In Search of Islamic Constitutionalism

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Abstract

This article examines the question of whether the Shari`ah is compatible with the principle and procedural form of western constitutionalism. The article will answer this question by looking at the arguments put forth by opponents of Islamic constitutional law and various counter-aguments. Using the substantive approach, I assert that the Shari`ah is compatible with constitutionalism. This position rejects both the fundamentalists' and the secularists' views on this subject. The Shari`ah's principles can be a formal source or an inspiration to a constitution.

Introduction

While constitutionalism in the West is mostly identified with secular thought,[1] Islamic constitutionalism, which incorporates some religious elements, has attracted growing interest in recent years. For instance, the Bush administration's response to the events of 9/11 radically transformed the situation in Iraq and Afghanistan, and both countries are now rewriting their constitutions. As Ann Elizabeth Mayer points out, Islamic constitutionalism is constitutionalism that is, in some form, based on Islamic principles, as opposed to the constitutionalism developed in countries that happen to be Muslim but which has not been informed by distinctively Islamic principles.[2]

Several Muslim scholars, among them Muhammad Asad[3] and Abul A`la al-Maududi,[4] have written on such aspects of constitutional issues as human rights and the separation of powers. However, in general their works fall into apologetics, as Chibli Mallat points out:

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> Whether for the classical age or for the contemporary Muslim world, scholarly research on public law must respect a set of axiomatic requirements. First, the perusal of the tradition cannot be construed as a mere retrospective reading. By simply projecting present-day concepts backwards, it is all too easy to force the present into the past either in an apologetically contrived or haughtily dismissive manner. The approach is apologetic and contrived when Bills of Rights are read into, say, the Caliphate of `Umar, with the presupposition that the "just" qualities of `Umar included the complex and articulate precepts of constitutional balance one finds in modern texts.[5]

The fall of the Ottoman Empire also contributed to the lack of Islamic constitutional thought, since it was the last caliphal state. Even books on political law (*fiqh siyasah*) written in the twentieth century by 'Abdurrahman Taj[6] and Ahmad Shalabi,[7] for instance, refer to the ideas and practices of an Islamic state that existed more than a thousand years ago.[8] This means that they are simply repeating opinions from *fiqh* books written several centuries ago without making any modifications through *ijtihad* (reinterpretation) and without trying to link the Qur'anic revelation and modern problems in a modern nation-state. In other words, what Islamic constitutionalism entails remains contested among Muslims, as well as among western scholars who study the topic.[9]

Constitutional law can be defined as the law that regulates a state's government. It is concerned with the struggle between rival contenders for power and the question of what limits should be imposed on the government. In a minimalist sense of the term, a *constitution* consists of a set of rules or norms that create, structure, and define the limits of governmental power or authority. In this way, all states have constitutions and all states are constitutional states. However, it should be noted that having a constitution – written or unwritten – does not necessarily mean that a state follows constitutionalism. In other words, constitutionalism does not reside only in the powers of the state.

When scholars talk of constitutionalism, they normally mean not only that rules create legislative, executive, and judicial powers, but that these rules impose limits on those powers. As a concept, constitutionalism is wider and broader than the text of a constitution. For instance, a state can have a written constitution that is against the spirit of constitutionalism.

Louis Henkin defines constitutionalism as constituting the following elements: (1) government according to the constitution, (2) separation of power, (3) sovereignty of the people and democratic government, (4) con-

stitutional review, (5) independent judiciary, (6) limited government subject to a bill of individual rights, (7) controlling the police, (8) civilian control of the military, and (9) no state power, or very limited and strictly circumscribed state power, to suspend the operation of some parts of, or the entire, constitution.[10] The philosophy behind the doctrine is that the people become the best judges about what is and what is not in their own interest.[11]

The main question is: What is the relationship between the Shari`ah and constitutionalism? This article will answer this question by looking at the arguments put forward by opponents of Islamic constitutional law and their counter-arguments. One group takes the view that not only is the Shari`ah sufficient to meet the Muslims' needs, and that, therefore, they do not need constitutionalism, but also that the Shari`ah, as God's law, is above the constitution. The Shari`ah has already provided a unique system of government or politics. Another group believes that Islam (including the Shari`ah) has no relationship with state affairs. According to this group, a constitution should not be used to enforce the Shari`ah.

Although both groups have different arguments, they share the same conclusion: The nature and characteristics of the Shari`ah do not permit them to acknowledge the relationship between the Shari`ah and constitutionalism. This article argues that the Shari`ah is neither above nor outside the constitution. Instead, the principles of the Shari`ah and constitutionalism can walk together. However, reform of the Shari`ah is needed to articulate the procedural and institutional mechanisms of Islamic constitutional law, particularly to draw a clear line of authority and accountability.

Authoritarianism and Secularism

In this section, I discuss the arguments opposing the compatibility of the Shari`ah and constitutionalism. The first four arguments are offered by fundamentalist groups, while the rest are provided by secularist groups. As pointed out above, although each authoritarian and secularist group has its own reasons, they share a similar view that the Shari`ah is not compatible with constitutionalism.

The Fundamentalists' Arguments. **ARGUMENT 1:** Islamic law is immutable because the authoritarian, divine, and absolute concept of law in Islam does not allow change in legal concepts and institutions. The Shari`ah is immutable, regardless of history, time, culture, and location, as it did not develop an adequate methodology of legal change. Muslims may change, but Islam will not. This means that the rulings pronounced

by the Shari`ah are static, final, eternal, absolute, and unalterable. In other words, its idealistic nature, its religious nature, its rigidity, and its casuistic nature lead to the Shari`ah's immutability.[12] This position is not compatible with the nature of a constitution which can be amended, modified, reformed, or even replaced.

ARGUMENT 2: The Shari`ah is based on God's revelation. Thus, the source of Islamic law is God's will, which is absolute and unchangeable. There has always been a close connection between Islamic law and theology. This means that the existing laws must operate within the boundaries set by the Shari`ah. In other words, real power lies with God.[13] This condition contradicts the nature of constitutionalism, which is based on the people's will. Following the point above, the Shari`ah states that sovereignty belongs to God, not to the people.[14] This means that the government must act according to the Shari`ah. This group also argues that the fact that a legislative measure is supported by a majority does not necessarily imply that it is a "right" measure. The underlying assumption here is that the majority, however large and even well-intentioned, might sometimes make a mistake, while the minority, despite its small numbers, may be right. What is right and what is wrong should be based on the Shari`ah, not on the popular vote.[15]

ARGUMENT 3: Constitutionalism is not drawn originally from Islam; rather, it is a western product and part of western hegemony. The tension between church and state in the western tradition is evident in all European constitutional traditions, as well as in the constitutions of such former colonies as the United States and Australia.[16] This group argues that adopting constitutionalism, which is outside of the Islamic discourse, will lead Muslims to abandon Islam by separating it from politics. Moreover, democracy and the rule of law are concepts alien to Islam and were introduced by western tradition. Unlike the law in a secular state, the Shari`ah makes no distinction and separation between religion and state. Islam is a religion and a state (*din wa dawlah*).[17] State politics is part of Islamic teachings, in that Islam is a religion as much as it is a legal system.

