding specific rights that specific states have concerns about.

Glossary

Abbasid caliphate
The second dynastic caliphate (750–1258). This era saw the restoration of caliphate after its decline amidst civil wars during the Umayyad caliphate. The cultural and economic 'golden age of Islam' ensued, followed by decline and disintegration from about the middle of the ninth century.

Abd al-Malik ibn Marwan
Fifth Umayyad caliph (685–705). His reign saw the end of the second *fitnah*, the unrest and civil wars that began after the passing of Mu'awiya in 680. Abd al-Malik consolidated the caliphate as an explicitly Islamic and Arab empire, for example issuing coins with Quranic inscriptions and standardising Arabic as the language of public administration. The caliphate expanded considerably during Abd al-Malik's caliphate, reaching its geographic peak under his son Walid I (705–715).

Muhammed ibn **Abd al-Wahhab**
Eighteenth century Hanbali jurist from Arabia. He held strict views, objecting to any deviation from the texts, especially mystic practices such as the veneration of tombs. He formed an alliance with Muhammad ibn Saud, by which they cooperated to establish a ruling dynasty. The family of Ibn Saud exercised the political power, while al-Wahhab and his descendants, known as the *Al ash-Shaykh*, pronounced the religious law and supervised the religious establishments. This arrangement continues today as the Kingdom of Saudi Arabia.

Muhammad **Abduh**
Egyptian Islamic reformist of the nineteenth century. Educated as an *alim* at al-Azhar, he became a dissident journalist and professor. He lived in exile during the 1880s, then returned in 1888 to a career in the judiciary. He became Grand Mufti in 1899. Abduh sought to reinvigorate Islam as a way to strengthen Muslim societies without abandoning traditional values. He advocated pan-Islamism and adopting scientific knowledge and methods. Though himself a senior jurist, he encouraged believers to develop their own understanding of Islam rather than relying entirely on the *ulama*. The ideas he developed passed into both Islamic revivalist and modernist streams of thought.

abrogation
See *naskh*.

Abu al-Abbas (al-Saffah)
First Abbasid caliph (749–754). Abu al-Abbas was presented as the caliph al-Saffah, having been sequestered by the Hashimiyya, the conspirators who instigated and led the rebellion that overthrew the Umayyad caliphate. He moved to eliminate the leaders of the Shi'ite and other factions within the rebel coalition and began to establish the caliphate as an Abbasid dynasty.

Abu Bakr Abdullah ibn Uthman
First caliph (632–634). The Prophet's close friend and the first convert to Islam from outside the Prophet's family. He was a senior Companion and advisor to the Prophet, and was chosen by consensus to succeed the Prophet in his leadership of the Muslims. He kept the community politically united and defeated the tribes that tried to depart after the Prophet passed, a period known as the wars of *ridda* (apostasy).

Abu Hanifa al-Nu'man ibn Thabit
Eighth century Islamic jurist from Kufa, whose teachings developed into the Hanafi *maddhab*, one of the four main Sunni schools of jurisprudence. Abu Hanifa emphasised rational analysis and structured legal reasoning. In particular, he is generally credited with introducing *qiyas*, analogical reasoning, into Sunni *fiqh*. His most prominent students included Abu Yusuf and al-Shaybani.

Abu Muslim
Military leader of the forces that overthrew the Umayyad caliphate and installed the Abbasid dynasty. His pseudonym signified the unity of all Muslims, as it gave no indication of his national or ethnic origin or social standing. He became governor of Khurasan but fell into disfavour and was assassinated in 755 at the instruction of the second Abbasid caliph, al-Mansur (754–775).

Abu Sufyan ibn Harb
Leader of the Banu Umayya during the time when the Prophet established the Muslim community at Medina. He led the Meccan forces against the Prophet at the battles of Uhud and the Trench. After the treaty of Hudaybiyyah, he sought compromise with the Muslims, then himself converted to Islam when the Prophet's forces entered Mecca the next year. He became an advisor to the Prophet and at times governed territories on the Prophet's behalf. His son Mu'awiya established the Umayyad caliphate.

Abu Talib ibn Abd al-Muttalib
Uncle of the Prophet and father of Ali. Head of the Banu Hashim clan of the Quraysh tribe in Mecca while the Prophet lived there. He was not wealthy, but was widely respected. He took the orphaned Prophet into his household as a child and protected him against the Meccans, especially the other Quraysh clans, after the revelations had begun. When he passed in 619, the Prophet's position in Mecca became more dangerous and he departed to Medina.

ahadith
Plural of *hadith*.

ahkam
Plural of *hukm*.

ahl al-dhimmah
People of the *dhimmah*. See *dhimmah*, *dhimmi*.

ahl al-hall wa'l-'aqd (those who loose and bind)
Traditionally, the close counsellors who nominated the leader of the Islamic community, for the people to ratify through the *bay'ah* ritual. It now generally signifies a group of trusted individuals whose acquiescence and advice to the government indicates the community's acceptance of its rule.

ahl al-kitab (people of the book)
Followers of Judaism and Christianity, whose religious texts Muslims also hold sacred. They are recognised in Islam as worshipping the same God, Allah, and are generally tolerated in Muslim society despite their perceived error in not recognising the Prophet and the Quran.

Aisha bint Abu Bakr
Daughter of Abu Bakr and the youngest and favourite among the Prophet's wives. After the Prophet's passing she retained a position of high honour among the Muslims. Caliphs and other authorities consulted her and the Prophet's other wives as advisors. She allied with the senior Companions who opposed Ali, leading the forces that briefly captured Basra, and was a commander at the Battle of the Camel. After the rebels' defeat, she retired to Medina, supported by a pension provided by Ali. She became a renowned teacher of Islam and transmitter of *ahadith*.

Hassan **al-Banna**
Egyptian imam and schoolteacher. Founder of the Muslim Brotherhood in 1928, assassinated in 1949. Al-Banna built on the ideas of reformists such as Muhammad Abduh and Muhammad Rashid Rida. He advocated a return to traditional Islamic values; a universalist view of the Muslim community; and the end of colonial control over Muslim lands. The Brotherhood was the progenitor of many Sunni Islamist organisations, and remains influential (although suppressed) in Egypt today.

Abu Hamid **al-Ghazali**
Persian jurist of the eleventh/twelfth centuries, of the Shafi'ite *maddhab*. A prolific writer and teacher of Islamic jurisprudence, theology and mysticism. Among his major contributions was his amalgamation of faith and reason, carried out in dialogue with Shi'ite counterparts and western philosophers of the age. Although this book references al-Ghazali only occasionally, his framing of Sunni jurisprudence is foundational to many classical and modern debates that engage Islamic law.

Abu Ja'far Abd Allah ibn Muhammad **al-Mansur**
Second Abbasid caliph (754–775), succeeding his brother Abu al-Abbas (al-Saffan). He completed his brother's consolidation of the caliphate as an Abbasid dynasty, killing the remaining leaders of other factions within the anti-Umayyad revolution, including Abu Muslim. He also eliminated the last vestiges of the Umayyad family, except for a branch in Iberia, and suppressed the last major revolts by partisans of Ali. He built a new capital at Baghdad and re-established an imperial army and bureaucracy based on Persian institutional models.

Abu al-Hasan **al-Mawardi**
Iraqi jurist of the tenth/eleventh centuries, of the Shafi'ite school. He entered public service as a *qadi*, and rose to become the chief judge for the caliph. He also served as an ambassador. His contributions to jurisprudence included stating the doctrine of *darura*, necessity (for example, breaking the fast of Ramadan may be excused if it is necessary due to illness). For the purposes of this book, al-Mawardi's seminal contribution was his *Al-Akham al-Sultaniyya*, 'The Laws of Islamic Governance'. In it he related the words of the Islamic texts and the precedents established by the Prophet and other political leaders to the structure of the caliphate. The book discusses topics such as the qualifications

and duties of a caliph, the nature of temporal power in the caliphate and how to select a caliph, and the ways in which a caliph may delegate power. Al-Mawardi's analysis of Islamic governance became, and remains, the foundation of orthodox Sunni political theory.

Harun **al-Rashid**
Fifth Abbasid caliph (786–809). Presided over the apex of the caliphate in terms of wealth and cultural influence. Although his own accomplishments as caliph were arguably modest, his reign came to epitomise the 'golden age of Islam'. Guided by his mother al-Khayzaran through the first years of his caliphate, and ably supported by viziers of the Barmakid family, he presided over a largely peaceful and prosperous empire. However, local dynasties began to exercise power in the caliph's name in the western reaches. Al-Rashid's decision to divide the succession between three of his sons helped to cause the subsequent civil wars from which the caliphate never recovered.

Muhammad ibn Idris **al-Shafi'i**
Eighth/ninth century Islamic jurist from Palestine, whose teachings developed into the Shafi'ite *maddhab*, one of the four main Sunni schools of jurisprudence. Al-Shafi'i studied under Imam Malik. He later debated with leading members of the nascent Hanafi school in Iraq, becoming a student of al-Shaybani. Al-Shafi'i developed his own approach to jurisprudence, firmly grounded in the texts of the Quran and *ahadith*, but adopting some of the methods of the Maliki and Hanbali schools. His book *Al-Risala* framed the future development of *usul al-fiqh*, as other jurists tended to present their methods by contrast with his.

Muhammad ibn Ahmad **al-Shaybani**
Student of Abu Hanifa and of Abu Yusuf, Abu Hanifa's senior student; a teacher of al-Shafi'i. Al-Shaybani wrote many of the main Hanafi books of *fiqh*, including *Al-Kitab al-Siyar al-Kabir* on the external relations (*siyar*) of Muslims with non-Muslim communities. This work focuses first on rules of war and peace, but also presents rulings on how Muslims should treat non-Muslims in the caliphate, the *dar al-Islam*, and how Muslims should conduct themselves when outside of it.

Al-Zubayr ibn al-Awam
One of the first converts to Islam and a close Companion of the Prophet. He was among the early Muslims who went to Abyssinia, and later fought in all the major actions between Meccan forces and the new Muslim state. He likewise served as a military commander for Abu Bakr and Umar, then participated in the *shura* that chose Uthman as the third caliph. He joined Aisha and the Companion Talha in demanding that Ali avenge Uthman's death, but declined to participate alongside them in the Battle of the Camel. He was assassinated shortly after leaving the battlefield.

