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Islamic Law and the Modern State: Islamic Constitutionalism for Shari'a-Minded Muslims

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Center for Islam and Global Affairs | Istanbul Sabahattin Zaim University | Istanbul

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Printed in Istanbul, Turkey
First published as a paperback in 2018

Center for Islam and Global Affairs,
Istanbul Sabahattin Zaim University, Halkalı, Küçükçekmece, 34303

Tel.: +90-212-692-9689
Fax.: +90-212-693-8229
E-mail: ciga@izu.edu.tr
Web: ciga.izu.edu.tr

Published by the Center for Islam and Global Affairs (CIGA)
Director: Prof. Dr. Sami A. Al-Arian

A catalog record for this publication is available from
Istanbul Sabahattin Zaim University (IZU)
Rector: Prof. Dr. Ahmet Cevat Acar

ISBN: 978-625-7558-22-8

Istanbul Sabahattin Zaim University Publications, No.80.

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Foreword

Since the fall of the Caliphate over a century ago Islamic scholars, intellectuals, and movements have been occupied by a central project and trying to answer a crucial question: How do we restore the Islamic state and the rule of Shari'ah-based society in today's world?
This study by Muslim legal scholar Asifa Quriashi-Landes was presented in the first CIGA conference few years ago and her attempt to address this fundamental question. In the paper, she proposes an Islamic constitutional structure inspired by historic Islamic legal pluralism. She argues that any Shari'a-based constitutionalism must necessarily have separate legal realms for fiqh and siyasa (politics), necessitated by the epistemology and diversity of fiqh. This type of constitutionalism is unique in a world where the legal monism of the nation-state is the norm. It also challenges the idea of Shari'a (often used interchangeably with "fiqh") dominant in contemporary Muslim discourse - especially within political Islam discourses. The study contends that understanding Shari'a as an Islamic rule of law — not just fiqh rules — not only opens up a whole new world of Islamic constitutional theory, but also introduces the uniquely Islamic idea of constitutionalized legal pluralism to global scholarship on constitutionalism.

In short, she asserts that her proposal would allow secularists and Islamists in Muslim majority countries to find middle ground without compromising their core values and purposes. For religious Muslims, it bases the legitimacy of state action directly on Shari'a principles. For secularists, it requires state lawmaking to be justified on something other than religious pedigree. It does this by articulating a model of government in which religious laws (fiqh) are only one of a two-part Shari'a-as-rule-of-law system, the other being state lawmaking based on the Shari'a notion of public good. This idea provides a way for Islamic governments to formally recognize fiqh rules without imposing them on those who do not want them. This pluralistic system includes an integral role for democratic lawmaking for the public good, situating it as part of a Shari'a-based system, not in opposition to it. It's an interesting proposal

that starts an important conversation on theis central topic, and desrves to be discussed, debated, studied, and critiqued.

Department for Islam and Muslim Societies Studies (IMSS)

Center for Islam and Global Affairs (CIGA)

Islamic Law and the Modern State: Islamic Constitutionalism for Shari'a-Minded Muslims

Prof. Asifa Quraishi-Landes

Abstract

This paper presents a structure for Islamic constitutionalism that is inspired by Islamic jurisprudence and Muslim history, yet designed for contemporary realities. This structure is conceptually different from the typical "Islamic state" imagined by modern political Islam movements. Unlike the centralized European nation-state systems inherited by most Muslim-majority countries, the constitutional structure presented here is built upon the separation of lawmaking power that characterized Muslim legal and political systems for centuries, namely, a separation between siyasa, made by rulers, and fiqh, articulated by religious legal scholars. Understanding sharia as an Islamic rule of law made up of both fiqh and siyasa, this paper builds an Islamic constitutional model on the powerful foundation of Islamic legal pluralism.

The proposed model has three essential pillars: (1) state action must be based on the public good, (2) a diverse marketplace of fiqh should exist in a parallel legal realm, available as a voluntary opt-out of state law, and (3) a "sharia check" reviewing the Islamic legitimacy of state action should be based on the purposes (maqasid) of sharia. Together, these three pillars form the essential structure for a system of government that would enable Muslims to have sharia as the "law of the land," but is not theocratic because it does not allow the state to impose its preferred religious doctrine upon the entire population. It also opens up new solutions to longstanding conflicts between secular and religious forces in Muslim-majority countries today, such as the purported incompatibility of Islam and democracy, or between sharia and human rights. These solutions have been missed in global discourses about Islamic government so far because Eurocentric concepts of law

(especially religious law) currently dominate the field. This chapter challenges these concepts by showing how an Islamic constitutionalism that is not secular and not theocratic is not impossible.

Islamic Law and the Modern State: Islamic Constitutionalism for Shari'a-Minded Muslims

Asifa Quraishi-Landes

I. Introduction

The "Islamic state" of modern political Islam generally presumes the central state is the location of all legal authority and the guardian of society's orthodoxy. This is why Islamist political advocacy usually seeks to incorporate Shari'a into the law of the modern state through legislation and constitutional amendment. This brings them into regular battle with secular forces seeking control over the same political space. In short, Islamists and secularists both operate with a presumption of legal monism: all law is controlled by the state. But this is not how law and legal authority has always operated in Muslim societies. Legal monism is an attribute of the European nation-state, imported to most Muslim-majority lands through colonialism. Yet Islamic state movements seem content to influence monist state power rather than exploring ways to diversify that power. Even reformist Muslim scholars and activists limit themselves to doctrinal, rather than structural, creativity about Shari'a. In other words, there is little, if any, Islamic *constitutional* theory around today.