Secularization, the separation of religion and politics, is seen as the product of western colonialism and a conspiracy directed against Islam. During the colonial era, accordingly, the concept of secularization was introduced into Muslim society in order to maintain western power. With the separation of religion and politics, jihad would be meaningless. The word and the idea of secularization have become very pejorative terms. Any Muslim scholar who supports this concept would allegedly be seen

as a supporter of western hegemony. Accordingly, constitutionalism is the product of this western idea.[18]

ARGUMENT 4: The Shari`ah is perfect, for it is based on the Qur'an (5:3)[19] and therefore covers broad topics (e.g., ritual, social interaction, criminal law, and political law) and can answer every single problem. In other words, it was designed for all times and places, for a universal application to all people. It is comprehensive and so encompasses all aspects of law, be they personal, societal, governmental, constitutional, criminal, mercantile, war and peace, and international treaties. Hence, Islam is an ideology that address all of life's affairs.[20] Meanwhile, constitutionalism will not (and cannot) provide answers for all of humanity's problems.

As mentioned earlier, these arguments are supported by authoritarian groups. Authoritarians view the Shari`ah as incompatible with constitutionalism in the modern, legal, and secular sense. Instead, the Qur'an and the Hadith literature should be seen as the Islamic constitution. Meanwhile, the secular groups reject the Shari`ah's constitutionalization on the grounds that it was never the constitution of the traditional Islamic caliphate, which was, in fact, an "absolute monarchy." Therefore, the Shari`ah cannot be enforced through a constitution, because they contradict each other.

The Secularists' Arguments. According to the secular groups, the Shari`ah is a matter for individual compliance and therefore is incompatible with constitutionalism. States do not have the right to intervene nor to enforce the Shari`ah on the public. One may observe that Islamic law began with the activities of jurists owing to religious motives, rather than being created by state legislation. This results in the jurists' conviction of the independence of Islamic law from state control. States can encourage their citizens' compliance with the Shari`ah (e.g., paying zakat, fasting, making the pilgrimage to Makkah), but cannot force them to comply. Unlike the authoritarians' view, this group believes in the secular state, and therefore say that the Shari`ah cannot (and should not) take the place of the constitution. They introduce the idea of de-politicizing Islam and determining it solely as a religious faith, as once articulated by the Islamic scholar `Ali `Abd al-Raziq.[21]

The Shari`ah, developed many centuries ago, is fit only for the conditional, political, and institutional conditions of that time. In other words, it can function only in a traditional state (or city-state) that is based on the leader's personal charisma rather than on the constitutional system. Fifteen centuries ago, there was no Parliament, system of checks-and-balances, judicial review, good governance, separation of powers, and so on.

Implementing the Shari`ah, therefore, is in contradiction with modern institutions and concepts. Moreover, constitutions cannot be viable documents in the absence of the ideological, cultural, and political prerequisites for constitutional life. How can constitutionalism emerge in societies in which liberalism and secularism are so far from hegemonic?

If constitutionalism is defined as a set of ideologies and institutions predicated on the idea of enabling the law to limit and regulate government authority, the Shari`ah does not limit the power of governments. In the Islamic tradition, the caliph could do anything he wanted without the fear of facing an opposition party or even impeachment procedures. Implementing the Shari`ah would lead to an undemocratic state, for the caliph's power would be unlimited. In the words of Bassam Tibi, "none of them was a legal ruler in the modern constitutional sense."[22] One of the reasons for this situation was that no institutional authority was able to enforce the caliph's compliance with the Shari`ah.

This leads us to discuss the rule of law. The modern conception of the rule of law derives from the late-nineteenth and early-twentieth-century movements in Anglo-American legal scholarship. This movement sought to convey the operation of the law, law-making, and functioning of the legal system as scientific processes governed by ascertainable and predictable rules.[23] The rule of law, as the embodiment of governance by fixed principles rather than the discretion of political expediency, fits into this mode by serving, in the view of Albert Venn Dicey, its best known exponent of that period, three functions: the supremacy of the law and the absence of arbitrariness, equality before the law, and constitutional law as part of the ordinary law of the land.[24]

Since then, the exposition of this concept has largely revolved around subjecting the government and, in particular, the lawmakers to the same laws as ordinary people. That is, the law effectively restrains and, where necessary, punishes the abuse of political power. Considering the historical context in which the concept was propounded, it is not surprising that its focus was political.[25] Though some effort has been made since the 1960s to direct the concept to economic issues, it has largely remained a political imperative.[26] In addition, Lon Fuller claimed that the rule of law is part of the "internal" morality of law.[27] M. J. Radin interprets this to mean that the complex of ideas associated with the term *rule of law* is essential for the efficacy of any system of legal rules.[28]

Meanwhile, the topic of the rule of law in Islam remains controversial. The image is that Islamic law allows the ruler (e.g., the king, prime minis-

ter, or president) to govern as a dictator: Whatever his decision, it is always right. This follows with other images that the Shari`ah does not provide procedural regulations to control the government, does not have a clear rule on how to elect the government and how to limit its powers, and enjoys no judicial independence in the countries where it is applied.

Historically, it is the ruler's discretion – not the rule of law – that plays a greater part in Islamic constitutional law. Islamic jurisprudence came to accept the idea of *siyasah shar`iyah*, which accords the terrestrial ruler a reservoir of discretionary power of command in the public interest. If "deviations from the strict Shari`ah doctrine"[29] were required to protect the *maslahah al-`ammah*[30] (public interest) in implementing its guiding principles, then such deviations were allowed. This expansive doctrine of government discretion was justified in terms that reflected the caliph's privileged position as the Islamic nation's head of state. Since caliphs were presumed to possess keen piety and the ability to engage in *ijtihad*, they were also presumed to be ideally qualified for their office and were to be allowed the discretion to take such steps as they, in their wisdom, saw fit.[31]

However, if taken too far or granted carte blanche, such discretion can be inimical to efficiency, stability, and transparency. Discretion, which is prone to *ad hoc* decision-making, does not lend itself to long-term planning and certainty and, in such circumstances, runs counter to the doctrine of the rule of law. Moreover, it can confer too much power that could corrupt and be abused. Factors other than transparent scientific considerations also could infect the decision-making process. Historically, the caliph's decision would be based heavily on his personal discretion or interpretation of the Shari`ah, not on the rule of law.

Historically, Muslim scholars have divided the world into two divisions: the territory of Islam (*dar al-Islam*), comprising Islamic and non-Islamic communities that had accepted Islamic sovereignty, and the rest of the world (*dar al-harb*) or the territory of war.[32] Muslims enjoyed the rights of full citizenship, while non-Muslims enjoyed only partial civil rights. For instance, a non-Muslim could not be appointed as a caliph or any other type of ruler. The non-Muslims' concern over their status under the Shari`ah can be understood by looking at the concept of *dhimmi*, which does not give them the governing rights and, while guaranteeing them security of life and property, does not permit them to become an integral part of the ruling class.[33] Such treatment violates the understanding of religious freedom enshrined in international human rights instruments.