Ali ibn Abi Talib
Fourth caliph (656–661). The son of Abu Talib and the cousin of the Prophet. After the Prophet's marriage, he and Khadija took Ali into their own household. Ali was the first convert to Islam after Khadija. In Shia tradition, the Prophet designated Ali as his successor. Sunnis hold that the Prophet designated no successor, with Abu Bakr, Umar and Uthman chosen instead by consensus of the Companions. Each time Ali stated his own claim to the leadership (caliphate) but acquiesced when another was selected, and

served as an advisor. He became caliph in a time of strife (*fitnah*) in the wake of the rebellion that overthrew Uthman, and had not yet consolidated his political authority when he was assassinated by a Kharijite rebel. Shia consider him the first Imam (632–661) after the Prophet, who imparted to Ali his *nass*, a mystic understanding of Sharia known only to the Imam. In Shia tradition the descendants of Ali and the Prophet's daughter Fatimah are the true Imams.

alim
Singular of *ulama*.

alms tax
See *zakat*.

amir
A commander or ruler. The first caliphs were called *amir al-Mu'minin*, commander of the faithful. The title *amir* came to be applied to any military commander, or a regional governor. In Islamic legal theory, an *amir* exercised only political authority delegated from the caliph.

Amr ibn al-As al-Sahmi
A leading military commander among the Quraysh who fought against the Muslims, then converted to Islam shortly before the Muslim conquest of Mecca. The Prophet made him a military leader of the Muslims. Under the Caliph Abu Bakr he led Muslim armies to victories against the Byzantine Empire in Palestine, and became governor of Palestine under Umar. Amr led the Muslim forces that conquered Egypt in the early 640s and remained governor of Egypt until he was dismissed by the Caliph Uthman. After Uthman's assassination, Amr sided with Mu'awiya against Ali and facilitated the temporary truce at Siffin. As caliph, Mu'awiya restored him to the governorship of Egypt.

Ansar
The original Muslim tribes of Medina. The *Ansar* invited and welcomed the Prophet, but had relatively little influence in the new state compared to the *Muhajirun*, the Muslims who had emigrated with the Prophet from Mecca. The *Ansar* made significant military contributions in the early caliphate and supported Ali's elevation to the caliphate after Uthman over the claims of other senior Companions. See also *Muhajirun*.

apostasy
The act of renouncing one's religion.

apostasy wars
See wars of *ridda*.

ashraf
Arab tribal leaders who formed the *de facto* public administration of the early caliphate. The caliph or governor would consult with the *ashraf* in forming policy, and the *ashraf* would take responsibility to ensure that the clans they led would comply. Their governmental role began to diminish under the Umayyad Caliph Abd al-Malik (685–705), who appointed governors from the military and began to institute a permanent bureaucracy. The power of the *ashraf* remained significant, which led over time to discontent among the *mawali* (non-Arab converts to Islam), who played a key role in supporting the Abbasid revolution.

awqaf
Plural of *waqf*.

Battle of **Badr**
The first significant armed conflict between the Muslims from Medina and Quraysh-led forces from Mecca, in 624. The Prophet provoked the Meccans with caravan raids. The Meccans responded by sending a small army toward Medina, which the Prophet met with his own forces at Badr. The battle consisted of a series of single combats between Meccans and *Mujahirun* from the Prophet's side, most of which the Muslims won, then a Meccan attack and a Muslim counterattack that put the Meccans to flight. The Muslims attributed their victory, against a force about three times their number, to divine intervention. The Medinan state was established as a local power, its faith in Islam solidified. Service at Badr became a mark of highest honour in the Islamic state.

Banu Hashim
One of the Quraysh clans of Mecca, of whom the Prophet was a member. Banu Hashim was not powerful or particularly influential, but was widely respected and held the prestigious responsibility of supplying food and water to the pilgrims who came to Mecca for the annual *hajj*. Since the Prophet's time, descendants of Banu Hashim are honoured as *ahl al-bayt*, people of the house (of the Prophet). The royal family of the Hashemite Kingdom of Jordan descends from Banu Hashim.

Banu Umayya
Along with Banu Makhzum, one of the two leading clans in the dominant Quraysh tribe in Mecca. With the prominent exception of Uthman, Banu Umayya opposed the Prophet from the start of his ministry, but refrained from overt attack due to the prestige and protection of his uncle, Abu Talib. After the *hijrah*, Banu Umayya led the Qurayshi opposition to the Prophet that culminated in the battles of Badr, Uhud and the Trench. In 630, the leaders of Banu Umayya converted to Islam and joined the Prophet, who assigned them senior political and military roles. Uthman later became the third caliph. His cousin Mu'awiya established the hereditary Umayyad caliphate, which lasted for nearly a century.

Barmakids
A Persian family of administrators who served the early Abbasid caliphs. Khalid al-Barmaki was a senior advisor to the first three Abbasid caliphs, and his son Yahya was vizier to Harun al-Rashid. Khalid organised the Abbasid administration, oversaw the land tax register, and was at times a regional governor. Yahya was al-Rashid's tutor, and later exercised almost total power on the caliph's behalf until he was dismissed and imprisoned in 803. His sons also served as senior administrators. From the Abbasid revolution until 803, the Barmakids became one of the wealthiest and most influential families in the caliphate, at times second only to the ruling dynasty itself.

Battle of **the Camel**
The first major battle between Muslims in 656. Aisha, Talha ibn Ubaydullah and Zubayr ibn al-Awam approached Basra with an army to insist that Ali, the newly acclaimed caliph, punish those who had killed his predecessor, Uthman. Negotiations began, but violence broke out and soon became a general battle. Intense fighting took place around the camel from which Aisha directed the insurgent army, disorganised by Zubayr's

departing the field before the battle. Ali's forces triumphed, ending the threat to his rule from the senior Companions other than Mu'awiya. Most of the insurgent leaders were killed. Aisha was captured, then released to live in retirement in Medina.

bay'ah
The acclamation by the people of a newly nominated caliph. In the Sunni tradition, the nominee is either designated by the previous caliph, or chosen by a group of counsellors acting as the *ahl al-hall wa'l-'aqd*. The nominee is presented to a gathering of the people, who publicly acclaim the new caliph on behalf of the *umma*.

bedouin
Ethnically Arab societies who traditionally live as nomads in the deserts of Arabia, North Africa and parts of the Middle East.

bid'ah
Innovation. In Islamic law, the term signifies attempting to change God's plan, by introducing practices that are not grounded in the words of the Quran or the *sunna*.

Byzantine Empire
The continuation of the Roman Empire, with its capital at Byzantium (later named Constantinople, then Istanbul). It was a main rival of the early caliphate, in religious as well as geopolitical terms, as an avowedly Greek Orthodox Christian state. Weakened by wars in the early 7th century, primarily against the Sasanian Empire, Byzantine armies were unable to hold two of the Empire's richest provinces, Syria and Egypt, against invasions from the Rashidun caliphate. Conflict between the Empire and the caliphate continued during the Umayyad years. Although the caliphs did not conquer Constantinople itself, the Empire never recovered its former territories in the Middle East and North Africa. The caliphate's tolerance of non-Muslim religious communities, epitomised by the institution of the *dhimmah* pact, may have facilitated its successes against the Byzantines.

caliph
The caliph was a political and religious leader. The office evolved from the need for a leader of the Muslim community after the Prophet. Although lacking the divine inspiration that graced the Prophet, the caliph led the community in prayers, or prayer leaders did so in the caliph's name. The first caliphs governed essentially as first among equals in consultation with clan chiefs and senior Companions. Later, the office became hereditary, and came to resemble the Persian imperial monarchy it supplanted. In the Abbasid era, Islamic jurisprudence developed theories of the caliphate that focused on the qualities and duties of a caliph, the ways to select a caliph, and the relationships between the caliph and the law. See also *khalifa*.

Companions
Muslims who knew the Prophet. The appellation Companion applies to any member of the community who came into contact with him, even infants or those who converted after careers in opposition to Islam. After the Prophet passed, Companions became teachers of the Prophet's ways, and agreement of the senior Companions served to establish *ijma* (consensus) on a point of Islamic law. Companions were consulted as to how to apply Sharia in situations the Quran did not explicitly address, and their reports of the Prophet's acts and teachings were seen as reliable *ahadith* sources.

Constitution of Medina
An agreement between the Prophet and his followers from Mecca and a group of clans in Medina that established the first Islamic political entity (referred to in this book for convenience as an Islamic state). It was essentially a treaty of alliance rather than anything resembling a modern constitution. All parties agreed to mutual self-defence under the Prophet's leadership, and that the Prophet would serve as arbitrator among the clans and as the interpreter of the agreement. The Prophet was also the clan chief of the Muslims from Mecca and the religious leader of all Muslims. The agreement encompassed several Jewish clans, who continued to practice their own religion.

Damascus
An ancient centre of culture and commerce, strategically located. When Islam emerged, Damascus was a major city of the Byzantine Empire. In 635–636 Muslim forces under Khalid ibn al-Walid defeated a Byzantine army and added Damascus to the caliphate. Umar appointed Mu'awiya governor of Damascus in about 640, in place of his brother Yazid who had died in a plague. Uthman expanded Mu'awyia's governorate, which became his base of power. Damascus was the capital of the Umayyad caliphate Mu'awiya established in 661. It remained the seat of the caliph until Marwan II, the last Umayyad caliph, relocated the capital to Harran.

dar al-harb
Approximately 'land of war'. In classical jurisprudence, the part of the world that abutted the caliphate and was invited to convert to Islam, but remained separate and without a peace treaty. See also *dar al-Islam*.

dar al-Islam
Approximately 'land of Islam'. In keeping with the universalist aspirations of Islam, classical jurisprudence divided the world into the lands where the caliph held sway (*dar al-Islam*) and lands whose rulers had not yet converted or been subjugated, the 'land of war' (*dar al-harb*). Some jurists later added a third realm, the 'land of treaty' (*dar al-sulh*), to accommodate the fact that the caliphate had entered into agreements and long-term relations with neighbouring rulers. This model enabled the development of a classical *fiqh* of Islamic external relations. With the multiplicity of Islamic states, the model itself is obsolete, but its principles and rulings can inform modern Islamic international law. Some jurists would now include within the *dar al-Islam* any state where Muslims are free to practice Islam. See also *dar al-harb*.

da'wah
The call to Islam. Its narrowest meaning is simply the invitation to follow Islam, through proselytisation or preaching. In its broader sense, *da'wah* can encompass any activities that seek to spread understanding of Islam and bring new converts.

dhimmah
A type of pact made between the original Islamic state and groups who submitted to its rule but preferred not to convert to Islam. The *dhimmah* pact varied from case to case, but the basic form was to exchange protection by the Muslim forces for payment of a tax called the *jizyah*. The amount of *jizyah* was usually equivalent to the alms tax (*zakat*) required of Muslims. *Dhimmis* (people subject to the pact) could participate in society, following their own religion rather than Islam, and were not required to render military service to the state (but did not share in the spoils of *jihad*).

dhimmi
A non-Muslim residing permanently in the caliphate under a *dhimmah* pact.

diwan
A government department. In Islamic government, the first *diwan* was the register Umar kept listing the Muslims according to their seniority (in length of time since joining the Muslims) and service to the faith. It later came to refer to government offices with functions such as overseeing taxation or producing documents, then to administration generally.

diya
Compensation paid by the victim or their family for bodily injury or killing, in lieu of *qisas*, retribution. The victim or family chooses whether to demand *qisas*, or to accept *diya* instead.

emir
See *amir*.

fatawa
Plural of *fatwa*.