This study is an early expedition into this territory. It describes what a Shari'a -based government could look like if Shari'a is understood as an Islamic rule of law rather than a collection of rules. This takes Shari'a all the way up the theoretical ladder to the rung of constitutional theory, opening up new Islamic ways of thinking about the allocation of legal and political power and how to create Islamic checks and balances on that power. The result is a model for Islamic constitutionalism that is based on Shari'a but is not about "Islamizing" the nation-state. Rather than accepting the current constitutional norm that centralizes all legal authority in one sovereign power — and then debating whether that power should or should not be used to enforce Shari'a (and if so, which version)

— this proposal shows that Shari'a -based government can mean something much more profound and constitutionally creative than anything that exists right now.

The study proposes a structure for Islamic constitutionalism that is inspired by pre-modern Islamic jurisprudence and Muslim history, yet designed for contemporary times. It is conceptually different from the typical "Islamic state" imagined by political Islam because it is based on the legal pluralism found in Islamic history rather than the legal monism of the European nation-state. Unlike the centralized system introduced in Muslim lands during the colonial era, the present constitutional structure is built upon the separation of lawmaking power that had previously characterized Muslim systems for centuries: a separation between siyasa made by rulers and fiqh articulated by religious legal scholars. This paper concludes that this bifurcation of fiqh and siyasa law is an indispensable feature of Islamic constitutionalism. Without it, Muslim governments venture into virtually theocratic rule, where they declare "the" Islamic law of the land, often discriminating against those who disagree. For a religion that has never had a "church," this is a dangerous and ill-fitting phenomenon. This paper presents a powerful course correction: a new theory of Islamic constitutionalism in which Shari'a is an Islamic rule of law encompassing both fiqh and siyasa, translating and updating the fiqh and siyasa realms to be appropriate for contemporary realities.

There are three essential pillars to the proposed model: (1) state action must be based on the public good, (2) a diverse marketplace of fiqh (and other religious law) should exist in a parallel legal realm, available as a voluntary opt-out of state law, and (3) a "Shari'a check" reviewing the Islamic legitimacy of state action should be based on the purposes (maqasid) of Shari'a. Together, these three pillars form the essential structure for a system of government that enables Muslims to have Shari'a as the "law of the land," but is not theocratic because it does not allow a state to impose its preferred religious doctrine upon the entire population. It also opens up new solutions to longstanding conflicts between secular and religious forces in Muslim-majority countries today, such as the purported incompatibility of Islam and democracy and between Shari'a

and human rights. These solutions have been missed in global discourses about Islamic government so far because Eurocentric concepts of law (especially religious law) currently dominate the field.

II. Thinking Outside the "Islamic State" Box

Political Islamic movements (often called "Islamism") work toward what has been called the "Islamization" of their states. They often support "Shari'a legislation" and constitutional provisions requiring Shari'a to be a source of legislation and/or a check on state action.[1] These legal markers often carry popular Muslim support, a phenomenon documented in polls indicating broad support for *Shari'a* as the "law of the land" in Muslim-majority countries around the world.[2] In response, secular-minded citizens and observers point to conflicts between legislated Shari'a and global human rights norms, often actively opposing these movements on the ground that Shari'a threatens human rights. It is thus not surprising that strong tensions between secular and Islamist forces pervade the social and political life of many Muslim-majority countries, especially on highly-publicized issues such as women's rights and freedom of expression and belief.

So far, the most popular approach to resolving these tensions has been that of "liberal" or "reform" Islam. Social and political actors following this approach urge Muslim governments to adopt liberal and new interpretations of Shari'a instead of traditional and conservative ones that conflict with global norms, as a way to bridge Muslim desires for Shari'a

[1] For a discussion of constitutional clauses setting up Shari'a as a/the source of legislation in several Muslim-majority countries, see Clark Lombardi, Constitutional Provisions Making Shari'a "A" or "The" Source of Legislation: Where Did They Come From? What Do They Mean? Do They Matter? 28 American University International Law Review 733 (2013). On the history and rise of Shari'a-based constitutional "repugnancy" clauses, see Dawood Ahmed & Tom Ginsburg, Constitutional Islamization and Human Rights: The Surprising Origin and Spread of Islamic Supremacy in Constitutions, 54 Virginia Journal of International Law 1 (2013).

[2] See, e.g., Pew Forum on Religion and Public Life, The World's Muslims: Religion, Politics and Society (2013), available at www.pewforum.org/the-worlds-muslims-2013.

with secular concerns for individual rights.[3] This strategy is popular with many because it offers Islamically-grounded arguments for things like gender equality, freedom of expression, and other tenets of contemporary global civil and human rights. But a liberal Shari'a resolution of the Islamist-versus-secularism fight can be short-lived. No matter how persuasive an argument is made for the state to adopt human-rights-affirming Shari'a interpretations, there is no conclusive reason to insist that all Muslims will agree with these new interpretations. Thus, advocates of liberal Islam may think they have solidly enacted, for example, woman-empowering interpretations of Shari'a grounds for divorce only to see an election bring a new political majority passing new legislation based on Shari'a interpretations that reject those grounds. In short, a political solution based on liberal Islam is ultimately unsatisfying because it leaves rights protections vulnerable to shifting political majorities.

Moreover, the social and political consequences of this phenomenon can be devastating to everyone. It can turn the legislative, executive and judicial houses of Muslim-majority countries into battlegrounds for liberal and conservative (and everything in between) interpretations of Shari'a, each side hoping their preferred view will be the one imposed through the power of the state. As a result, many Muslim-majority countries today seem doomed to repeat endless cycles of religiously-motivated politics. In the face of all this, strict secularists seem well-positioned to argue that the only way out is a full and complete separation of religion from the state.[4]

But what if religion is not the problem? What if these cycles of religious politics are caused not by the association of Islam with the state, but instead by the nature of the state itself? To understand the point, we have to step back to better understand the nation-state canvas upon which

[3] A full summary of liberal Islamic advocacy is far beyond the scope of this paper, but a useful introduction to a range of liberal Islamic thought can be found in Liberal Islam: A Source Book (Charles Kurzman, editor) (Oxford University Press, 1998).