This means that there would be no equality before the law, should the Shari`ah be implemented. In other words, the Shari`ah does not guarantee and protect the rights of minority groups. The problem of equality in Islamic society is centered around, as pointed out by John Esposito and James Piscatori, the "unequal status between Muslims and non-Muslims as well as between men and women."[34] For instance, Muslim women's testimony is accepted in civil matters, but it takes two of them to make a single witness. A Muslim man is always a fully competent witness under the Shari`ah.[35] Another example of gender discrimination is found in the law of inheritance: A woman is entitled to half the share of a man who has the same degree of relationship to the deceased.[36] Some Muslim politicians go further by stating that women cannot become president, citing the Prophet's saying: "Those who entrust their affairs to a woman will never know prosperity."[37] They interpreted this as implying that a woman cannot lead a Muslim state. This restriction should be seen as violating the spirit of constitutionalism. Once again, accordingly, these examples provide evidence that the Shari`ah should not be put into a constitution.

The Shari`ah and Constitutionalism

As seen from the discussion above, both authoritarian and secularist groups believe that the Shari`ah is not compatible with constitutionalism. Although both have similar views, they have different arguments in support of these views. While authoritarians believe that the Shari`ah is better than constitutionalism, secularists take the position that the Shari`ah is part of a religious faith and not a system of government. It seems that both groups put different interpretations on the word and the meaning of *Shari`ah.* Therefore, the idea of the Shari`ah and its relationship with the idea of constitutionalism will be examined critically.

Kurzman opines that within the Islamic discourse, there are three main tropes of the Shari`ah. The first one is the liberal Shari`ah, which argues that the Qur'anic revelation and the Prophet's practices command Muslims to follow liberal positions. The second trope, the silent Shari`ah, holds that coexistence is not required but is allowed, and that the Shari`ah is silent on certain topics not because divine revelation was incomplete or faulty, but because the revelation intentionally left certain issues for humans to choose. The first trope holds that the Shari`ah requires democracy, while the second trope holds that the Shari`ah allows democracy.

However, the third trope, that of interpreted Islam, takes issue with each of the first two. According to this view, revelation is divine, but interpretation is human, fallible, and inevitably plural. This third trope suggests that religious diversity is inevitable, not just among religious communities but within Islam itself.[38] Despite their different opinions, those tropes can simply be classified as the substantive Shari`ah, meaning that the Shari`ah should be reinterpreted along the lines of democracy and constitutionalism. Using this substantive Shari`ah approach, I take the position that no inherent contradiction exists between the principles of the Shari`ah and constitutionalism.

Contrary to the (religious) authoritarians' views, such other Muslim scholars as Abdullahi Ahmed An-Na'im[39] and Muhammad Sa`id Al-Ashmawy[40] advocate an emancipated understanding of the Shari`ah, stressing its original meaning as a "path" or guide rather than a detailed legal code. The Shari`ah must involve human interpretation. Islamic law is, in fact, the product of a very slow and gradual process of interpreting the Qur'an and collecting, verifying, and interpreting the Sunnah during the first three centuries of Islam (the seventh to the ninth centuries C.E.). This process was undertaken by scholars and jurists who developed their own methodology for classifying sources, deriving specific rules from general principles, and so forth.

This led the scholars to distinguish between the Shari`ah and *fiqh*. While the Shari`ah can be seen as the totality of divine categorizations of human acts, *fiqh* might be described as the articulation of the divine categorizations by human scholars. These articulations represent or express the scholars' understanding of the Shari`ah. In other words, these jurists or scholars, however highly respected they may be, can present only their own personal views or understanding of what the Shari`ah rules on any given matter. Moreover, the Qur'an and the Sunnah cannot be understood or have any influence on human behavior except through the efforts of (fallible) human beings.

Bernard Weiss has correctly pointed out that:

> Although the law is of divine provenance, the actual construction of the law is a human activity, and its results represent the law of God *as humanly understood.* Since the law does not descend from heaven ready-made, it is the human understanding of the law–the human *fiqh* (literally meaning understanding)–that must be normative for society.[41]

Therefore, even though the Shari`ah is based on God's revelations, it cannot be drawn up except through human understanding, which means both the

inevitability of different opinions and the possibility of error, whether among scholars or the community in general. Khaled Abou El Fadl explains further:

> All laws articulated and applied in a state are thoroughly human, and should be treated as such. Consequently, any codification of Shari`ah law produces a set of laws that are thoroughly and fundamentally human. These laws are a part of Shari`ah law only to the extent that any set of human legal opinions is arguably a part of Shari`ah. A code, even if inspired by Shari`ah, is not Shari`ah – a code is simply a set of positive commandments that were informed by an ideal but do not represent the ideal. In my view, human legislation or codifications, regardless of their basis or quality, can never represent the Divine ideal.[42]

Since the Shari`ah involves human understanding, its social norms follow the nature of human beings, because they are derived from specific historical circumstances. For instance, the caliphate was the product of history, an institution of human (rather than divine) origin, a temporary convenience, and therefore a purely political office. This means that most Islamic legal regulations, including the status of non-Muslims and women, may be amended, changed, altered, and adapted to social change.[43] While the Qur'an contains a variety of elements (e.g., stories, moral injunctions, and general, as well as specific, legal principles), it prescribes only those details that are essential. It thus leaves considerable room for development and safeguards against restrictive rigidity. The universality of Islam lies not in its political structure, but in its faith and religious guidance.

Another source of Islamic jurisprudence, secondary only to the Qur'an, consists of the examples and words of Prophet Muhammad (the Sunnah). The Qur'an and the Sunnah quite often use words that have speculative, interpretable, and debatable meanings. This leads to the third source, *ijtihad*, which can be defined simply as "interpretation." The main difference between *ijtihad* and both the Qur'an and the Sunnah is that *ijtihad* is a continuous process of development, whereas the Qur'an and the Sunnah are fixed sources of authority and were not altered or added to after the Prophet's death.[44]

Ijtihad literally means "striving, or self-exertion in any activity which entails a measure of hardship."[45] According to al-Amidi,[46] *ijtihad* is defined as "the total expenditure of effort made by a jurist to infer, with a degree of probability, the rules of Islamic law."[47] In this sense, al-Gazali defined *ijtihad* as "the expending, on the part of a *mujtahid*, of all that he is capable of in order to seek knowledge of the injunctions of Islamic law."[48]

Ijtihad can be conducted in one of at least three ways: *ijtihad bayani*, *ijtihad qiyasi*, and *ijtihad istislahi*.[49] *Ijtihad bayani* may be applied to cases that are mentioned explicitly in the Qur'an or Hadith literature but need further explanation. *Ijtihad qiyasi* may be applied to cases that are not mentioned in these two sources, but that are similar to cases mentioned in either of them. *Ijtihad istislahi* may be applied to those cases that are not regulated by either source and cannot be solved through analogical reasoning. In this case, *maslahah* (utilities) is considered to be the basis for legal decisions.