Fatimah bint Muhammad
Youngest daughter of the Prophet and Khadija, and the only one of the Prophet's children to survive him (by less than a year). She married Ali, with whom she became the progenitor of nearly all the Prophet's descendants. Their descendants include the Shi'ite Imams and the rulers of the Fatimid caliphate that controlled Egypt and much of the Maghreb in the tenth through twelfth centuries.

Fatimid caliphate
An Ismaili Shi'ite empire, ruled by a dynasty claiming descent from the Prophet through his daughter Fatimah and Ali. Established in tenth century Tunisia, it dominated Egypt and North Africa for about a century, rivalling and at times overshadowing the Abbasid caliphate. Cairo was built as its capital, where the dynasty also founded the Al-Azhar mosque and university. At its greatest extent, the Fatimid caliphate (or imamate, as the head of the ruling house was considered a divinely guided Imam) covered North Africa east of Morocco, the Hijaz including the holy cities, Sicily and the Levant. It declined in the face of an Abbasid resurgence and sporadic wars with other regional powers, and was finally extinguished in 1171.

fatwa
A *mufti*'s formal statement of opinion on a matter of Islamic law. A *mufti* may issue a *fatwa* spontaneously, or in response to a question. The questioner might be a *qadi* or another type of judge, for example, or a petitioner in a court case, a government official, a fellow *mufti*, or a member of the public. A *mufti* arrives at a *fatwa* by a process of legal reasoning, usually *ijtihad* or *taqlid*. Although court judgments or other legal acts such as legislation or administrative decisions might reflect the content of a *fatwa*, a *fatwa* in itself is merely an informed legal opinion, without binding force.

fiqh
Islamic law as interpreted by jurists. *Fiqh* represents the human effort to understand the divine law that is within Sharia and apply it to individuals and societies. See also *usul al-fiqh*.

fitnah
Violent civil strife among Muslims. The early caliphate saw three periods of *fitnah*. The first *fitnah* began after the assassination of Uthman, and lasted until Mu'awiya ended the Rashidun caliphate and established the Umayyad dynasty of caliphs. The second *fitnah* began upon Mu'awiya's passing, sparked by his designation of his son Yazid (680–683) as the next caliph, and lasted until the end of Ibn al-Zubayr's rebellion in 692. The third *fitnah* began as a contest for the succession to the caliphate following the overthrow of al-Walid II (743–744) consequent to ongoing disputes between 'northern' and 'southern' Arab tribes within the Umayyad caliphate. Marwan II (744–750) emerged as caliph and ended the conflicts by 747, but almost immediately faced the revolution that ended the Umayyad era and installed the Abbasid dynasty. *Fitnah* became a general term indicating strife or disorder. The jurists of the Abbasid era declared a duty under Islamic law for the *umma* to submit to even imperfect authority, if it would avert the greater threat to the posed by *fitnah*.

fuqaha'
Literally, 'those who are versed in *fiqh*'. See *ulama*.

Gabriel
An archangel of the Abrahamic religions, who appeared in the Old and New Testaments to give prophecies and to guide prophets. Gabriel spoke the words of the Quran to the Prophet, and appeared several times to advise or discourse with him.

hadd
Crimes for which the Quran or *ahadith* prescribe specific punishments. They are theft, illicit sexual relations, false accusation of illicit sexual relations, and highway robbery; many jurists also consider apostasy or blasphemy and drinking alcohol to be *hudud* (plural of *hadd*) crimes. Because they are set out in the texts, the prescribed punishments must be applied, in contrast to *qisas* offences, where the victims may forgive the offender, and *tazir* offences, where public authorities have discretion whether or not to punish. High evidentiary thresholds often limit the practical impact of a mandatory *hadd* punishment; for example, four eyewitnesses must testify to prove *zina*, illicit sexual relations.

hadith
Approximately, 'report'. A saying, later recorded in writing, that demonstrates Sharia. The most important *ahadith* (plural form) report the words or actions of the Prophet, bringing his *sunna* to future generations. Early Muslims memorised and repeated *ahadith*. Later jurists compiled them into edited volumes, of which the earliest that have survived date to the early Abbasid caliphate. The compilation process, sometimes referred to as *hadith* science, entailed collecting *ahadith* then evaluating their reliability, to avoid recording spurious or unreliable reports. A sound *hadith* includes an unbroken chain of transmission, in the form of the names of those who learned it and taught it to the next generation, starting with the original eyewitness. Its soundness depended on its transmitters' reputations for piousness and reliability; how widely it was reported; and how well it cohered with the Quran and other *ahadith* already found to be sound. The six canonical Sunni *hadith* collections are those of Abu Dawud, al-Tirmidhi, Ibn Majah, al-Nasai and especially al-Bukhari and Muslim. Since the Prophet's *sunna* is a revealed proof of Sharia, *ahadith* can be treated as positive law. *Ahadith* that report the words

or deeds of other teachers of Islam, particularly the Companions, can also transmit understanding of Sharia, but carry less legal weight.

hajj
The annual great pilgrimage to Mecca. It is one of the five pillars of Islam, the acts required of all believers, alongside the *shahada* (profession of faith), *salat* (prayer), *zakat* (giving alms) and *sawm* (fasting). Each Muslim, if able, should perform the *hajj* at least once. The pilgrimage predated Islam, having its origins in the time of Abraham, when his son Ishmael miraculously discovered water there. An annual tradition developed in which otherwise polytheistic tribes came together once per year to worship the one God, with violence forbidden during this time. Due in large part to the pilgrimage, Mecca became the commercial and religious centre of Arabian society, with the Quraysh tribe becoming responsible for hosting the visiting pilgrims. The Prophet led the *hajj* in the last year of his life, establishing its Islamic form. It entails a series of rites carried out over five days during the last month of the Islamic year, most famously walking in procession seven times around the Kaaba. The *hajj* is sometimes called the major pilgrimage. The lesser pilgrimage to Mecca, the *umrah*, is recommended but not required and may be performed at any time.

Hanafi *maddhab*
One of the four main Sunni schools of Islamic jurisprudence, named for Abu Hanifa. It is the most widely followed Sunni school, prevalent for example in Central and South Asia and many formerly Ottoman territories. Originally centred in Kufa, the Hanafi teachings tended to reflect those of the Companions who had settled in Iraq. Hanafi jurisprudence espouses *qiyas* (analogical reasoning) and *istihsan* (juristic preference, or equity) to supplement the words of the Quran and *ahadith*, and *ijma*, in reaching rulings of Islamic law. Abu Yusuf and al-Shaybani, two of Abu Hanifa's most prominent pupils, developed the first compilation of rulings regarding relations between Muslims and non-Muslims, which can be seen as the genesis of Islamic international law.

Ahmad **ibn Hanbal**
Ninth century Sunni jurist, whose teachings the Hanbali *maddhab* is based on. He was a student first of Abu Hanifa's pupil Abu Yusuf, then of al-Shafi'i. He was a renowned recorder of *ahadith*, compiling a notably large, carefully verified collection. Ibn Hanbal reached the height of his influence and fame during the *mihna*, when he resisted the caliphs' efforts to pronounce on matters of Islamic doctrine, despite imprisonment and repeated flogging. In his view, the way to understand Sharia is through the texts, and interpretation is the province of highly qualified and pious *ulama*.

Hanbali *maddhab*
One of the four main Sunni schools of Islamic jurisprudence, named for Ibn Hanbal. The Hanbali *maddhab* developed from a renewed focus on *ahadith* and the *sunna* of the early Muslims, partly in reaction against the use of structured reasoning and juristic discretion to reach rulings in situations the texts did not seem to cover. It is the strictest of the four *madhahib* in terms of adherence to the texts. Like the Shafi'ite school, it is wary of *istihsan* and *maslahah* as bringing subjective human discretion into *fiqh*. Similarly, the Hanbali school takes a restrictive view of *ijma*, traditionally accepting only the consensus of Companions, and it rejects *'urf* entirely as an indicator of Sharia. Ibn Hanbal also disapproved of *qiyas*, but his followers eventually accepted it. Today the

Hanbali *maddhab* has its main influence in the Arabian Peninsula, and is the state's designated *maddhab* in Saudi Arabia, Kuwait and Qatar.

Hasan ibn Ali ibn Abi Talib
Eldest son of Ali and Fatimah, grandson of the Prophet, and second Shi'ite Imam (661–670). He was also a Companion of the Prophet, having lived in his household as a child. He supported his father in his attempts to consolidate power as caliph and fought at the battle of Siffin. After Ali's assassination he was acclaimed caliph in Kufa, but rather than continue the wars, abdicated and recognised Mu'awiya as caliph. He retired to Medina and took no further part in politics.

Hashimiyya
A sect that formed clandestinely in Kufa in the eighth century, opposed to the Umayyad caliphs on religious and political grounds. The Hashimiyya held the caliphs to be impious usurpers, and advocated for their replacement by new rulers from among the Prophet's descendants (hence 'Hashimiyya', from the name of the Prophet's clan, Banu Hashim). Members of the movement travelled to Khurasan, where they proselytised and organised resistance against the caliphs. When the movement emerged into the open, it did so accompanied by a significant military force that eventually overthrew the Umayyad caliphate and installed the Abbasid family in its place.

Hijaz
The region of western Arabia where Islam emerged, on the Red Sea coast and containing the cities of Mecca and Medina.

Hijrah
The migration in 622 of the Prophet and his followers from Mecca to Medina, where they founded the Islamic polity. It is considered one of the most significant moments of the Prophet's career and in the history of Islam, and marks the starting point of the Muslim calendar.

hisbah
In general, a duty of Muslims to promote good and prevent evil. Good and evil may be understood in terms of acts that are approved or disapproved of under Sharia, guided for example by the *maqasid al-Sharia*. Because of the amount and type of power vested in governments, especially in states that recognise a religious role for their rulers, *hisbah* is a particularly strong responsibility of state authorities. In some Islamic societies, there is a specific public authority known as the *Hisbah*, which originated as a person appointed by the ruler to monitor the public markets and ensure that transactions are fairly conducted.