[4] One example among many is Abdullahi Ahmed An-Na'im, Islam and the Secular State: Negotiating the Future of Shari'a (Oxford University Press 2008).

this political picture is drawn. The nation-state that is ubiquitous in the world today is a product of European history. It is centered on the idea that a culturally and ethnically distinct people (a "nation") form a territorially-bound sovereignty that gives legitimacy to their governing power. This political power is characterized by legal monism and legal centralism - the idea that law is made by the state.

The European nation-state model of government was imported into the Muslim world with colonialism. In countries colonized by (or greatly influenced by) European powers, the pre-existing Muslim legal and political systems were dismantled and replaced with national legal codes and judicial systems based on those of the relevant European colonial power. These arrangements remained in place even after independence: the new Muslim-majority states in Arabia, Africa, Asia, and Eastern Europe of the mid-twentieth century retained most of the law and legal systems set up by their former European rulers, now woven into their socio-economic infrastructures.[5] Thus, in virtually every Muslim-majority country today, whether it was actually colonized by a European power or not, legal monism is the norm.

Some Muslims sought to remedy the wound of the colonialist purging of Shari'a by organizing themselves into Islamically-oriented socio-political movements. Remarkably however, the "Islamization" work of these movements displayed a stunning amnesia: rather than look at what came before the nation-state constitutional structure, they concentrated their efforts on making that central state "Islamic." As Sherman Jackson has put it,

liberal or illiberal, pro- or anti-democratic, the basic structure of the nation-state has emerged as a veritable grundnorm of modern Muslim politics. The basic question now exercising Muslim political thinkers and

[5] *See* Wael Hallaq, An Introduction to Islamic Law (Cambridge University Press, 2009), 85-124 (Chapter 7, "Colonizing the Muslim World and its Shari'a").

activists is not the propriety of the nation-state as an institution but more simply whether and how the nation-state can or should be made Islamic.[6] Even those calling for an "Islamic state" did not change the nation-state presumptions of legal monism. To use Jackson's words again, "the Islamic state is a nation-state ruled by Islamic law."[7]

This is a dangerous turn of events. Monolithic legal positivism has shrunk the Muslim constitutional horizon to the narrow realm of state law, contributing to dangerous power monopolies in contemporary Muslim governments. All law in these countries is now defined by the state, and any laws not created or sanctioned by the state do not have any enforceable legal status for the people.[8] The more it is insisted that all law comes from the state, the more everyone is forced into that arena to acquire any recognition and protection for laws that are important to them - religious laws included.

This is the reason for "Shari'a legislation." Following the legal monist presumption that the central state controls all law, Islamist movements consistently look to state lawmaking bodies to officially recognize Shari'a – usually in the form of legislating it.[9] In doing so, modern Islamists are instead reinforcing the European nation-state concept that state power is what gives law its authority, and that the state has the responsibility of establishing the substantive content of Shari'a in these countries.[10] What these movements fail to recognize is that, far from

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[6] Sherman Jackson, Islamic Reform Between Islamic Law and the Nation-State, in The Oxford Handbook of Islam and Politics 42 (John L. Esposito & Emad El-Din Shahin, editors.) (Oxford University Press 2013).

[7] Sherman Jackson, Islamic Law and the State: The Constitutional Jurisprudence of Shihab al-Din al-Qarafi XIV (E.J. Brill 1996).

[8] For a commentary on this phenomenon in a discussion of legal pluralism, see Sherman Jackson, "Legal Pluralism Between Islam and the Nation-State: Romantic Medievalism or Pragmatic Modernity?" 30 Fordham International Law Journal 158 (2006-2007).

[9] Frank Vogel comments that this is apparent "when Islamic thinkers assume that to return to Shari'a one should just amend here and there the existing positive-law constitutions and statutes; or assert that a modern state is Islamic if its legislature pays respect to general Islamic legal precepts, such as bans on prostitution or gambling." Frank Vogel, Islamic Law and Legal System: Studies of Saudi Arabia 219 (Brill 2000).

[10] See Mohammad Hashim Kamali, Methodological Issues in Islamic Jurisprudence, 11 Arab Law Quarterly 3, 9 (1996) ("The government and its legislative branch tend to act

restoring Shari'a to those places from which it was removed, these Shari'a legislative projects have fundamentally transformed the nature of Shari'a's engagement with these societies. To understand how, it is necessary to review some basic Islamic legal theory and history.

A. The Importance of Fiqh Diversity

A core principle of Islamic jurisprudence is that Shari'a, God's Law, cannot be known with certainty. Literally meaning "street," or "way," Shari'a in the Quran denotes the perfect Way of God - the way God advises people to live a virtuous life. This Way of God is depicted in the Quran and the life example of the Prophet Muhammad (PBUH), but of course not everything is clearly answered in those sources, so Muslim scholars perform ijtihad to extrapolate more detailed guidance for life according to Shari'a. This guidance comes in the form of detailed legal rules called fiqh (literally, "understanding").

The epistemology of fiqh is important. The fiqh scholars (fuqaha) acknowledged that their work of ijtihad is a fallible human endeavor that always carries the possibility of error.[11] Their use of the term "fiqh" linguistically signals that every fiqh rule is only a scholar's best *understanding* of God's Law, nothing more. In short, although their job is to articulate God's Law, the fuqaha are careful never to speak definitively for God.