From the short discussion above, it can be stated that *ijtihad* is a tool for Muslims to understand and practice the Shari`ah in line with human nature and characteristics. Having performed *ijtihad*, Muslim scholars can build a fresh theoretical construct, as well as a contextual approach, to legal language and legal interpretation in order to follow the dynamic character of human beings. Thus the secularist views discussed above, that the Shari`ah fits only with the conditional, political, and the institutional occasions of 15 centuries ago, can be rejected.

The rule of *ijtihad* might also be seen to indicate "the imperfectness of the Shari`ah." This means that the Shari`ah alone does not cover all issues, as claimed by authoritarian groups. Their interpretation of Qur'an 5:3, as mentioned above, could be criticized. The verse only deals with the complete and perfect teachings of Islamic rituals, from prayers to pilgrimage. After Allah revealed this verse, there were other verses, such as the verse on *kalalah* (4:176). This means that "This day I have perfected your religion for you" should be read in the context only of this verse. Qur'an 5:3 actually discusses such prohibitions as eating some foods, using arrows to seek luck or decisions, and fearing unbelievers. Accordingly, the word *perfect* should be understood as referring only to Islam's mandates and prohibitions, not as regulating the caliphate's establishment.

In other words, based on this verse, one could not argue that the Shari`ah deals with any specific form of government. In fact, no verse directly regulates a state's power. If the Qur'an is a comprehensive compendium of knowledge on every issue, then why does it not clarify this issue? As will be explained below, the Qur'an provides only some basic principles on this matter.

Scholars who believe that Islam was meant to be a political order have performed their *ijtihad* according to their understanding and interpretation of the Shari`ah's rule. While their interpretations should be respected as intellectual exercises, their *ijtihad* is neither legally binding on all Muslims

nor can it be regarded as the Shari`ah itself. This means that scholars who have different opinions have performed their *ijtihad* and that the outcome of their intellectual activities cannot be seen as being against the Shari`ah. The issue of whether or not the Shari`ah is compatible with constitutionalism is the issue of *ijtihad*.

Following on the point made above, one may argue that our understanding of the Shari`ah is not perfect, in the sense that it is changeable through the *ijtihad* of Muslim scholars according to the requirements of different places and times. For instance, al-Shafi`i changed several of his views in Iraq (*qawl qadim*) when he moved to Cairo (*qawl jadid*). Much earlier, `Umar ibn al-Khattab was known as a caliph who practiced *ijtihad* on several occasions when there was no guidance in the Qur'an and the Hadith literature, and when he thought that the law mentioned in both sources was no longer suitable for dealing with the circumstances of his era. The two texts below provide examples of how `Umar's *ijtihad* differs from the Prophet's decision:

> Narrated 'Imran: "We performed Hajj al-Tamattu' in the lifetime of Allah's Apostle and then the Qur'an was revealed (regarding Hajj al-Tamattu') and somebody [`Umar] said what he wished (regarding Hajj al-Tamattu') according to his own opinion (ra'y)."[50]

> Yahya related to me from Malik, from Ibn Shihab, that Muhammad ibn `Abdillah ibn al-Haris ibn Nawfal ibn `Abd al-Muttalib told him that he had heard Sa`d ibn Abi Waqqas and al-Dahhak ibn Qays discussing tamattu' (performing `umrah first, then Hajj) in between 'umrah and Hajj. Al-Dahhak ibn Qays said, "Only someone who is ignorant of what Allah, the Exalted and Glorified, says would do that." Whereupon Sa`d said, "How wrong is what you have just said, son of my brother!" al-Dahhak said, "`Umar ibn al-Khattab forbade that," and Sa`d said, "The Messenger of Allah, may Allah bless him and grant him peace, did it, and we did it with him."[51]

`Umar believed that the situation had changed, and this forced him to apply *ijtihad*. Hence, in several cases, his decision differed from the position adopted by the Prophet. `Umar's decision not to distribute the lands of Iraq and Syria among the Companions is another example. Muslims insisted on following the Prophet's practice. `Umar replied that if he kept on distributing the lands, where would he maintain the army to protect the borders and the newly conquered towns? The Companions, therefore, finally

agreed with him and remarked: "*Al-ra'y ra'yuka*" (Yours is the correct opinion). He later justified this decision by citing 59:6-10.[52] `Umar actually preferred actions that benefited Muslims in general, rather than individuals. During his time, social justice demanded that conquered lands should not be distributed among the army. Another interesting example occurred when a thief was captured but `Umar did not amputate his hand, citing an ongoing famine.[53] In deciding this, it seems that `Umar contravened the formal Qur'anic injunction.[54] However, since he was still regarded and respected as one of the four rightly-guided caliphs, these cases suggest that the Shari`ah is not unchangeable.

The Shari`ah is also considered not to be "perfect" on the grounds that there is a great deal of disagreement and disputation among scholars concerning the meaning and significance of different aspects of the sources with which they are working. For example, one school considers analogy as a source of Islamic law, while others reject it. Furthermore, as the case of al-Shafi`i shows, the scholars' work cannot be done in isolation from the prevailing conditions of their communities in local as well as broader regional contexts. The interpretations of scholars, 'ulama, and *mujtahidun* would reflect the state of their human and political consciousness, and usually that of their people, at that particular time and place. Disagreements among schools, not to mention among scholars of the same school, provide other evidence that understanding the Shari`ah, in human terms, is not static, final, eternal, absolute, and unalterable.

The Qur'an encourages ethnic and other types of diversity as blessings from God. Consequently, classical Muslim jurists recognized the fact that what may suit one culture may not be quite so suitable for another. For this reason, they encouraged each country to introduce its own customs into its laws, provided that these customs did not contradict basic Islamic principles. As a result, even today the Islamic laws of Muslim countries differ significantly on various matters.

While rejecting the Qur'an and the Hadith literature as the Islamic constitution (authoritarian view), at the same time I also reject the secularist view that Islam is a religion, in the western sense, that regulates only the relationship between humanity and the Supreme Creator. The Qur'an and the Hadith literature cannot be seen as the Islamic constitution, but perhaps as its code of high constitutional principles. They comprise guidance on legislation, morality, and meaningful stories, all of which, unlike other constitutions and laws, were not recorded systematically. Although both the Qur'an and the Hadith literature do not prefer a definite political

system, both primary sources have laid down a set of principles, or ethical values and political morals, to be followed by Muslims in developing life within a state.