Hudaybiyyah
A small town near Mecca where the Prophet and the Meccans made a treaty. The Prophet had arrived in 628 with his followers from Medina to perform the pilgrimage at Mecca. In return for their departure without entering the city, the Meccans agreed to vacate the city the following year so the Muslims could perform the pilgrimage undisturbed. By 630, confusion and dissent had so weakened the Qurayshi political leadership of Mecca that when the Prophet arrived with an army and asserted a violation of the treaty, the city capitulated and agreed to convert to Islam and submit to the Prophet's leadership.

hudud
Plural of *hadd*.

hukm
A binding judgment in Islamic law. Usually issued by a *qadi* or an arbitrator. The judgment might or might not reflect the content of a *fatwa*. The *qadi* or arbitrator, or one of the parties, might contact a mufti to request a *fatwa* to apply to the specific case. The person deciding the case might also consult an archive of *fatawa*, or issue a ruling based on a canon of rulings or simply their own understanding of the law, if the case is straightforward enough not to require a *mufti*'s opinion. A *hukm* decides the case and is enforceable against the parties. It does not set a precedent, although future decision makers might consult it and apply its reasoning to cases they are called on to decide.

Husayn ibn Ali ibn Abi Talib
Second son of Ali and Fatimah, grandson of the Prophet, and third Shi'ite Imam (670–680). In his childhood, a Companion of the Prophet. Husayn did not overtly oppose Mu'awiya after his brother Hasan's abdication of the caliphate, and accepted a pension to live on in Medina, but refused to recognise Mu'awiya's son Yazid as the next caliph. He travelled from Mecca, where he had taken refuge, toward Kufa at the invitation of supporters there. Yazid's forces intercepted Husayn and his party at Karbala in Iraq and demanded that he recognise Yazid, on pain of death. Husayn refused. After a short battle he and his vastly outnumbered followers were killed. His martyrdom became a lodestar for future opposition to the Umayyads, as well as a seminal event in Shi'ite history, commemorated annually with processions and remembrance services.

ibadat
The rulings of Islamic law that concern personal and devotional matters. These are not usually enforceable by human authorities. See also *mu'amalat*.

ibahah
A principle of Islamic law according to which acts that are not specifically prohibited are permissible. It applies more to *mu'amalat*, social relations, than to *ibadat*, devotional duties, because acts of worship are specifically prescribed and innovating in this area risks violating *tawhid*, the oneness of God.

Abd Allah **ibn al-Zubayr**
Son of al-Zubayr ibn al-Awan and niece of Aisha. Ibn al-Zubayr was the first child born to the *Muhajirun* in Medina. He participated in several military campaigns of the early caliphate and fought alongside his father against Ali's forces at the Battle of the Camel. He acquiesced in Mu'awiya's caliphate, but refused to recognise his son Yazid as his successor and established a base of opposition in Mecca, where his forces withstood a military siege. After Yazid's passing, the caliphate descended into conflict, the second *fitnah*, and Ibn al-Zubayr declared himself caliph in Mecca. His caliphate grew beyond the Hijaz to include for example Egypt and much of Iraq, exceeding the remaining Umayyad territory as well as that of other contenders. After Marwan established a new line of Umayyad caliphs, Ibn al-Zubayr's forces suffered a succession of defeats until 692, when his caliphate was ended and he was killed in battle outside of Mecca.

Taki al-Din Ahmad **ibn Taymiyyah**
Hanbali jurist of the thirteenth/fourteenth centuries, based first in Damascus and later in Egypt. He taught strict adherence to the words of the texts and opposed innovations of any kind, such as the introduction of classical logic or theology or the veneration of saints. In his time Ibn Taymiyyah became popular with the people of the cities where

he worked, but often dissented with the prevailing views of other jurists or clashed with governing authorities. His prolific writings remained outside the mainstream of Islamic jurisprudence for centuries, but strongly influenced the modern Islamic revivalist movement. He taught and wrote broadly, but in the area of public law his seminal work was *Al-kitab al-siyasah al-Sharia* ('The book of governance by Sharia'). In this work, Ibn Taymiyyah argued that Islamic rulers were subordinate to the law as enunciated by the *ulama*, but had wide latitude to interpret and apply the law as needed to govern according to Sharia.

ijma

Consensus, the third proof of Islamic law after the Quran and *sunna*. The legal basis of *ijma* is the Prophet's statement 'my community will never agree on an error'. This is interpreted to mean that if the Muslims agree on the answer to a question of law that the Quran and *sunna* do not resolve, their answer must correctly reflect Sharia. Sharia being immutable, a consensus, once reached, is permanent. Jurists differ over who participates in *ijma* – the *ulama* as heirs to the Companions, or the entire *umma* – and how to show consensus. Some have argued that the consensus of a group followed by lack of disagreement by others, or by only very few, suffices. Some have also argued that localised *ijma* can establish the law of a particular region. As the Muslim community has grown and become more diverse, *ijma* has become rarer. The only universally recognised type of *ijma* is that of the Companions.

ijtihad

Structured legal reasoning by which muftis arrive at rulings of Islamic law. Literally, an effort to understand; linguistically related to *jihad*. To perform *ijtihad*, a *mujtahid* must have the Quran and all legally significant *ahadith*, as well as all decisions made via *ijma*, committed to memory. The *mujtahid* must also be fluent in classical Arabic and well versed in the techniques of Islamic jurisprudence and legal reasoning. In applying *ijtihad*, the *mujtahid* first verifies that the revealed proofs of law (the Quran, *sunna* and *ijma*) do not resolve the issue, then searches the works of renowned jurists for an answer. Depending on which *maddhab* the *mujtahid* follows, the next step is to apply *qiyas* (analogical reasoning) or purposive techniques such as *maslahah* (public interest) or *istihsan* (equity, approximately), or even the *mujtahid*'s own considered opinion (*ra'y*). In order to be allowed to perform *ijtihad* and to issue *fatawa*, a jurist must be certified as qualified by a more senior, already recognised *mujtahid*. The modern use of *ijtihad* is somewhat controversial. Some jurists hold that the law has been completely discovered and modern *mujtahidun* should instead use *taqlid*, the application of older rulings to new cases. In another aspect of the controversy, some Islamic reformers would prefer to expand the use of *ijtihad*, including possibly reopening previous rulings to new analysis, or relaxing the qualifications required to perform *ijtihad*.

'illah

The legal reason behind a ruling. Often this is tied to the *maqasid al-Sharia* (the purposes for which Sharia was revealed). Its main use is to facilitate *qiyas*, analogical reasoning. For example, one reason drinking wine is prohibited might be that its intoxicating effect interferes with the ability to pray, thus impeding the beneficial effects of religion, or that it diminishes the intellect. Protection of religion and intellect are two of the five main *maqasid*.

imam
Literally, 'leader'. In Sunni Islam it refers to prayer leaders, for example at a mosque, or to persons recognised as senior teachers of Sharia. In Shi'ite theology there is only one Imam at any time, the successor to the Prophet through descent from his daughter Fatimah and the first Imam, Ali. The Shi'ite Imam possesses *nass*, unique understanding of Sharia imparted by the Prophet.

imamate (*imamiya*)
The Shi'ite belief that the *umma* should be governed by an Imam who is a descendant of the Prophet. In this view, any caliph who is not of the Prophet's line is illegitimate.

international bill of rights
An informal term of art in international human rights law. It is usually understood to refer to the Universal Declaration of Human Rights, and two treaties that aimed to implement it, the International Convention on Civil and Political Rights and the International Convention on Economic, Social and Cultural Rights.

istihsan
Juristic preference, sometimes referred to as akin to the common law doctrine of equity. When there are multiple possible rulings to use to decide a question or a case, *istihsan* allows the jurist to select a weaker ruling (one with less support in the proofs of law) if the stronger ruling would cause harm or injustice in a particular case. *Istihsan* is somewhat controversial, for example used with approval by jurists of the Hanafi school but forbidden by the Shafi'ite school.

Jerusalem
The third holiest site in Islam, after Mecca and Medina. The city is associated with many revered prophets of Islam, including Abraham, David and Jesus, among others. According to Islamic tradition, the Prophet took a miraculous journey to Jerusalem when his revelations began. There he received the injunction that Muslims should pray five times daily. For about two years after the *Hijrah*, Muslims prayed facing Jerusalem. The city has retained its significance in Islam over the years, symbolised by structures such as the Dome of the Rock and the Al-Aqsa Mosque.

jihad
Literally, a struggle. *Al-jihad fi sabil Allah* ('to struggle in the path of God') has a broad meaning. According to classical jurisprudence, the primary form of *jihad* is an internal struggle within the believer to better understand and implement God's will. Ibn Qayyim al-Jawziyya, Ibn Taymiyyah's most prominent student, classified *jihad* as waged against the self, the unbeliever, the hypocrite and corruption, by means of internal effort, words, money and in person. Only the last type, sometimes called *jihad* by the sword, implies war. Fighting if necessary to defend the *umma* against attack is a duty of all able Muslims. Whether there is or was a duty to instigate war is controversial. If there is such a duty, it is a community duty rather than incumbent on individuals, and the purpose of the war must be to spread the *da'wah*. *Jihad* doctrine restricts war in that other types of war are prohibited, and war, if waged, must be fought according to rules that for example require humane treatment of prisoners and prohibit unnecessary killing or wanton destruction of property.

Kaaba
The central shrine of Islam at Mecca, shaped like a cube and usually shrouded in black. According to tradition, it was erected by Abraham and Ishmael at the site of an earlier shrine built by Adam. It contains the Black Stone, sent from heaven to Adam and Eve as a means to obtain forgiveness of their sins. As a traditional place of worship prior to the advent of Islam, the Kaaba also contained objects of polytheistic worship until the Prophet had them destroyed upon his assumption of the leadership of Mecca in 630. The Kaaba has been damaged and rebuilt several times, most famously after it burned in the sieges of Mecca during the second *fitnah*. From the beginning of the Prophet's ministry, Muslims have prayed in the direction of the Kaaba, except for a brief period after the *Hijrah* when they prayed towards Jerusalem.

Khadija bint Khuwaylid
First wife of the Prophet. A wealthy trader in Mecca, she first employed Muhammad as a manager for her caravans, then later proposed marriage. He accepted. When the Prophet began to receive revelations, it was Khadija who convinced him he was the Messenger of God. The Prophet and Khadija had several children, of whom their daughters Umm Kulthum, Raqiyyah, Zaynab and Fatimah survived to adulthood. The Prophet had no other children. Khadija and the Prophet remained monogamously married until her passing in 619.