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as the sole repository of legislative power. . . . The advent of constitutionalism and government under the rule of law brought the hegemony of statutory legislation that has largely dominated legal and judicial practice in Muslim societies.); Sherman Jackson, Shari'ah, Democracy, and the Modern Nation-State: Some Reflections on Islam, Popular Rule, and Pluralism, 27 Fordham International Law Journal 88 (2003).

[11] The fuqaha took very seriously the famous hadith of the Prophet (PBUH) that the mujtahid (person who does ijtihad) and arrives at the correct answer will receive two rewards from God, while the mujtahid who arrives at the wrong answer will get one reward from God. See Sahih Bukhari 6919; Sahih Muslim 1716. Among other things, the significance of that hadith is that, here in this lifetime, each scholar has to respect the fiqh conclusions of other scholars as potentially correct articulations of Shari'a.

Thus, fiqh lawmaking is based upon an acceptance of the impossibility of knowing God's Law with certainty, but not the futility of trying.[12] This simultaneously humbling and empowering attitude among the fuqaha resulted in a natural and unavoidable diversity of fiqh doctrine. Because there is no way to know for sure which fiqh conclusions are correct (and there is no Muslim "church" to designate favorites), all ijtihad-derived rules of fiqh are valid understandings of Shari'a, even though they often contradict each other. This is why there are several schools of fiqh (madhahib), each with a different methodology of interpretation.[13] Thus, the reality of Shari'a in the world is not a monolithic single code of law, but rather the different doctrines of many fiqh schools, each equally legitimate representations of the Law of God (Shari'a).

In pre-modern Muslim systems, the application of fiqh was mediated through this diversity. Fiqh law was accessible to the public in a way that gave individual Muslims choice over which school of fiqh law they would follow. To summarize a vast temporal and geographic history, individual Muslims typically identified with one fiqh school and sought out fuqaha of that school for guidance when in need of specific legal answers, such as whether or not a contract was valid, or how to distribute inheritance. The fuqaha's answers to these individual questions came in the form of legal responsa (fatawa) which were usually self-enforced by the questioner himself or herself. When a fiqh-based dispute arose between

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[12] *See* Khaled Abou El Fadl, Speaking in God's Name: Islamic Law, Authority and Women (Oneworld Publications 2001) at 39 ("Islamic legal methodologies rarely spoke in terms of legal certainties (*yaqin* and *qat'*). The linguistic practice of the juristic culture spoke in terms of probabilities or the preponderance of evidence. . . . Muslim jurists asserted that only God possesses perfect knowledge–human knowledge is tentative."). For more on this concept in the various schools of Islamic jurisprudence, see Aron Zysow, The Economy of Certainty: An Introduction to the Typology of Islamic Legal Theory (Lockwood Press 2013).

[13] From hundreds of early *fiqh* schools, five remain famous today: the Maliki, Hanafi, Shafi'i, Hanbali, and Ja'fari (Shi'a). *Fiqh* doctrinal differences often fall along school lines, although there are always minority views within each school. For more on these different *fiqh* schools and their respective methodologies compared with the methodologies of American constitutional interpretation, see Asifa Quraishi, Interpreting the Qur'an and the Constitution: Similarities in the Use of Text, Tradition and Reason in Islamic and American Jurisprudence, 28 Cardozo Law Review 67 (2006).

two or more Muslims (for example, a property dispute between adjacent neighbors), they would typically seek out a ruler-appointed qadi (judge) from their fiqh school to resolve the dispute, and the qadi's ruling would be enforced by the executive power of the Muslim ruler. This was possible because Muslim rulers could accommodate the fiqh diversity of their populations by appointing a variety of judges from different fiqh schools according to the demographic needs of each geographic area.[14] Importantly, rulers did not alter the content of the fiqh applied in these courtrooms, nor did they consolidate the rules of divergent fiqh schools to create one fiqh code applied by all the qadis in the land. Muslim rulers understood that, even though they were enforcing fiqh rules through their executive power, that power was about enforcement – not creation – of fiqh.[15] Substantive control over the content of fiqh laws always remained with the fuqaha, outside of ruler authority. This system created a "to each his own" quality of religious law in these societies that included not just the many Muslim *fiqh* legal schools, but also the religious laws of Christians, Jews, and others. In this way, individuals in pre-modern

[14] Significantly, Muslim governments did not view this fiqh diversity as a threat to their sovereignty. See Jackson, supra note 11, at 106 (2003-2004) ("the pre-modern Muslim state . . . did not equate the integrity of the State with the exercise of an absolute monopoly over lawmaking or the ability to impose a uniform code of behavior on the entire society."). Which fiqh school would resolve conflicts between Muslims of different fiqh affiliations differed according to the details of each time and place, a topic too large to summarize here, but, generally speaking, the resolution was similar to the way that conflict of laws rules govern how disputes between citizens of different nations or states is resolved today.

[15] Fuqaha autonomy over the interpretation of scripture is a result of the mihna, an attempt by early Muslim rulers to control theological belief of the Muslim population. Fuqaha resistance ultimately prevailed, leading to the separation of fiqh and siyasa authority that became typical of Muslim societies thereafter. See Marshall G.S. Hodgson, The Venture of Islam: Conscience and History in a World Civilization I: The Classical Age of Islam (UCP, Chicago 1974) 285-319, 479-89; Abou El Fadl, supra note 13, at 26 ("after the age of mihna . . . [the fuqaha', or Muslim legal scholars] establish[ed] themselves as the exclusive interpreters and articulators of the Divine law. . . . [T]he inquisition was a concerted effort by the State to control the juristic class and the method by which Shari'ah law was generated. Ultimately, however, the inquisition failed and, at least until the modern age, the [fuqaha', or Muslim legal scholars] retained a near exclusive monopoly over the right to interpret the Divine law.").