For instance, Muhammad Husayn Haykal takes the view that Islam does not provide direct and detailed guidance on how the Islamic community should manage state affairs. According to him, Islam lays down the basic principles for human civilization, not the basic provisions that regulate human behavior in life and in association with fellow humans, and which, in turn, will characterize the pattern of politics. In short, according to Haykal, there is no standard system of government in Islam. The Islamic community is free to follow any governing system that ensures equality among its citizens (both in rights and responsibilities) and in the sight of the law, and manages affairs of state based on *shura* (consultation) by adhering to Islam's moral and ethical values.

Haykal believes that a governmental system based on Islamic provisions ensures freedom and is based on the principle of appointing a head of state with the people's approval, and that the people have the right to control how the government operates and to call it to account. Islam appeals to all people, especially Muslims, to make an effort to carry out those above-mentioned principles as far as possible. This position is located right in the middle, between authoritarian and secularist views. In this context, one may see that Haykal's views clearly oppose the strict authoritarian groups' opinions that sovereignty belongs to Allah and not to the people. However, at the same time, he also opposes the view that Islam does not teach how to live within a community and a state.[55]

Principles of Islamic Constitutional Law

The counter-arguments above specifically reject some ideas of the incompatibility of the nature and the characteristics of the Shari`ah and constitutionalism. The following arguments will focus on examining the Shari`ah's principles in relation to constitutionalism. By doing so simultaneously, the arguments are presented to counter secular views on this matter.

Secularist groups hold that the caliph's power was historically unlimited, and that therefore the Shari`ah is incompatible with constitutionalism. This view could be rejected on the grounds that Islam has provided a *wilayah al-mazalim* (the redress of wrongs), the embryo of administrative tribunal or constitutional court in the modern sense. Al-Mawardi outlines

ten areas that can be reported to this tribunal, including government officials' oppression and maltreatment of the public and not implementing sentences when judges cannot enforce them due to the sentenced person's power or social standing.[56]

Abd al-Wahhab Khallaf goes even further by stating that the Islamic government is a constitutional, as opposed to a tyrannical, government.[57] In other words, based on his understanding of the Shari`ah, government in Islam is not based on the charisma of the person. He also opines that Islam guarantees individual rights (*huquq al-afrad*) and separates power into *al-sultah al-tashri`iyah*, *al-sultah al-qada'iyah*, and *al-sultah al-tanfiziyah*[58] – which could easily be classified as the legislative, judiciary, and executive powers, respectively. Khallaf's views can be justified on the grounds that the Qur'an provided the basic principles for a constitutional democracy without providing the details of a specific system. Muslims were to interpret these basic principles in light of their customs and the demands of their historical consciousness. Once again, this partly explains why Muslims currently need a new *ijtihad*.

In addition, advocates of Islamic constitutional law have sought to broaden the classic understanding of *ijma`* (consensus). In the past, only Muslim scholars had a role in reaching consensus; the general public had little significance.[59] Fazlur Rahman argues that the classical doctrine of consultation was in error because it was presented as the process of one person, the ruler, asking subordinates for advice. In fact, the Qur'an calls for "mutual advice through mutual discussions on an equal footing."[60] In this context, *ijma`* is closely related to *shura* (consultation) and, therefore, can be implemented as a legislative power in the modern sense. Louay M. Safi also notes that the "legitimacy of the state ... depends upon the extent to which state organization and power reflect the will of the *ummah* [the Muslim community], for as classical jurists have insisted, the legitimacy of state institutions is not derived from textual sources but is based primarily on the principle of *ijma`*."[61] According to this understanding, an Islamic constitution is a human product of legislation based on the practices of consultation and consensus, and thus, virtually, no longer the result of a divine act. It is set and approved by the people. In other words, consensus and consultation offer a justification of Islamic constitutional law.

Nathan J. Brown points out that the Shari`ah does provide such a basis for constitutionalism and that Islamic political thought is increasingly inclined toward constitutionalist ideas. While it is true that attempts to implement these ideas have not been successful, the problem could be seen

to lie in the lack of attention given to the structures of political accountability, rather than to any flaws in the concept of Islamic constitutionalism.[62]

Azizah Y. al-Hibri explains some key concepts of Islamic law in order to support the view that the Shari`ah is compatible with constitutionalism. A state must satisfy two basic conditions to meet Islamic standards: the political process must be based on "elections" (*bay`ah*), and the elective and governing process must be based on "broad deliberation" (*shura*). These two principles are part of the criteria employed to determine or to judge Islamic constitutional law. According to al-Hibri, these two principles, together with other factors (e.g., a Muslim ruler has no divine attributes and Islam has no ecclesiastical structure), indicate that there is, in fact, little difference between an Islamic constitutional setting and a secular one.[63]

Given the alleged parallels she discovers between the Constitution of Madinah and the American Constitution, al-Hibri considers the possibility that the Founding Fathers were either directly or indirectly influenced by the Islamic precedent. She notes that Thomas Jefferson was aware of Islam, since he had in his library a copy of George Sale's translation of the Qur'an. Al-Hibri suggests that Sale presented Islam in as fair a light as possible, under the circumstances of the eighteenth century, thereby making the Prophet's precedent amenable to Jefferson. Furthermore, she argues that if the Founding Fathers were, in fact, influenced by the Islamic model of constitutionalism, then this would "support the argument that American constitutional principles have a lot in common with Islamic principles. Such a conclusion would be helpful in evaluating the possibility of exporting American democracy to Muslim countries."[64]

Although her argument could be considered apologetic,[65] it seems that she has attempted to show some similarities between the two traditions by using the American standard as the standard of evaluation. The comparison between two legal traditions is, to borrow Patrick Glenn's term, a multivalent thinking. Glenn takes the view that all traditions contain elements of others. Thus, western legal traditions may contain some elements of eastern legal traditions. In other words, "there are always common elements and common subjects of discussion."[66] Glenn rejects the proposition that "you can't have your cake and eat it too."[67] He offers the multivalent view that everything is a matter of degree. It is possible to compare apples and oranges. In other words, you can have your cake and eat it too, if you eat only half of it.[68] Therefore, he rejects the claim that a religious legal tradition is incompatible or incommensurable with a secular legal tradition.

In addition, Muslim scholars could readily conclude that a Muslim country may choose to be a republic and still be in compliance with the Shari`ah, as long as the presidential election is genuinely free and the consultation among all branches of government is broad. Furthermore, the existence of a House of Representatives would ensure that the people's voice is heard in legislative matters, even if indirectly. Other scholars, however, may make similar arguments for a constitutional monarchy based on the British example. One can see that Muslim countries may or may not satisfy the two criteria above in their constitutions.

In relation to protecting the citizens' rights, despite some rights that are established in the Qur'an and the Sunnah,[69] the *maqasid al-Shari`ah* (the objectives of Islamic law) should become another principle or criterion of Islamic constitutional law, a view supported by El Fadl.[70] According to Muhammad Husein Kamali, the *maqasid al-Shari`ah* is an important but neglected aspect in the Shari`ah's discourse. He claims that even today many reputable textbooks on *usul al-fiqh* do not include the *maqasid al-Shari`ah* in their usual coverage of familiar topics. Generally those textbooks are more concerned with conforming to the letter of the divine text. This, directly or not, has contributed to the literalist orientation of juristic thought.