Khalid ibn al-Walid
A military commander and member of the Banu Makhzum, one of the leading Quraysh clans in Mecca alongside the Banu Umayya. He led the Meccan cavalry that drove the Muslims from the field at the Battle of Uhud. Some time after the Battle of the Trench and before the Muslim conquest of Mecca, he converted to Islam. The Prophet installed him as a military leader. Khalid led Muslim forces to several victories during the apostasy wars under Abu Bakr, then won a reputation as a master strategist while leading armies against the Sasanian and Persian Empires in Iraq and Syria during the early part of Umar's caliphate.

khalifa
Translatable as either 'deputy' or 'successor'. This reflects an early debate over the nature of the authority of a caliph. For example, Abu Bakr considered himself *khalifat rasul Allah*, the successor to the Prophet of God, whereas some Umayyad caliphs styled themselves *khalifat Allah*, God's deputy. See also caliph.

Kharijites (***Khawarij***)
Literally, 'those who went out' or seceded. A pious, egalitarian and insular sect originally formed by Muslims who rejected Ali's rulership when he agreed to submit his dispute with Mu'awiya to arbitration after the battle of Siffin in 656. They argued that arbitration usurped God's prerogative to favour one side or the other in battle, and that as the duly recognised ruler, Ali had a duty to suppress the pretender by force. Ali defeated the main Kharijite forces in 658, but was assassinated in 661 by one of the surviving rebels. Further serious Kharijite uprisings during the second and third *fitnahs* were suppressed. According to Kharijite beliefs, divergence from the injunctions of Islam rendered the offender an unbeliever, until they repented and were accepted back into the community (alternatively, some argued, they should be killed). The most pious and morally upright of the Muslims should become caliph, regardless of lineage or political considerations;

it was for these reasons, not his close relationship to the Prophet, that they initially supported Ali. A moderate subset of the Kharijites survives in the Ibadi sect, found today mostly in Oman, one of very few sects who are neither Sunni nor Shia.

Ayatollah Ruhollah **Khomeini**
Shi'ite theologian and progenitor of the Islamic Republic of Iran. Khomeini studied and taught in the city of Qom. He received the titles of ayatollah, then grand ayatollah, the highest rank among Shi'ite clerics. Starting in the 1960s, he became a focus of popular opposition to the Iranian regime and its secular, western oriented ideology. He advocated a return to strict adherence to Islamic norms. Eventually exiled for his political activities, he began to espouse the idea of an Islamic state, with a government overseen by senior jurists. He returned to Iran in 1979, recognised as the religious leader of the new regime following the overthrow of the monarchy. Khomeini led the consolidation of the revolution, eliminated opposition and imposed Islamic social norms. He directed the drafting of a new, Islamic constitution that reflected his understanding of Shi'ite theology, and became a prototype of an Islamic theocracy.

Kufa
A city in Iraq, south of Baghdad and northwest of Basra, established as a garrison town by Umar. It was Ali's capital and main base of support during the disputes leading to the first *fitnah*. It was again a centre of unrest in the second *fitnah*, when it became a centre of support for Ibn al-Zubayr. It was the Abbasid administrative capital until the founding of Baghdad in 762. Kufa's political significance then declined. It remained a major centre of learning and culture until the disintegration of the caliphate.

Loya Jirga
'Grand Council'. A *jirga* is a legal assembly in Afghanistan. The *Loya Jirga* traditionally meets to settle major national issues or to end conflict. It enacted the current Constitution of Afghanistan. Under the Constitution, the members of the national assembly and the presidents of regional and local assemblies form the *Loya Jirga*. They convene to consider constitutional amendments, to impeach the president, or for other matters of great national importance.

maddhab
A school (in the sense of a school of thought) of Islamic jurisprudence. As *hadith* science developed, Islamic scholar-jurists evolved methods to derive rulings of Islamic law on questions that the Quran or widely accepted *ahadith* did not seem to address directly. Imams in different regions of the caliphate preferred different approaches, often reflecting the traditions of the Companions and other early Muslims who had settled there. Teaching circles developed, where students would write down the imam's lectures. This led over the years to canons of rulings that followed the analytical style of an early jurist, whose followers would identify themselves as adherents to a particular set of doctrines or school. *Madhahib* (plural) proliferated in the early Abbasid caliphate. Most have since disappeared. Today the main *madhahib* are the Sunni Hanafi, Maliki, Shafi'ite and Hanbali schools, the Shi'ite Twelver Ja'fari, Ismaili and Zaidi schools, and the Ibadi school, an offshoot of the Kharijite movement that is neither Sunni nor Shi'ite.

madhahib
Plural of *maddhab*.

Majalla
The Ottoman civil code, *Mecelle* in Ottoman Turkish. Established in 1877, it regulated a range of civil matters including transactions, torts, evidence and procedure, with family and personal status law left to Sharia courts. It is based largely on Hanafi rulings of Islamic law, reflecting an effort to balance the westernising Tanzimat reforms that preceded it.

majlis
A council. The term is broad enough to cover a legislature, an advisory body, or assemblies that meet regularly or ad hoc on behalf of some part of the community of Muslims.

Malik ibn Anas
Eighth century Islamic jurist from Medina, whose teachings developed into the Maliki *maddhab*, one of the four main Sunni schools of jurisprudence. He compiled *Al-Muwatta*, one of the earliest surviving books of *ahadith*. Al-Shafi'i was his student. Malik taught adherence to the *ahadith* rather than juristic preference (*ra'y*). For matters not settled in the texts or by *ijma*, he preferred to look to the prevailing customs and consensus in Medina for guidance, as reflective of the Prophet's *sunna*.

Maliki *maddhab*
One of the four main Sunni schools of Islamic jurisprudence, named for Imam Malik. It is most widespread in North and West Africa. The Maliki school prioritises the consensus of the Companions or of the early Muslims of Medina, then the teachings of individual Companions, before applying *qiyas* or other juristic techniques to reach a ruling.

maqasid al-Sharia
The purposes for which Sharia was revealed. Jurists have come to agree that the highest, main purposes are to protect and promote life, religion, family, intellect and property. Rulings in the Quran serve these purposes. Beyond the *maqasid*, jurists have found further purposes such as the recognition of hardship in particular circumstances, and the promotion of good public morals. Sometimes the texts explicitly connect a ruling to its purpose. In other cases, jurists are left to infer the purpose. Purposive doctrines such as *istihsan* (juristic preference) and *maslahah* (public interest) allow the jurist to depart from conclusions reached through strict *ijtihad* or *taqlid* and select a less well supported conclusion, if that would better advance the *maqasid al-Sharia*.

Marwan ibn al-Hakam (Marwan I)
Fourth Umayyad caliph (684–685). First cousin of Uthman and second cousin of Mu'awiya. He was a close adviser to Uthman and then the governor of the Hijaz under Mu'awiya. He emerged as caliph from the second *fitnah*, as the consensus choice of the Syrian tribes that backed him over Ibn al-Zubayr. In his brief caliphate, he began to re-establish control over the Syrian core of Mu'awiya's former realm, and Palestine and Egypt. From 685 on, the rest of the Umayyad caliphs were Marwan's direct descendants.

***maslahah* (*maslahah mursalah*)**
A 'public interest' principle of Islamic law, first attributed to Imam Malik. In cases where the Quran, *sunna* and consensus do not provide a clear ruling, a jurist may consider which among alternative rulings best serves the public interest. Public interest is broadly defined, but starts from the *maqasid al-Sharia*, and also includes considerations such as social welfare. *Maslahah* is generally accepted among Sunni schools, although not by the Shafi'ite school and only as a secondary consideration by the Hanbali school.

Sayyid Abu'l-A'la **Mawdudi**
Indian (later Pakistani) Islamist political theorist and activist of the twentieth century. He undertook studies in Islamic law, which he could not complete for financial reasons, but continued informally, achieving renown as a scholar and journalist. During the independence era he advocated for the construction of an Islamic state, founding a party that eventually participated in electoral politics, Jamaat-i-Islami (Islamic Society). The party has had limited success, but Mawdudi's patient advocacy over the decades strongly influenced the construction of Pakistan's constitution and legal order. In Mawdudi's view, the purpose of politics is to implement Sharia. His overarching idea was an Islamic democracy, in which the citizens would imbibe Islamic values (guided by the *ulama*) and integrate them into all aspects of public life under the sovereignty of God.

mawali
A term with connotations of patronage. During the Umayyad caliphate it came to refer to non-Arab converts to Islam. To fit the new Muslims into the social structure of the caliphate, *mawali* were affiliated to existing Arab tribes. This, alongside factors such as Arab predominance in military expeditions and the establishment of garrison cities, led to a stratified society, although the caliphs Umar II (717–720) and Yazid III (744) made some efforts to promote the equality of Muslims, including *mawali*. As a group, *mawali* gained greater coherence and importance in Khorasan, due partly to intermingling among Arabs and new converts in that region, and played a crucial role in the Abbasid revolution.

mazalim
A type of tribunal loosely analogous to the old English equity courts. Supplicants could appear to plead against injustice at the hands of public officials, enforcement of public duties or property rights, or other issues that fell outside the jurisdiction of the ordinary courts. In the early Islamic state, Umar and other caliphs would personally hear *mazalim* cases. Later this responsibility was often delegated to judges on behalf of the caliph. Because of the general nature of the caliph's authority, *mazalim* courts have broad discretion to fashion solutions in the interest of justice.

Mecca
A trading city and a centre of religious activity in western Arabia since before the advent of Islam. Today it is the primary holy city of Islam. The Prophet was born in Mecca and lived most of his life there. He received the first revelations of the Quran at a mountain outside Mecca, and proselytised in the city for about twelve years. After the Prophet's exile to Medina in 622, Mecca fought against the Muslims as economic and religious rivals until its leading tribes submitted to the Prophet's rule and the Muslim religion in about 630. Its central significance to Islam manifests in institutions such as the Quranic injunction to pray facing toward Mecca; the structures of al-Masjid al-Haram (the Great Mosque) and the Kaaba; and the annual great pilgrimage, the *hajj* to Mecca.