Muslim systems could receive official recognition of their preferred religious law without having to impose it on everyone else.[16]

B. The Nature of Siyasa Authority

Muslim rulers' deference to fuqaha authority over the content of fiqh was not out of politeness. It was the natural result of a unique separation of legal authority in pre-modern Muslim lands that has all but disappeared today. In pre-modern Muslim legal systems, there were two types of law: siyasa, created by the rulers, and fiqh, created by the fuqaha.[17] These two types of law operated in an interdependent relationship with each other, but they came from very different sources and stood on very different grounds of legitimacy. Unlike fiqh, siyasa laws were not extrapolated from scripture by religious legal scholars. Rather, Muslim rulers crafted siyasa according to their own philosophies of government and ideas about how best to maintain public order. Siyasa laws were typically pragmatic, governance-related laws, covering topics like taxes, security, marketplace regulation, and public safety—i.e., things necessary for public order, but about which the scripture says little.[18] Notably, siyasa rulers were specifically expected not to draw their rules from scripture, but from their own opinions of what is necessary for social and political order.[19] The

[16] In fact, pre-modern fuqaha firmly resisted ruler attempts to enforce uniform fiqh doctrine on Muslim populations. For example, 'Abbasid Caliph al-Mansur (753-775 AD/135-158 AH) approached Malik ibn Anas (eponym of the Maliki *fiqh* school) to adopt Malik's law book, "*al-Muwatta*," as the official law of the Empire, but he refused. According to one report, Malik asserted that it would be "harsh on the peoples of other regions, who had adopted practices to which they were now long accustomed, which they believed to be correct, and which were supported by the hadiths and legal opinions that had reached them." Umar F. Abd-Allah Wymann-Landgraf, Malik and Medina: Islamic Legal Reasoning in the Formative Period 58 (Brill 2013).

[17] See Asifa Quraishi, "The Separation of Powers in the Tradition of Muslim Governments," in Constitutionalism in Islamic Countries: Between Upheaval and Continuity (Tilmann Roder, Rainer Grote & Katrin Geenen, eds., Oxford University Press, 2011); Frank Vogel, supra note 10, at 31 (describing siyasa and fiqh as "macrocosmic" and "microcosmic" law).

[18] See Vogel, supra note 10 at 52, 171-73.

[19] Khaled Abou El Fadl, "Islam and the Challenge of Democratic Commitment, 27 Fordham Int'l Law Journal 4 (2003), at 64 ("Only the jurists [were] qualif[ied] to investigate and interpret the Divine will. . . . However, pursuant to the powers derived

result was religious legitimacy for Muslim rulers to issue laws and "perform the duties of everyday governance and law enforcement without specific reference to, or grounding in, the sacred texts."[20]

Siyasa lawmaking by temporal holders of power ultimately came to be seen as Islamically legitimate because of the widespread consensus in Islamic jurisprudence that the ultimate purpose of Shari'a is to promote the welfare of the people (maslaha).[21] Because rules extrapolated from scripture cannot cover all the day-to-day public needs of civil society, the fuqaha recognized that another type of law besides fiqh was necessary to fully serve the public good (maslaha 'amma). Scriptural study cannot identify, for example, what is a safe speed limit or what regulations will ensure food safety. The only institution capable of creating and enforcing these sorts of rules is the power that controls the use of force—that is, the siyasa power held by rulers. Thus, in the literature of Muslim political science that came to be known as "siyasa shariyya," fiqh scholars agreed that it is fundamental to a Shari'a -based system that rulers exercise siyasa lawmaking power for the purpose of serving the public good (maslaha 'amma).[22] Though the siyasa shariyya scholars differed widely in their

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from its role as the enforcer of Divine laws, the State was granted a broad range of discretion over what were considered matters of public interest known as the field of al-siyasah al-Shar'iyyah."); Mohammad Fadel, The True, the Good and the Reasonable: The Theological and Ethical Roots of Public Reason in Islamic law, 21 Canadian Journal of Law and Jurisprudence 5, 59 (2008), ("[t]his area of the law was entirely independent of theological expertise, and accordingly, legitimized rule-making for the vindication of public interests rather than the vindication of express revelatory norms.").

[20] Sadiq Reza, Torture and Islamic Law, 8 Chicago Journal of International Law 21, 27 (2007),.

[21] Vogel, supra note 10, at 529 ("The whole basis and foundation of Shari'a is to serve the welfare of God's servants in this world and in the hereafter."). For more detail on maslaha, see Felicitas Opwis, Maslaha and the Purpose of the Law: Islamic Discourse on Legal Change from the 4th/10th to 8th/14th Century 1-8 (2010).

[22] Vogel, supra note, 10, at 529 ("as understood by [fiqh scholars] the ruler possesses authority under siyasa doctrine to act freely to pursue the welfare of the [community] as he understands it"). Shihab al-Din al-Qarafi, for example, described siyasa as "that power entrusted to the government to improve society. Exercises of this power were valid insofar as they were undertaken with the purpose of enhancing the community's welfare, and did so improve it in fact." See Fadel, supra note 21, at 58 (2008) (quoting Shihab al-din Ahmad b. Idris al-Qarafi, al-Furuq vol. 4 at 39); see also generally Ovamir Anjum Politics, Law, and Community in Islamic Thought: The Taymiyyan Moment

ideas about the proper Shari'a scope of siyasa power, the practical impact of siyasa shariyya scholarship as a whole was to expand the concept of Shari'a to include pragmatic considerations of good governance. This genre of Islamic legal literature solidified the idea that Shari'a as "God's Law" is meant to cover more than just the fiqh elaboration of scriptural rules.