The *maqasid al-Shari`ah* consists of five juristic core values of protection (*al-daruriyah al-khams*): religion, life, intellect, honor or lineage, and property. Basically, the Shari`ah, on the whole, primarily seeks to protect and promote these essential values and validates all measures necessary for their preservation and advancement. El Fadl argues that protecting religion would have to mean protecting the freedom of religious belief; protecting life would mean that the taking of life must be for a just reason and the result of a just process; protecting the intellect would have to mean the right to freedom of thought, expression, and belief; protecting honor or lineage would have to mean protecting each person's dignity; and protecting property would ensure the right to compensation for the taking of property.

As he also points out, these five core values are human – not divine – values, since they were developed by Muslim jurists based on their interpretations of the Qur'an and the Sunnah. This could mean that the *maqasid al-Shari`ah* are not limited to the five core values. Ibn Taymiyah departs from the notion of confining the *maqasid al-Shari`ah* to a specific number of values.[71] Yusuf al-Qardawi takes a similar approach, for he extends the list of the *maqasid al-Shari`ah* to include human dignity, freedom, social welfare, and human fraternity among the higher *maqasid al-Shari`ah*.[72] The existence of additional objectives is upheld by the weight

of both the general and detailed evidence found in the Qur'an and the Sunnah.

A new *ijtihad* could be performed by considering the theory of the *maqasid al-Shari`ah* and examining the Shari`ah as a unity in which detailed rules are to be read in light of their broader premises and objectives. This means that by looking at the *maqasid al-Shari`ah*, the Shari`ah could be analyzed beyond the particularities of the text. In Kamali's words, "the focus is not so much on the words and sentences of the text, as on the purposes and goals that are being upheld and advocated."[73] It is worth noting that the principles and the procedural form of Islamic constitutional law could be found through the theory of the *maqasid al-Shari`ah*.

In relation to the position of religion vis-à-vis the state, another principle or criterion could be drawn from the Charter of Madinah.[74] One of the challenges for Islamic constitutional law is the position of Islam (or the Shari`ah) in the constitution. This could be examined on three levels: the position of Islam within the Muslim community itself, in relation to other religions, and its relationship with the state. The Charter of Madinah is a document reportedly drawn up by Prophet Muhammad upon his migration from Makkah to Madinah. The document establishes the rights and obligations of the Ansar of Madinah, the Muhajir who left Makkah with the Prophet, and Madinah's Jewish tribes as they embarked upon a new journey of coexistence and cooperation in the nascent Muslim polity. The text itself consists of a preamble and 47 clauses outlining various aspects of community organization, procedures for common defense, and the relationship between the Muslim and Jewish inhabitants of Madinah.

This declared that all of Madinah's Muslim and Jewish tribes (apparently, there were no Christians) to be one community. It also stipulated that non-Muslim minorities (Jews) had the same right to life as Muslims; guaranteed peace and security for all Muslims based on equality and justice; guaranteed freedom of religion for both Muslims and Jews; and ensured equality between the rights of the Jewish tribes of Banu Najjar and Banu `Awf.

Instead of strictly using the text, the spirit of this document could be used as a principle or criterion of modern Islamic constitutional law. Although this constitution does not mention an Islamic state, the text states that "where a contention arises between two parties on a matter, the issue is to be referred to God and to Muhammad for a decision." Using both an historical and a legal approach, one may examine the significance of textual ambiguity in a modern pluralistic society. This would help to

clarify the debate between authoritarians and secularists on Islam being both a religion and a state (*din wa dawlah*).

Conclusion

As may be seen from the foregoing discussion, the substantive Shari`ah approach has been taken. This holds that the Shari`ah, in this context, should be reinterpreted in line with democracy and constitutionalism. This substantive approach is based on the belief that any understanding of the Shari`ah cannot be static and final. As argued earlier, it can be amended, reformed, modified, or even altered – as long as its fundamental basis is not neglected. The Shari`ah is changeable and adaptable to social change, and thus follows the dynamics and the characteristics of human beings. Revelation is divine, whereas interpretation is human, fallible and inevitably plural. It is also suggested that religious diversity is inevitable, not just among religious communities, but within Islam itself.

This approach leads to the following position: The Shari`ah is compatible with constitutionalism. This position rejects both the authoritarian and the secularist views. The Shari`ah's principles could be a formal source for, or be used only as an inspiration for, a constitution. The phrase *al-maqasid al-Shari`ah* should be distinguished from the divine ideal or the Shari`ah itself. With this approach, Islamic constitutional law does not stop at the point reached by the secularists – that the Shari`ah can borrow from western constitutionalism. Rather, it goes further by asking: Can the Shari`ah develop a new theory, type, idea, of form of constitutionalism? It is possible to produce some criticisms on the current discourse of constitutionalism by using the substantive Shari`ah approach. This is a real challenge for Islamic constitutionalists.

Notes

1. Graham Hassal and Cheryl Saunders, *Asia-Pacific Constitutional Systems* (Cambridge: Cambridge University Press, 2002), 42.
2. See Ann Elizabeth Mayer, "Conundrums in Constitutionalism: Islamic Monarchies in an Era of Transition," *UCLA J. Islamic & Near E.L.*, no. 1 (2002): 183.
3. Muhammad Asad, *The Principles of State and Government in Islam* (Kuala Lumpur: Islamic Book Trust, 1980).
4. For example, Abul A`la al-Maududi, *Political Theory of Islam* (Lahore: Islamic Publications, 1985).

5.   Chibli Mallat (ed.), *Islam and Public Law: Classical and Contemporary Studies* (London: Graham & Trotman, 1993), 1-2.

6.   `Abdurrahman Taj, *Al-Siyasah al-Shar`iyah wa al-Fiqh al-Islami* (al-Qahirah: Dar al-Ta'rif, 1953).

7.   Ahmad Shalabi, *Al-Siyasah fi al-Fikr al-Islami* (al-Qahirah: Nahdah al-Misriyah, 1983).

8.   The common sources are al-Mawardi, *Al-Ahkam al-Sultaniyah* (Cairo: Mustafa Babi al-Halabi wa Auladuh, 1996); Ibn Khaldun, *Muqaddimah* (Beirut: Dar al-Fikr, n.d.).

9.   In April 2000, a major international conference on Islam and constitutionalism, held by the Islamic Legal Studies Program, Faculty of Law, Harvard University. The papers will be edited by Sohail Hashmi and Houchang Chehabi and published by Harvard University Press (forthcoming).

10. Louis Henkin, "Elements of Constitutionalism," *Occasional Paper Series* (Center for the Study of Human Rights: 1994). See also Dario Castiglione, "The Political Theory of the Constitution," in *Constitutionalism in Transformation*, ed. Richard Bellamy and Dario Castiglione (London: Blackwell Publishers, 1996), 5; Francis D. Wormuth, *The Origins of Modern Constitutionalism* (New York: Harper & Brothers, 1949).