Medina
The second holy city of Islam. An agricultural oasis town north of Mecca, known in pre-Islamic times as Yathrib and renamed *Madinat Rasul Allah* ('the city of the Messenger of God'). The clans of Yathrib jointly invited the Prophet to relocate to their city, and act as their arbitrator to resolve ongoing rivalries. The Prophet's journey to Medina, the *Hijrah*, marks the start of the Islamic calendar. Medina is the location of the Prophet's mosque, and of his tomb. Even after the Muslim conquest of the much

larger city of Mecca, Medina remained the capital of the Islamic state until 661, when Mu'awiya rebased the caliphate in Damascus.

mihna
Approximately 'ordeal'. Sometimes referred to as an inquisition. Taking place from 833 until about 850, it was a watershed in establishing the balance between the *ulama* and the caliph in interpreting Sharia and Islamic law. The doctrinal disagreement was over the createdness of the Quran – whether God created it, or whether, like God, it has always existed. The Caliph al-Ma'mun (813–833) declared its createdness, had *ulama* questioned to ascertain their views on the subject, and required public officials to attest to its createdness during their daily duties. His successors al-Mu'tasim (833–842) and al-Wathiq (842–847) continued to enforce the view of the Quran as created, meeting the determined resistance of traditionalist *ulama*, most prominently Ibn Hanbal, with sanctions that included imprisonment, flogging and execution. Ultimately the Caliph al-Mutawakkil (847–861) ended these efforts and declared that the Quran is eternal, not created. This became the mainstream Sunni doctrine. More important, the outcome of the *mihna* firmly established the prerogative of the *ulama* to interpret Sharia independently of the caliph's views.

modernists
This book uses 'modernists' to refer to those Islamic reformists who espouse rebasing government of majority Muslim states on democratic norms, informed by core values of Islam. A state grounded in principles of Islamic modernism would not be bound by the methods or conclusions of past jurisprudence, nor even necessarily by the words of the texts. Each generation would be trusted to understand the core messages of Islam and apply them in its own particular context.

mu'amalat
The rulings of Islamic law that govern social relations. See also *ibadat*.

Mu'awiya ibn Abi Sufyan
Fifth caliph (661–680), ascribed as the founder of the Umayyad caliphate. Son of Abu Sufyan and second cousin to Uthman, he converted to Islam upon the Prophet's conquest of Mecca and was appointed as a scribe to the Prophet. Umar named him governor of Damascus. During Umar's and Uthman's caliphates his governorate expanded across Syria and he had considerable military success against the Byzantine Empire. As Uthman's relative, he could not accept Ali's succession to the caliphate without vengeance against Uthman's murderers. In the subsequent first *fitnah*, Mu'awiya's forces fought inconclusively against Ali, but he continued to expand the territory under his control. Upon Ali's assassination, Mu'awiya faced little serious opposition in his accession to the caliphate, especially once Ali's son Hasan had abdicated. He stabilised the caliphate and began to introduce a formal civil administration. His most famous innovation was to designate his son Yazid (680–683) as his successor, rather than leaving the choice of the next caliph to consultation or to the community to decide. The caliphs descended directly from Mu'awiya are known as the Sufyanids, from the name of Mu'awiya's father, as opposed to the Marwanids, the descendants of Marwan I (684–685). Despite his accomplishments, Mu'awiya's legacy is controversial, with many Sunnis disparaging him for kingship, *mulk*, seen particularly in the institution of hereditary rule, and Shi'ites implacably opposed to his memory as the enemy of Ali.

mufti
An Islamic jurist qualified to issue *fatawa*. *Muftis* address questions submitted by petitioners on their own terms, without investigating the matter, and in principle without accepting payment. A *mufti* must be well versed in Islamic law and pious. After sufficient study and training, recognised senior jurists certify that a new *mufti* is ready to begin issuing *fatawa*.

Muhajirun
The early converts to Islam in Mecca who accompanied the Prophet when he relocated to Medina. This group was instrumental in the early fighting against forces from Medina. After the Prophet passed, its members assumed the leadership of the *umma*, partly due to their wealth and prior political experience in the pre-Islamic Quraysh leadership of Mecca. The orthodox Sunni theories of the caliphate came to recognise the norm that the caliph should be a member of the Quraysh (although not necessarily descended from the *Muhajirun*). See also *Ansar*.

mujtahid
A *mufti* who is recognised as capable of arriving at independent conclusions of Islamic law through the application of *ijtihad*.

mujtahidun
Plural of *mujtahid*.

mulk
The sin of 'kingship', imposing one's will on the people rather than guiding and leading by example and righteousness. *Mulk* arguably usurps *tawhid*, the unique supremacy of God. It is a charge most famously made by classical Islamic jurists against the Umayyad caliphs, based in part upon Mu'awiya's de facto introduction of hereditary succession to the caliphate.

naskh
Abrogation. Some rulings of Islamic law override earlier rulings. Even some passages in the Quran appear to contradict passages that were revealed earlier. The explanation for this is the doctrine of *naskh*, which recognises that although Sharia is immutable and perfect, its revelation to humans proceeds in stages. Sometimes social conditions change such that an earlier ruling no longer applies, and sometimes the society needs time to develop before it is ready to receive the final ruling.

Ottoman caliphate
The last of the widely recognised Sunni caliphates. With the Abbasid caliphate finally extinct after its long decline, Sultan Murad I declared himself caliph following the Ottoman conquest of Edirne. The 1453 conquest of Constantinople, a feat that had eluded all previous caliphs, and becoming custodians of the holy cities of Mecca and Medina early in the sixteenth century, added immensely to this caliphate's credibility. The Ottoman caliphs did not particularly innovate in matters of governance or religious doctrine, but infused Islamic values throughout their administration. For example, Islam was taught in all schools, *ulama* were appointed to senior public offices, and Sharia courts had jurisdiction over family, personal status and devotional matters. After a long cultural and political golden age, the Ottoman Empire and its caliphate proved unable to match the economic dynamism and military innovations of the emerging European powers.

After declining in power and prestige through the nineteenth century, the empire fell in the wake of the First World War, and the caliphate was abolished in 1924.

qadi
A judge of a Sharia court. The *qadi* evolved from the Prophet's role of arbitrator in the first Muslim community, which the early caliphs continued. The growth of the caliphate soon made it impractical for a caliph to personally hear disputes. Umar began the practice of appointing judges, and a court system developed. Since Sharia was the law of the land, *qadi* courts had jurisdiction to hear any dispute. Qualifications were similar to those of *muftis*: knowledge of the Quran and *ahadith*, training in *usul al-fiqh*, and an upright and pious character. During the caliphates, *qadis* also came to assume administrative duties, such as oversight of charitable endowments (*awqaf*) and guardianship. Decisions of a *qadi* are *akham*, rulings of Islamic law that are binding on the parties to the case. As Islamic states came to adopt the mechanisms of civil courts and civil law, sometimes incorporating rulings or principles of Islamic law, *qadi* courts receded. Today, the jurisdiction of most Sharia courts is limited to matters such as family and personal status law and *awqaf*.

qisas
Retribution. For some crimes, such as murder, the victim or their family has the right to have the public authorities exact an equivalent punishment, or to accept monetary compensation (*diya*) from or on behalf of the offender, or simply to forgive the offender.

qiyas
Analogical reasoning as a component of *fiqh*. It is accepted to varying degrees by the main Sunni *madhahib*, as a secondary proof of Sharia. Once it is shown that the words of the Quran and the *ahadith*, and conclusions of *ijma*, do not address a question, a jurist may employ *qiyas*. This means discovering the *'illah*, the legal cause, underlying a ruling found in those sources (or via prior application of *qiyas*), then applying it *mutatis mutandis* to the facts of a new question.

Quran
The holy book of Islam. It is the literal Word of God, revealed to the Prophet over about 22 years starting in 610. Some parts of the Quran were revealed in response to specific situations. This resulted in significant differences in tone between the verses revealed in Mecca, where the Muslims were a minority sect, and those from Medina, where they formed a new, independent city state. During his caliphate, Uthman directed the written compilation and standardisation of the Quran. The Quran is organised thematically, rather than in the exact order in which it was revealed. Because the Quran is a complete statement of God's Word, immutable and infallible, it addresses every question or issue that humans may face. Because its applicability to new situations is not always obvious, Islamic jurisprudence has developed a rich range of interpretive techniques.

Quraysh
The dominant tribe in the Mecca region in Prophet's time. The Prophet and most of the Companions who came with him to Medina were from Qurayshi clans. Most of the leading Quraysh opposed the Prophet until about 630, when Mecca submitted to the Prophet and Islam. The Quraysh leaders then assumed influential military, administrative and advisory roles in the new Islamic state. After the Prophet, the norm quickly developed

that the caliph was always from the Quraysh, although jurists disagreed on whether the law required this.

Sayyid **Qutb**
Twentieth century Egyptian teacher, writer and political Islamist. He became a senior member of the Muslim Brotherhood. He built on the works of Islamists such as Mawdudi and Rashid Rida, as well as those of classical jurists such as Ibn Taymiyyah, to argue that Egypt and other modern societies had turned away from Islam. In works such as *In the Shade of the Quran* and *Milestones*, he sought to map out how to apply the words of the Islamic texts to modern life and governance. In Qutb's view, the secular governments of the day were illegitimate, and should be removed, if necessary by violence. Executed for treason in 1966, he become a martyr for violent Islamist groups.

Muhammad **Rashid Rida**
Syrian Islamic reformist of the nineteenth/twentieth centuries. A student of Muhammad Abduh who relocated to Egypt in 1897. Rashid Rida built on Abduh's ideas to reform society through Islam. Like Abduh, he promoted education in sciences and other disciplines seen as western oriented, alongside simultaneous religious studies. He advocated a return to the words of the Islamic texts, which all believers should strive to interpret, and a consultative role for the *ulama* in governance. Rashid Rida took Abduh's pan-Islamist vision a further step, advocating for the re-establishment of a universal caliph to guide the *umma*.

Rashidun caliphate
The first era of the original Islamic state after the Prophet. Although the Prophet's divine guidance was irreplaceable, the community still needed a leader in order to survive. The Prophet's Companions chose his closest friend Abu Bakr to succeed him in a position that became known as caliph (*khalifa*). Abu Bakr (632–634) and the next three caliphs, Umar (634–644), Uthman (644–656) and Ali (656–661), are known as the Rashidun ('rightly guided' or 'pious') caliphs. During this era the caliphate expanded from its origins in Arabia to become one of the world's largest empires. The Rashidun caliphs developed many aspects of Islamic governance, from standardising the religion to establishing courts and a civil bureaucracy. Their rule became the reference model against which future Muslim rulers were measured.

ra'y
A jurist's considered opinion about a question of Islamic law. In the early days of Islam, *usul al-fiqh* had not yet developed, nor was *hadith* science organised and widespread. Following a report of the Prophet's instructions, jurists who could not find the answer to a question explicitly in the Quran or the teachings of the Prophet decided based on their own best judgment as to what Sharia required. Later, when Islamic jurisprudence had matured, *ra'y* became disfavoured, as it risked injecting the jurist's personal preferences into a question of law.

reformists
A term this book uses to collectively refer to Islamic modernists and revivalists. Although they take widely divergent viewpoints of the role of Islam in society, both groups, in contrast to traditionalists, advocate rethinking the religion from first principles. By contrast, traditionalists prefer to continue to evolve Islamic law and its application to

society through ongoing discourse of jurists using classical *fiqh* to build on existing canons of rulings.

revivalists
This book uses 'revivalists' to refer to those Islamic reformists who advocate a return to a strict, literal reading of the Quran and the *sunna* as a basis for governance. Revivalists differ from traditional Islamic scholars, in that they would discard the conclusions of *fiqh* in favour of the words of the texts. A revivalist state would in effect be grounded in renewed *ijtihad*, except that the Muslim community as a whole rather than only the *ulama* would perform the *ijtihad*.

ridda
See apostasy. It is widely held that Islamic law forbids *ridda*. It remains a controversial topic, with many observers holding that it is punishable by death. The main counterargument is that the Quranic verses cited to support temporal punishment for *ridda* were revealed in wartime, when turning away from the *umma* was tantamount to treason, not merely apostasy.

ruler
A general term applied to the head of an Islamic polity. Classical jurists wrote about governance as the personal responsibility of caliphs or sultans or emirs. Many modern Islamists argue that an Islamic state should have a single chief executive, for example a caliph or a president, and refer to this role as the ruler. Even those who hold that Sharia can accept collective rule, as in a democracy or a parliamentary system, tend to use the term as short hand for the part of the public administration that establishes and executes laws.

ruling
A catch-all term encompassing authoritative interpretations of Islamic law given in response to a question asked or a legal case. The two main types of rulings are *fatawa* and *ahkam*.

sabiqa
Seniority in Islam. In the early days of the Islamic state, especially under Caliph Umar who established a register (*diwan*), Muslims were ranked according to when they had first joined the community. This translated into positions of responsibility and shares of public funds, generally booty from raids and conquests. *Sabiqa* was an important criterion but not always determinative, as military and other service to the caliphate, as well as needs, also influenced the assignments.