Siyasa's lack of direct grounding in sacred texts is important for Islamic constitutionalism because it illustrates how Shari'a can work as a holistic and nuanced Islamic rule of law. Even though siyasa laws were not derived directly from scripture, pre-modern Muslims did not think of siyasa as "outside" of Shari'a. Instead, they considered fiqh and siyasa both to be important components of their rule of law systems. Pre-modern Muslim political theory and practice illustrates a system where rulers and religious legal scholars together serve Shari'a, through their respective jobs, each serving different roles. The job of the rulers is to make and enforce laws that serve the public good, and the job of the scholars is to use ijtihad to extrapolate rules from the Quran and Sunnah.

To use contemporary terminology, legal pluralism -- not legal monism -- was the constitutional structure of most Muslim governments before the colonial era.[23] This structure was actually necessitated by the epistemology of Islamic jurisprudence: Muslim legal systems had to figure out how to accommodate the unavoidable and inherent diversity of fiqh. After all, if all the fiqh schools are all equally valid, it is not possible to deem one of them correct and make it the law of the land (and those who tried, failed). So, unlike law in Europe, legal centralism simply was not an option. Muslims had to figure out another way to set up their legal systems, and their solution was two types of law: siyasa (made by the ruler) and fiqh (made by the scholars). Both had authority over the people, but in very different ways. Siyasa was to serve general public needs such

(2012) (comparing a great number of siyasa shariyya scholars on the topic of Islamic governance, including their divergent views on the reason for and nature of the siyasa ruler).

[23] In Sherman Jackson's words, "legal pluralism was to the premodern Muslim state what legal monism has become to the modern nation-state." Jackson, supra note 7, at 46.

as safety and justice and order, whereas fiqh was to provide rules to guide Muslims in living a life according to the will of God. Siyasa was enforced by the state through use of force, whereas fiqh was partly enforced by the state and partly self-enforced, depending on the nature of the issue.[24] In sum, the rule of law in pre-modern Muslim lands depended upon the existence and complementarity of both types of law, siyasa and fiqh. These two legal realms, moreover, were interdependent. Neither one alone could serve all the legal needs of the society. Siyasa and fiqh operated with a mutual awareness of each other, sometimes in cooperation, sometimes in tension but always interdependently.[25]

C. The Problems with Legal Monism for Islamic Government

We can now see more clearly why the nation-state may be the source of the destructive cycles of religious politics in Muslim-majority countries today. The dominance of nation-state legal monism has obscured what is arguably the most constitutionally relevant aspect of Islamic history: the bifurcation of legal authority between fiqh and siyasa law. Siyasa respect for a separate and autonomous realm of fiqh law ultimately protected premodern Islamic governments from theocratic rule. Because fiqh and siyasa each play separate roles in a Shari'a rule of law system, pre-modern Muslim governments worked with the reality of these different legal realms rather than using their political power to enforce one singular version of religious law on everyone.

The contemporary phenomenon of "Shari'a legislation" ignores this fundamental feature of pre-existing Muslim legal systems. Rather than thinking of Shari'a as a rule of law system composed of both fiqh and siyasa legal realms, the "Islamization" of Muslim governments has

[24] It was self-enforced when individual Muslims sought out fatwas for their personal legal questions. It was enforced by the state if the fiqh was being applied through the judgement of a qadi.

[25] There are far too many examples to go into here, but for some, see Kristen Stilt, Islamic Law in Action: Authority, Discretion, and Everyday Experiences in Mamluk Egypt (Oxford University Press 2012) (describing the mixed fiqh-siyasa role of the muhtasib).

amounted to collapsing Shari'a into just fiqh, and then looking to state power to bring fiqh doctrine into the political realm. But in premodern Muslim systems, the Shari'a mandate of siyasa power was quite different: it was not to enact and impose fiqh doctrine on everyone, but rather, to maintain public order and serve the public good. In short, state action for the public good -- *not* legislating fiqh doctrine -- is the Islamic duty of the ruler in a Shari'a rule of law system.

Moreover, so-called "Shari'a legislation," does not really legislate "Shari'a" at all. It merely legislates one (or several) among many fiqh possibilities. Because every fiqh rule is fallible, no Muslim government can claim that the fiqh rule they have enacted is in fact God's Law. Therefore, the best that a government can claimed of so-called "Shari'a legislation" is that it has enacted its preferred *understanding* of Shari'a from among many equally valid options. But to call such legislation "Shari'a" is to use religion in a politically manipulative manner – implying divine mandate for rules that are in reality fallible human interpretations of divine law.

Another way to see this is to see that "Shari'a legislation" is actually an act of *siyasa*. The adultery laws in Nigeria and Pakistan, the fiqh-inspired marriage and divorce laws in the family law codes of Egypt and Morocco - all are acts of siyasa lawmaking because they are laws created by a political power. And, because no fiqh rule can claim to be the correct understanding of Shari'a, enacting one and not another must necessarily be on some basis other than it "being" divine law. Usually, it is some combination of political majorities, social pressure, and administrative preference (whether this is admitted publicly or not). So, even when they "legislate Shari'a," Muslim governments are really doing a purely *siyasa* job: making prudent choices given the practical realities of their public lawmaking systems, ostensibly to serve the public good. In itself, there is nothing wrong with this – after all, making pragmatic decisions to serve the public good is exactly what siyasa is meant to do. The problem with "Shari'a legislation" is that they call it "Shari'a." Its promoters pretend that it is obligatory divine law, instead of the policy choices that they

really are, with no mention of the human element between God and the statute codes.