11. Alan S. Rosenbaum (ed.), *Constitutionalism: The Philosophical Dimension* (Connecticut: Greenwood Press, 1988), 8 (introduction); see also J. Lane, *Constitutions and Political Theory* (Manchester, Manchester University Press, 1996), 25.

12. See the discussion in Muhammad Khalid Masud, *Shatibi's Philosophy of Islamic Law* (Pakistan: Islamic Research Institute, 1995), 17.

13. Ahmad Shalabi, *Al-Hukumah wa al-Dawlah fi al-Islam* (Cairo: Maktabah al-Nahdah al-Misriyah, 1958), 23.

14. See M. `Abd al-Qadir Abu Faris, *Al-Nizam al-Siyasi fi al-Islam* (Beirut: Dar al-Qur'an al-Karim, 1984), 15-40.

15. Asad, *The Principles of State and Government.*

16. See Said Amir Arjomand, "Religion and Constitutionalism in Western History and in Modern Iran and Pakistan," in *The Political Dimensions of Religion*, ed, Said Amir Arjomand (Albany: State University of New York Press, 1993), 69-99.

17. See Muhammad Salim al-'Awwa, *Fi al-Nizam al-Siyasi li al-Dawlah al-Islamiyah* (Cairo: al-Maktab al-Misri al-Hadith, 1983).

18. Ahmad Husain Ya`qub, *Al-Nizam al-Siyasi fi al-Islam* (Iran: Mu'assasah Ansariyan, 1312 A.H.), 250.

19. "…This day, I have perfected your religion for you, completed My Favor upon you, and have chosen for you Islam as your religion …" (Qur'an 5:3).

20. Taqiyuddin al-Nabhani, *Nizam al-Islam*. Online at www.hizb-ut-tahrir.org/arabic/kotobmtb/htm/01ndam.htm.

21. `Ali `Abd al-Raziq (1888-1966) was the most controversial Islamic political thinker of the twentieth century. His book, *Al-Islam wa Usul al-Hukm*, written in 1925, aroused great criticism within the Muslim world. He was then condemned and isolated by al-Azhar's 'ulama council, dismissed from his position as a judge, and prohibited from assuming a position in the government. Raziq disagreed with many 'ulama, who considered the establishment of the *khilafah* as obligatory and therefore it would sinful if it were not carried out. Raziq could not find a strong foundation to support this belief.

22. Bassam Tibi, *The Challenge of Fundamentalism: Political Islam and the New World Disorder* (Berkeley: University of California Press, 1998), 160.

23. Information on the origins of the rule of law can be obtained from F. A. Hayek, *The Rule of Law* (California: Institute for Humane Studies, 1975); see also Robert S. Summers, "A Formal Theory of the Rule of Law," *Ratio Juris* 6, no. 2 (July 1993): 127-42.

24. See A. V. Dicey, *Introduction to the Study of the Law of the Constitution* (London: Macmillan, 1959).

25. For more information see Judith N. Shklar, "Political Theory and the Rule of Law," in *The Rule of Law: Ideal or Ideology*, ed. Allan C. Hutchinson and Patrick Monahan"(Vancouver: Carswell, 1987), 2-16.

26. Maxwell O. Chibundu, 'Law in Development: on Taping, Gourding and Serving Palm-wine," *Case Western Reserve Journal of International Law*, no. 29 (spring 1997): 178.

27. Lon Fuller, *The Morality of Law* (New Haven: Yale Univ. Press, 1969), 157.

28. M. J. Radin, "Reconsidering the Rule of Law," *Boston University Law Review*, no. 69 (1989): 785.

29. Taj, *Al-Siyasah al-Shar`iyah,* 10-11.

30. More information on the concept of public interest in Islam can be found in Husain Hamid Hasan, *Nazariyah al-Maslahah fi al-Fiqh al-Islami* (Cairo: Dar al-Nahdah al-`Arabiyah, 1971).

31. Nabhani, *Nizam al-Islam*.

32. For a full account, see Patricia Crone, *Medieval Islamic Political Thought* (Edinburgh: Edinburgh University Press, 2004), 358-92.

33. Ann K. S. Lambton, *State and Government in Medieval Islam* (New York: Oxford University Press, 1991), 203-08.

34. John L. Esposito and James P. Piscatori, "Democratization and Islam," *Middle East Journal* 45, no. 3 (1991): 428.

35. The Qur'an 2:282 says: "... if the two be not men, then one man and two women, such witnesses as you approve of, that if one of the two women errs the other will remind her ..."

36. For a full account, see Zainab Chaudhry, "Myth of Misogyny: A Reanalysis of Women's Inheritance in Islamic Law," no. 61, *Alb. L. Rev.* (1997: 511.

37. For full discussion, see Nadirsyah Hosen, "Can a Woman Become the President of the World's Largest Muslim Country? Megawati – An

Indonesian Political Victim" (paper presented at Women in Asia Conference, Australian National University, Canberra, 23-26 September 2001).

38. Charles Kurzman, "Liberal Islam: Prospects and Challenges," *Journal Middle East Review of International Affairs* 3, no. 3 (September 1999).

39. See Abdullahi Ahmed An-Na'im, *Toward an Islamic Reformation: Civil Liberties, Human Rights, and International Law* (Syracuse, NY: Syracuse University Press, 1996).

40. See Carolyn Fluehr-Lobban (ed.), *Against Islamic Extremism: The Writings of Muhammad Sa`id al-Ashmawy* (Gainesville: University Press of Florida, 1998).

41. Bernard Weiss, *The Spirit of Islamic Law* (Athens: University of Georgia Press, 1998), 116.

42. Khaled Abou El Fadl, "Constitutionalism and the Islamic Sunni Legacy," *UCLA J. Islamic & Near E.L.*, no. 1 (2002): 67.

43. For instance, Amina Wadud al-Muhsin, a professor at Virginia Commonwealth University, offers a hermeneutical approach to understand the Qur'an on women. See her article, "Qur'an and Woman," in *Liberal Islam: A Source Book*, ed. Charles Kurzman (Oxford: Oxford University Press, 1998), 127-38. For the interpretation and historical context of the Prophet's statement "Those who entrust their affairs to a woman will never know prosperity," see Fatima Mernissi, "A Feminist Interpretation of Women's Rights in Islam," in ibid, 112-26.

44. Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence* (Cambridge: The Islamic Text Society, 1991), 366.

45. Ibid., 367; Hans Wehr, *A Dictionary of Modern Written Arabic* (London: Macdonald & Evans LTD, 1974), 142-43.

46. Sayf al-Din al-Amidi was a noted scholar who wrote *Al-Ihkam fi Usul al-Ahkam*. After the first edition of this work appeared, Bernard Weiss of the University of Utah published an exhaustive study of al-Amidi's work in a volume entitled *The Search for God's Will: Islamic Jurisprudence in the Writings of Sayf al-Din al-Amidi* (Utah: University of Utah Press, 1992).