Abd El-Razzak El-**Sanhuri**
Egyptian legal scholar of the twentieth century, educated in both Islamic law and French law. Sanhuri sought to re-introduce Islamic law into predominantly Muslim states through adaptation of civil law. Given the reality of multiple nation states with diverse legal histories, he aimed to produce legal codes that reflected each state's particular background. Accordingly, the prototypical civil code he drafted for Egypt was based on a European model, but instructed judges to look to Islamic law as well as local custom to resolve points of law the code itself did not address. It did not cover family or personal status law. Following a similar philosophy, the civil code he helped to institute in Iraq drew heavily on the Ottoman *Majalla* code, which had been in force prior to the British

mandate over Iraq. Sanhuri also helped to draft civil codes for Jordan, Libya and Syria. Today the legal systems of nearly all Islamic states in predominantly Arab regions reflect Sanhuri's approach.

Sasanian Empire
A Persian empire with its capital at Ctesiphon, near modern Baghdad, that at times extended into modern Turkey in the West and India in the East. Weakened by long wars, mostly against the Byzantine Empire, it was in some disarray when Muslim raids began in the early 630s. After a series of conflicts, Muslim armies under Umar took Ctesiphon in 637, ending the empire. The caliphate acquired the Sasanian wealth and physical and administrative infrastructure, and was influenced by the influx of Persian culture.

Shafi'ite *maddhab*
One of the four main Sunni schools of Islamic jurisprudence, named for al-Shafi'i. The main thrust of the school is adherence to the words of the Quran and *ahadith*, without introducing human reasoning. The Shafi'ite methodology relies on a hierarchy of proofs of law: the Quran, then the *ahadith*, *ijma* and *qiyas*. Within the definition of *ijma*, Shafi'ite jurists prefer the *ijma* of the Companions or, failing that, the teachings of individual Companions. Later consensus carries little weight, and discretionary techniques such as *istihsan* are disfavoured. The Shafi'ite school is less prevalent than in pre-Ottoman times, but is still widely followed in the Horn of Africa, Indonesia and scattered pockets around the central regions of the classical caliphate.

Sharia
'The way', in the sense of a path to water in the desert. Sharia is a comprehensive way of living for all Muslims. It is perfect, comprehensive and unchanging. Islamic law is one part of Sharia. According to Sunni Islam, no human since the Prophet can be sure of completely understanding Sharia (in Shi'ite Islam, the Imam also shares this understanding). Humans must therefore continuously struggle in good faith to better understand and apply Sharia in their lives.

shaykh
A title of respect accorded to a senior religious figure or traditional political leader.

Shaykh ul-Islam **(Grand Mufti)**
A title established under the Ottoman Caliph Suleiman to refer to the *mufti* of Istanbul. Its holder was the head of the state religious institutions, including the judiciary, and a senior advisor the caliph. Previously, the title *shaykh al-Islam* was applied to eminent jurists recognised as having led the development of the law, such as the ascribed founders of the *madhahib*.

Shia
Plural form of Shi'i or Shi'ite.

Shi'ite
A member of the Shia branch of Islam (the word can also be used as an adjective). Shi'ite derives from '*Shiat* Ali', 'the party of Ali'. Shi'ite beliefs centre on the idea of an infallible Imam, descended from the Prophet through his daughter Fatimah and his cousin Ali. In this view, the Prophet designated Ali as his rightful successor in leading the Muslims, and imparted to him unique understanding of Sharia that passes each generation to the next

Imam. The largest school of Shi'ite jurisprudence is the Twelver Ja'fari school. Today the main Shi'ite state is Iran.

shura
Counsel or consultation. *Shura* is a key aspect of Islamic governance, as shown by its use in the Quran. It is used both to indicate the act of consulting, as for example when the Prophet would discuss alternatives with the Companions before making a decision, and to refer to a consultative meeting, such as the *shura* that selected Abu Bakr as the first caliph.

Siffin
The main battle, in July 657, between the forces of Ali and Mu'awiya in the first *fitnah*. The battle itself was indecisive, but its aftermath led to the downfall of the Rashidun caliphate and Mu'awiya's establishment of the Umayyad dynasty of caliphs. During the fighting, some of Mu'awiya's army raised pages from the Quran on their spears, leading to hesitation in Ali's ranks about fighting against fellow Muslims. The two leaders agreed to arbitration to decide who should be caliph. The arbitration failed to reach a conclusion. Serious fighting did not resume, but Ali faced a rebellion within his ranks by a faction that became known as the Kharijites, for having submitted his caliphate to arbitration. Meanwhile, Mu'awiya gathered further forces, and when Ali was assassinated in 661, no major opposition remained to his becoming the next caliph.

siyar
Literally, 'practices'. It has a broad meaning, for example indicating the conduct of an eminent person for others to emulate. This book uses it in a second, technical sense to refer to the body of Islamic law that governs how Muslims should relate to non-Muslims. This *siyar* developed in the Hanafi *maddhab*, with al-Shaybani credited as its main expositor, though most of the rulings he recorded were received from Abu Hanifa, in discussion with al-Shaybani and Abu Yusuf. *Siyar* as reported by al-Shaybani is the foundation for an Islamic approach to international law.

***siyasah Sharia* (*siyasah*)**
A theory of public law propounded by Ibn Taymiyyah. State authorities were bound by Islamic law, as interpreted by the *ulama*. But Islamic law leaves the government wide discretion to regulate as necessary to protect and promote the well-being of the *umma*.

Suleiman the Magnificent
Tenth Ottoman Sultan (1520–1566). During his reign, the Ottoman Empire grew through conquest to nearly its maximum extent, and experienced a golden age of culture, learning and commerce. Among Suleiman's many seminal achievements, his sultanate codified the law as formed by edicts of prior sultans. The new code, which was vetted to make sure its contents complied with the prevailing rulings of Islamic law, remained in force until the nineteenth century.

Successors
The first generation of Muslims after the Companions. Successors did not personally interact with the Prophet, but they learned about him from the original Companions. This made them trusted sources of Islamic teachings and reliable sources of *ahadith*.

sultaniyya
Approximately, 'rulership'. The laws governing the exercise of political power. See al-Mawardi.

sunan
Singular of *sunna*.

sunna
In general, ways or practices (in English, *sunna* is also sometimes used as a singular noun). In Arabia, the *sunna* of a widely respected individual provided an example of behaviour for the community to follow. *Sunna* could also refer to the practices of a community or subgroup. The *sunna* of the Prophet, which included his teachings as well as his actions, became the main reference point alongside the Quran for Sunni Muslims to understand Islam and apply it to daily life. The *sunna* of the Prophet is recorded in *ahadith*.

Sunni
Along with Shi'ism, one of the two main branches of Islam. The word derives from *sunna*, signifying that the ways of the Prophet should guide the *umma* in their understanding of Islam. Unlike Shi'ite Islam, Sunnism is decentralised, reflecting a belief that since the Prophet no human can know Sharia completely. The Sunni *madhahib* accept their mutual differences, agreeing that the law is found in the Quran and the *sunna*, but acknowledging the impossibility of knowing for sure whether a particular interpretation is correct. The ruler of a country may decree which *maddhab* national law follows, in which case the standards of that school become enforceable public law.

talaq
The discretionary right of a husband to divorce his wife in an Islamic marriage. Many jurists have ruled that arbitrary use of this right is reprehensible or even forbidden, but it is agreed in *fiqh* that the husband cannot be prevented from exercising it. This imbalance of rights is accompanied by a set of financial obligations of the husband toward the wife, the right to negotiate a marriage contract, and disincentives against pronouncing *talaq* lightly or capriciously.

Tanzimat
'Reorganisation'. A series of reforms to the Ottoman state that began in 1839 and lasted until the enactment of a constitution in 1876. Faced with declining wealth and power compared to European states, Sultan Abdulmecid I (1839–1861) initiated a series of comprehensive reforms designed to reinvigorate, modernise and centralise Ottoman society and governance. The reforms systematised and centralised taxation and public finance, and abolished the millet system under which different communities followed their own traditional laws. The army was reorganised along Prussian lines, and colleges were formed for military training and the education of public administrators. A series of legal codes based on French models was enacted. The role of the *ulama* was drastically reduced, as a secular public education system grew to replace religious schools, and a civil courts system was instituted. The Tanzimat era ended with a further reform, the 1876 constitution that established a parliament, as well as reintroducing some Islamic influence.

taqlid
Imitation. The word can have a pejorative connotation, as when the Quran enjoins believers not to blindly follow, but rather to understand their faith. In Sunni jurisprudence, *taqlid* refers to the practice of following and applying sound rulings of senior jurists, instead of developing new rulings through *ijtihad*. The use of *taqlid* increased around the tenth century, as many jurists argued that the early generations of Muslims had completely described the law, and that those further removed from the Prophet's time should adopt

their conclusions rather than trying to form their own, for fear of introducing error. *Mujtahidun* may nonetheless continue to perform *ijtihad*, or to apply *taqlid*, as they see fit. Less expert jurists are expected to use *taqlid*, applying the rulings of their *madhahib*.

tawhid
The oneness of God, the core Islamic doctrine. *Tawhid* means there are no other deities, and God is one undivided entity. Among the many implications are doubts about the legitimacy of purely secular authorities, and that Muslims should not pursue wealth or fame in lieu of submission to God's will. The opposite of *tawhid*, *shirk* (polytheism or idolatry), is the gravest sin against Islam.

tazir
Offences for which punishment is at the discretion of the public authorities. These may be offences of the same type as *hudud* offences, but that do not fit all the elements of a particular *hadd* offence, or offences for which the Islamic texts require punishment, but do not specify the punishment. The judge or other public authority determines the appropriate sanction based on factors including the type and severity of the offence, and the relationship between the victim and the perpetrator.