Unfortunately, most Muslims do not see this as a problem. To the contrary, because most Muslims around the world have an incomplete understanding of Shari'a, fiqh diversity, and the role of siyasa before colonialism, [26] they usually do not question "Shari'a legislation," believing to do so would be to question God's Law. Many even defend "Shari'a legislation" as if defending their very faith, seeing opponents of "Shari'a legislation" as enemies of Islam.[27] Thus, because it is so often immune from popular criticism and amendment and — most of all — repeal, Shari'a -based legislation has a powerful (and often manipulative) strategic advantage in Muslim-majority countries.

Sadly, and ironically, this has added a theocratic quality to these legal systems. Muslim governments can now occupy the powerful position of acting as both author and enforcer of what is Shari'a. This creates dangerous potential for state-enforced religious dogma, a situation exacerbated by the creation of "Shari'a courts" with final authority to interpret the authoritative meaning of state-enacted "Shari'a law." Seen in greater historical and theological context, this is an odd thing for Muslims to do. For centuries, Muslims rejected the establishment of any church or clergy with the power to declare "the" Islamic rule on any given topic. Today, however, "Shari'a courts" have the sole authority to interpret the meaning of Shari'a for the public. Ironically, this is arguably the closest thing to a Muslim "state church" that has ever existed.

It is important to recognize that it is not Shari'a itself that has caused this situation. It is rather, the result of failing to think of Shari'a as a rule of law, encompassing both fiqh and siyasa realms. Islamist activists often

[26] See for example, Tamir Moustafa, Islamic Law, Women's Rights, and Popular Legal Consciousness in Malaysia, 38 Law and Social Inquiry 168 (2013) (showing, based on recent polling data, lay Muslim ignorance of core epistemological commitments in Islamic legal theory, such as its commitment to diversity and the importance of human agency in fiqh lawmaking).

[27] For details on this phenomenon in the context of Islamic law and women's rights, see Asifa Quraishi, What if Shari'a Weren't the Enemy? Rethinking International Women's Rights Advocacy on Islamic Law, 22 Columbia Journal of Gender and Law 173 (2011).

use Shari'a and fiqh as interchangeable terms, thus they not only miss the important role of siyasa in a Shari'a -based system but also contribute to this new theocratic trend by inserting (selected) fiqh rules into a nation-state structure that has exclusive control over all law. Thus, "Shari'a legislation" is a wholly modern, post-colonial invention: it depends upon the centralized power and legal monism of the nation-state to operate. These governments would not be able to uniformly enforce their selected fiqh rules if the pluralist bifurcation of fiqh and siyasa had survived. The theocratic consequences of this status quo should offend not just secularists who feel that state law should be separated from religion, but also religious Muslims because it disrespects fiqh diversity and lets the state claim control over what used to be left to the autonomy of independent fuqaha.

It is also important to realize that liberal Islamic advocates are not immune to this charge. So-called liberal and reform Islamic movements also promote theocracy when they promote state enactment of liberal interpretations of Shari'a. This is a theocratic move – a progressive and liberal one, perhaps, but theocratic just the same.[28] This is why liberal Islam as a political movement cannot make lasting change: it does not challenge the fundamental constitutional feature that frequently leads to their defeat, i.e. state control over a singular fiqh doctrine to be enforced upon the entire population. As long as the power to define Shari'a lies with those in political power, it is theocratic. And any theocracy is dangerous, even one with moderate laws, because it uses the power of the state's sword while claiming to act for God. On this point there is common ground between modern human rights norms and classical Islamic jurisprudence.

[28] As Mohammad Fadel has put it, "this modernist solution is simply the other side of the dilemma . . .: both of them assume that the norm of revealed law, once properly derived from revelation, would have to function as the rule recognized by the temporal legal system. . . . Islamic modernists … because they are confident in their ability to identify the correct substantive norm, are unconcerned that they are substituting their own judgment for that of God's." Mohammad Fadel, Is There Such a Thing as an Islamic Public Law, and Does Its Existence Matter for Post-Authoritarian Arab Regimes? (forthcoming, Yearbook of Middle Eastern Law, 2015).

In contrast, the framework for Islamic constitutionalism presented here is specifically designed to prevent theocracy. It is based on an appreciation of the fallibility of any understanding of Shari'a, especially those holding state power over others. It starts with the concept of Shari'a as holistic rule of law rather than a mere collection of rules to be legislated. It shows that the way to prevent the theocratic tendencies of current Islamic states is not by liberal reform of Shari'a legislation. Rather, the entire project of "legislating Shari'a" - whether liberal or conservative interpretations - needs to be taken off the table altogether. This is accomplished by rejecting the legal monism of the nation-state, and reclaiming the legal pluralism of the historical Muslim bifurcation of fiqh and siyasa law. It is to that framework for a re-claimed and renewed Islamic constitutionalism that we now turn.