47. Sayf al-Din al-Amidi, *Al-Ihkam fi Usul al-Ahkam* (Cairo: Dar al-Kutub al-Khidiwiya, 1914), 4:218. See also Kamali, *Principles*; Muhammad Taqi al-Hakim, *Al-Usul al-`Ammah li al-Fiqh al-Muqarin* (Beirut: Dar al-Andalas, 1963), 561-62.

48. Abu Hamid Muhammad al-Gazali, *Al-Mustasfa min `Ilm al-Usul* (Madinah: Al-Jami`ah al-Islamiyah, n.d.), 4:4. See also Taha Jabir al-Alwani, "The Crisis of Thought and Ijtihad," *The American Journal of Islamic Social Sciences* 10, no. 2 (1993): 237.

49. Muhammad Ma`ruf al-Dawalibi uses these classifications in his book *Al-Madkhal ila `Ilm al-Usul al-Fiqh* (Damascus: Matba`ah Jami`ah Dimashq, 1959), 389. Muhammad Salam Madkur mentioned Dawalibi's book when discussing this issue (see *Manahij al-Ijtihad fi al-Islam* [Matba`ah al-

`Asriyah al-Kuwayt, 1974], 396) and, shortly afterwards, Wahbah al-Zuhaili also referred to this book in 1977 (see *Al-Wasit fi Usul al-Fiqh al-Islami* [Matba`ah Dar al-Kitab, 1977], 484). However, Muhammad Taqi al-Hakim criticizes these categorizations and, therefore, proposes only two classifications, namely, *al-ijtihad al-`aqli* and *al-ijtihad al-shar`i*. (See Al-Hakim, *Al-Usul al-`Ammah*).

50. Al-Bukhari, "Kitab al-Hajj," *Sahih Bukhari* (Beirut: Dar al-Qalam, 1987), no. 1469.

51. Abu `Abd Allah Malik, "Kitab al-Hajj," *Al-Muwatta'*, (al-Sharikah al-`Alamiyah, 1993), no. 671. See also al-Darimi, "Kitab al-Manasik," no. 1745.

52. Fazlur Rahman, *Islamic Methodology in History* (Lahore: 1965), 180-81.

53. Ahmad Hasan, *The Early Development of Islamic Jurisprudence* (Islamabad: Islamic Research Institute, 1970), 120.

54. The decision of `Umar ibn al-Khattab to suspend the *hadd* penalty (a penalty prescribed by the Qur'an and the Sunnah) of amputating a thief's hand during a time of famine is an example of *istihsan* (juristic preference). Here the law was suspended as an exceptional measure in an exceptional situation. *Istihsan* is considered a method of seeking facility and ease in legal injunctions and is in accord with Qur'an 2:185. This suggests that the Companions were not merely literalists. On the contrary, their rulings were often based on their understanding of the spirit and purpose of the Shari`ah.

55. More information can be found in Musdah Mulia, *Negara Islam: Pemikiran Politik Husain Haikal* (Jakarta: Paramadina, 2001).

56. Al-Mawardi, *Al-Ahkam al-Sultaniyah*, 80-92.

57. Abd al-Wahhab Khalaf, *Al-Siyasah al-Shar`iyah* (Cairo: Salafiyah, 1350 A.H.), 25.

58. Ibid., 41-51.

59. The doctrine of *ijma`* (consensus) was introduced in the second century A.H./eighth century C.E. in order to standardize legal theory and practice and to overcome individual and regional differences of opinion. Though conceived as a "consensus of scholars," in actual practice *ijma`* was a more fundamental operative factor. From the third century A.H., *ijma`* has amounted to a principle of rigidity in thinking; points on which consensus was reached in practice were considered closed, and further substantial questioning was prohibited. Accepted interpretations of the Qur`an and the actual content of the Sunnah all rest finally on *ijma`*, which, according to one definition, should be attended by all *mujtahidun* only. The problem is, if one refers to all books of Islamic legal theory, no definition of *ijma`* is accepted by all *mujathidun*. There is no consensus (*mujma` `alayhi*) in defining *ijma`* itself. See `Ali `Abd al-Raziq, *Al-Ijma` fi al-Shari`ah al-Islamiyah* (Dar al-Fikr al-`Arabi, 1948), 6.

60. Fazlur Rahman, "The Principle of Shura and the Role of the Ummah in Islam," in *State, Politics, and Islam*, ed. Mumtaz Ahmad (Indianapolis: American Trust Publications, 1986), 90-91 and 95.

61. Louay M. Safi, "The Islamic State: A Conceptual Framework," *The American Journal of Islamic Social Sciences* (September 199): 233.

62. See Nathan J. Brown, *Constitutions in a Non-Constitutional World: Arab Basic Laws and the Prospects for Accountable Government* (Albany, NY: State University of New York Press, 2002), 162.

63. Azizah Y. al-Hibri, "Islamic Constitutionalism and the Concept of Democracy," in *Border Crossings: Toward a Comparative Political Theory*, ed. Fred Dallmayr (Maryland: Lexington Books, 1999), 63-87.

64. Azizah Y. al-Hibri, "Islamic and American Constitutional Law: Borrowing Possibilities or a History of Borrowing?" *U. Pa. J. Const. L.*, no. 1 (1999): 492 and 497.

65. El Fadl, "Constitutionalism." See also Anver Emon, "Reflections on the 'Constitution of Madinah: An Essay on Methodology and Ideology in Islamic Legal History," no. 1, *UCLA J. Islamic & Near E.L.* (2002): 103.

66. H. Patrick Glenn, *Legal Traditions of the World* (New York: Oxford University Press, 2000), 35.

67. Ibid., 325.

68. See also Glenn, "The Capture, Reconstruction and Marginalization of 'Custom,'" *Am. J. Comp. L.*, no. 45 (summer 1997): 613.

69. Many Muslim scholars are firm in their belief that the Shari`ah addresses the fundamentals of human rights. For instance, they identify the most important human rights principles in Islam to be dignity and brotherhood; equality among members of the community, without distinction on the basis of race, color, or class; respect for the honor, reputation, and family of each individual; the right of each individual to be presumed innocent until proven guilty; and individual freedom. See Tahir Mahmood (ed), *Human Rights in Islamic Law* (New Delhi: Genuine Publications, 1993). This book compiles articles from such leading Muslim scholars as Abul A`la Maududi, M. I. Patwari, Majid Ali Khan, Sheikh Showkat Husain, and Parveen Shaukat Ali.

70. El Fadl, "Constitutionalism."

71. Taqi al-Din ibn Taimiyah, *Majmu` al-Fatawa* (Beirut: Mu'assasat al-Risalah, 1398 A.H.), 32:134.

72. Yusuf al-Qardawi, *Madkhal li Dirasah al-Shari`ah*, 75.

73. Kamali, *Principles,* 408.

74. The Charter of Madinah's full text can be found online at http://islamic-world.net/islamic-state/macharter.htm.