Thaqif
The leading tribe in the city of Ta'if, a nearby rival to Mecca. After the Muslim conquest of Mecca, the Thaqif and another tribe attacked. The Muslims prevailed at the Battle of Hunayn, then besieged Ta'if. The siege failed, but the Thaqif leaders agreed to convert to Islam. Subsequently, the Thaqif alongside the Quraysh provided a cohort of experienced soldiers and administrators.

Battle of **the Trench**
The third and final main battle between the Muslims of Medina and the Qurayshi forces from Mecca, in 627. Abu Sufyan led about 10,000 Meccans and allied tribes toward Medina. Reportedly on the advice of a Persian Muslim, the Prophet ordered the digging of a large ditch to the north of the city, the only direction cavalry could attack from. A siege ensued, the Muslims being too well entrenched for even the much larger opposing force to attack. Over the next three weeks, the Meccans tried to convince the Banu Qurayza, the last remaining Jewish clan in Medina, to attack the Muslims from behind, while the Prophet and his advisors negotiated to convince non-Qurayshi tribes to abandon the Meccan coalition. None of these efforts came to fruition, but the would-be attackers began to lose interest in a prolonged stalemate and the alliance disintegrated. In the aftermath, Medinan independence was assured and the Banu Qurayza were annihilated.

travaux preparatoires
'Preparatory works'. In international law, the record of discussions and debates leading to the conclusion of a treaty. This material helps to clarify the meaning of a treaty and the intentions of its parties. For example, the record of language proposed, rejected and amended can clarify the meaning of the language finally adopted; or speeches of delegates leading up to votes can demonstrate the delegates' collective understanding of what they were agreeing to.

Twelver Ja'fari
The predominant *maddhab* among Shi'ites. It is based on the belief that God sent twelve Imams, one for each generation, descended from Ali and Fatimah. Ali and their sons

Hasan and Husayn were the first three Imams. The twelfth, Imam Muhammad ibn al-Mahdi, has lived in occultation (concealment) since 874 and will return to bring Islam to the entire world.

Battle of **Uhud**
The second of three main battles between the Muslims of Medina and Qurayshi forces from Mecca, in 625. It took place at the foot of Mount Uhud, at the outskirts of Medina. Tactically, the Muslims were defeated when, after initial Muslim success, Khalid ibn al-Walid's cavalry scattered their formation, inflicting serious casualties. Strategically, the Meccans did not have the forces to follow up their victory, leaving the Muslim forces damaged but not destroyed, and Medina still intact.

ulama
An ancient class of scholars of Islamic law. They evolved from study circles in the early caliphate, as new Muslims learned the law from Companions and Successors. Learned and pious teachers were appointed as judges and served the caliph as advisors. A system evolved by which senior *ulama* would issue certificates attesting that new *ulama* were sufficiently prepared to issue *fatawa*, undertake *ijtihad*, and otherwise contribute to the development and application of Islamic law. Some tension naturally arose between the *ulama*'s role in pronouncing the law, and the caliph's prerogatives to govern. The *mihna* of the ninth century, sometimes called the Islamic inquisition, eventually established that, collectively, the *ulama* remained the interpreters of Islamic law and the caliph could not dictate doctrine. In modern times the role of the *ulama* has come into question, for standing in the way of Muslim societies striving to understand Sharia and modernise Islamic law.

Umar ibn Al-Khattab
Second caliph (634–644). A member of the Banu Ami clan and a leading citizen of Mecca, his conversion was an early advancement for the Muslims; for example, they could then worship openly. Umar became one of the Prophet's two most trusted Companions, alongside Abu Bakr, who later named Umar as his successor as caliph. During Umar's caliphate the Islamic state expanded dramatically, destroying the Sasanian Empire and seizing the Byzantine provinces of Syria, Palestine and Egypt. Umar began to develop formal government structures, combining Islamic principles with administrative models drawn from the conquered lands. He appointed the first judges of the caliphate; compiled a *diwan* (a register of Muslims listed by how early they had joined the community, for paying stipends); and grounded governance in *shura* (consultation) and *sabiqa* (leadership based on seniority in Islam). Famously pious and stern, he also established the practice of official tolerance of non-Muslims' religious practices, which eased the caliphate's growth.

Umar ibn Abd al-Aziz (**Umar II**)
Eighth Umayyad caliph (717–720). He is seen as a reformer and restorer of the faith, revered by future generations, almost uniquely among the Umayyad caliphs. He did not focus on military conquest, for example lifting the siege of Constantinople begun by Sulayman (715–717). He was pious and ascetic; began the project of compiling the *ahadith* into written collections; facilitated the conversion of large numbers of conquered peoples to Islam, despite the resulting loss of tax revenues; and tried to institute civil equality between Arabs and *mawali* (non-Arab converts).

umma
The Muslim people, in the sense of a universal religious community.

Umayyad caliphate
The caliphate that followed the civil war that ended the Rashidun caliphate. While it was not formally a hereditary monarchy, in fact each Umayyad caliph designated his successor from among his own branch of the Banu Umayya. The first three Umayyad caliphs were descendants of Abu Sufyan ('Sufyanids'). When their line failed, civil war ensued, from which another Umayyad, Marwan (684–685) the son of al-Hakim and first cousin of Uthman emerged victorious. The final ten Umayyad ('Marwanid') caliphs were descended from him. Under the Umayyad dynasty, the caliphate reached its greatest extent and developed its lasting institutional structure. The Umayyad legacy is complex. While they are traditionally remembered as having replaced the Rashidun caliphate with *mulk*, kingship, the Umayyads also established the caliphate as an Arab, Islamic empire, thus creating many of the expectations of Islamic rule they were later said to have violated.

'urf
Custom, acceptable as a secondary proof of Islamic law in the Maliki and Hanafi *madhahib*. If a local custom does not contradict the texts or consensus, then a jurist may rule that it demonstrates Islamic law for that community.

usul al-fiqh
'Roots of *fiqh*'. Islamic jurisprudence, or techniques for discovering Islamic law (*fiqh*). Schools of jurisprudence (*madhahib*) apply different approaches to *fiqh*. All Sunni schools are based on analysing the words of the Quran and the Prophet's *sunna*. Shia schools reason differently but also start from the Quran. Today the main Sunni *madhahib* are the Hanafi, Hanbali, Maliki and Shafi'ite schools. The Twelver Ja'fari school is the most widespread and influential Shia *maddhab*.

Uthman ibn Affan
Third caliph (644–656). He was one of the wealthiest merchants in Mecca and a member of the powerful Banu Umayya clan. After conversing with Abu Bakr, he became one of the earliest converts to Islam. He remained one of the Prophet's closest Companions and married the Prophet's daughter Ruqayyah then, after her death, another of the Prophet's daughters, Umm-Kalthum. Uthman was an advisor to the Prophet and the first two caliphs, but unlike the Prophet and most of his senior colleagues, did not usually take part in combat. When Umar, mortally wounded by an attacker, designated six close advisors to choose the next caliph from among themselves, the group settled on Uthman as a compromise candidate. As caliph, Uthman continued the expansion and administrative development of the caliphate that had accelerated under Umar. He directed the compilation of the canonical version of the Quran, which is still the standard version, and centralised the collection of taxes. Uthman tended to place his relatives in positions of influence, which facilitated effective administration (many Banu Umayya were experienced in governance, as a leading family in pre-Islam Mecca) but evoked discontent among other Muslims, many of whom had converted long before the bulk of the Banu Umayya. Eventually rebellions broke out, and Uthman was killed in his palace in Medina when insufficient forces rallied to his side.

Wahhabism
The reformist Islamic sect established by Ibn al-Wahhab that now prevails on the Arabian Peninsula. Based on the teachings of Ibn Hanbal and Ibn Taymiyyah, Wahhabism considers conclusions of *fiqh* to be *bid'ah*, impermissible innovation, unless they are based on a literal reading of the Quran and the *sunna*. It forbids veneration of saints and sites such as shrines or tombs, as tantamount to polytheism.

waqf
An Islamic charitable trust. It is irrevocable. The property used to endow a *waqf* must not be the result of any transactions or activities forbidden by Islam. The *waqf* should benefit charitable purposes, in keeping with the *maqasid al-Sharia*, which can include for example alleviation of poverty or provision of hospitals, as well as institutions to spread the *da'wah* explicitly.

wars of *ridda*
A series of conflicts during the caliphate of Abu Bakr. After the Prophet passed, some tribes that had joined the Muslims asserted that their alliance had been with the Prophet personally, and declined to pledge allegiance to his successors or to continue to pay the *zakat*. During 632 and 633, Abu Bakr employed military and diplomatic means to bring the rebels back under the control of the nascent caliphate. The most significant engagement took place at Yamama, where Khalid ibn al-Wahid led a Muslim force that defeated a larger army that supported Musaylimah, a regional leader who claimed for himself the title of prophet. After this battle, in which the pretender was killed, Abu Bakr was able to consolidate the caliphate in Arabia and launch further expeditions into Syria and Iraq.

***wazir* (vizier)**
A chief minister, or other senior advisor, to the caliph or *amir*. The office entered Islamic use during the Abbasid caliphate. Al-Mawardi stated the law of the *wazirate*, contrasting *wazirs* of delegation with *wazirs* of execution. A *wazir* of delegation could exercise the powers of the caliph, except for selecting the heir apparent or dismissing officials appointed by the caliph. A *wazir* of execution did not have discretionary authority, and could only carry out specifically assigned tasks.

zakat
An alms tax, one of the five pillars of Islam alongside professing the faith, prayer, fasting and the *hajj*. Muslims with income above a certain level should give a portion (traditionally 2.5%) of their wealth (excluding land) for the support of the poor, veterans of *jihad*, pilgrims, collectors of *zakat* and others in need. Annual payment of the *zakat* is obligatory, commanded in the Quran, but in most Islamic states it is left between the believers and the religious leaders rather than levied by the state.

Index

Note: for the most part Islamic jurists and Islamic reformists are to be found respectively under' Islamic jurists' and 'Islamic constitutionalism, modern approaches to'. Scholarly writers are indexed under the relevant subject heading. Dates of persons are either the date in the designated office or the lifespan. Emboldened locators indicate key glossary references. Subsidiary glossary references are not emboldened.