III. Islamic Re-constitutionalism: Three Essential Pillars

The Islamic constitutional structure presented here is based on three essential pillars — three principles inspired by the lessons of Muslim legal and political history summarized above. The first principle is that all government action must be based on the public good. This draws upon the principle articulated by siyasa shariyya scholars that siyasa power is an essential part of a Shari'a rule of law system, and that the Shari'a responsibility of a Muslim ruler is to serve the public good. This general principle is updated for contemporary realities by adding democracy as a viable mechanism by which to identify the public good. The second principle, inspired by the historical bifurcation of siyasa and fiqh, provides that a diverse marketplace of fiqh (and other religious laws, as needed) should exist in a separate legal realm parallel to that of state law, available on a voluntary opt-in basis for every resident. This principle sees legal pluralism as the most important constitutional feature of pre-modern Muslim systems, and therefore makes it the structural foundation of the proposal. A pluralist constitutional structure also has the added benefit of helping to solve the oppositional Islam-versus-secularism politics that dominates today. Finally, the third principle states that a Shari'a check on state action should review the legitimacy of government

action based on the purposes (maqasid) of Shari'a. This principle is drawn from principles found in the siyasa shariyya literature, along with an appreciation of contemporary Muslim desires for Shari'a compliance by their governments. Together, these three pillars form the constitutional framework for a system of government that enables Muslims to have Shari'a as the "law of the land," but not a land that forces religious doctrine upon its population.

A. The First Pillar: State action must be based on the public good

The first principle comes from the classical Islamic legal-political literature, siyasa shariyya, that addressed the power of rulers. As discussed above, siyasa shariyya centered the legitimacy of siyasa power upon its service of the general public good (maslaha 'amma). Today, siyasa power comes in the form of presidents, parliaments and kings rather than sultans and caliphs, but the essential nature of the power is the same - siyasa authority is with whoever holds physical power, i.e. today's state.[29] Thus, the first pillar of the present framework for Islamic constitutionalism is that all state action must be based on the public good. Further, the public good could (and I believe *should*) be identified through democratic means.

Serving the public good may not seem at first like a very Islamic demand to make of a Muslim government. It is more commonly assumed that a state's Shari'a compliance should be measured by comparing its laws to the laws found in classical fiqh, namely, the better the correlation with classical fiqh rules, the more Islamic the government. In short, it is presumed that lawmaking by a Muslim government should be limited to implementing laws already made by God, probably via religious experts who best understand divine scripture. But this displays an extremely narrow understanding of Shari'a, limiting it to only the doctrinal rules of

[29] Today, siyasa power is often divided into legislative, executive and judicial power, with complex and different arrangements between them depending upon the country. But altogether, all government power today is the contemporary manifestation of classical siyasa power.

fiqh and ignoring the entire field of siyasa. It also perpetuates oppositional politics between secular and religious forces rather than seeing past them to imagine Shari'a as a holistic Islamic rule of law attuned to the concerns of both. When Shari'a is understood as a rule of law system that includes siyasa service of the public good, then it becomes clear that "Shari'a legislation" is not the way to make a government Islamic. Instead, serving the public good is what gives Shari'a legitimacy to state action.

If it is appreciated—as an *Islamic* matter—that the government should not be selectively enforcing its preferred religious doctrine but instead should be seeking to serve the public good, this could cause a seismic shift in political discourse in Muslim-majority countries. Rather than debating "should we have religious law or not?" the people would instead be asking "what serves our public good?" This opens up the public conversation to everyone regardless of their religious credentials: if the basis of lawmaking by an Islamic government is the public good, then citizens of all religions and no religion can participate in determining what that is with equal relevance and credibility. Public discourse could thus focus on practical evaluations of social need rather than oppositional arguments about the role of Islam and fiqh. As their government debates whether or not to sign an international human rights treaty, for example, the conversation would not be about whether or not the terms of this treaty match up with doctrine in the fiqh, but rather whether the treaty serves the public good. And Shari'a-minded Muslims should support state consideration of these treaties as serving the proper Shari'a role for their state, rather than presuming it is always a concession to secularism.

The public good could be determined in a variety of ways, but the overwhelming desire for democracy among the world's Muslims[30] indicates that democratic means would likely be the most effective.[31]

[30] See, e.g., Pew Forum on Religion and Public Life, The World's Muslims: Religion, Politics and Society (2013), available at www.pewforum.org/the-worlds-muslims-2013.

[31] The question of how to reach consensus in the public sphere, especially between religious and secular voices - is a subject of much attention these days. See, e.g. Mohammad H Fadel, "Public Reason as a Strategy for Principled Reconciliation: The Case of Islamic Law and International Human Rights Law," *Chicago Journal of International Law* 8 (2007): 1–20; Andrew F. March, *Islam and Liberal Citizenship:*

Democratic decision-making is, after all, one method by which a society decides what is in the public good. This is why Muslim affinity for both democracy and Shari'a is not an oxymoron.[32] That is, statistics showing that a large majority of Muslims around the world are pro-democracy and also support Shari'a[33] are confusing only if we insist on limiting the meaning of Shari'a to fiqh. However, once we recognize that Shari'a is larger than fiqh - that it also encompasses siyasa as the realm of state lawmaking based on the public good -- then the paradox disappears. In short, if human lawmaking in the interest of the public good is itself part of God's Law, then there is no inherent conflict between human lawmaking and God's Law.

Moreover, if laws made by democratic legislatures are recognized as modern versions of ruler-made siyasa, then a whole range of important lawmaking for the social good could gain credibility as the siyasa arm of an Islamic government. Laws on things that are usually described as purely "secular" - such as environmental protection, city zoning, traffic, health care, labor, antitrust, public education, criminal procedure, and

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The Search for an Overlapping Consensus (Oxford: Oxford University Press, 2009); Abdullahi Ahmed An-Na'im, *Toward an Islamic Reformation: Civil Liberties, Human Rights, and International Law* (Syracuse University Press, 1996). My proposal is does not take a position on this question because it is not its purpose. It is not crucial to my model to decide how a given society decides to identify what is in its public interest, maslaha) My point is only to show that maslaha should be the basis of state lawmaking (however a given society decides to figure that out). My proposal does not seek to present a particular theory of political science ordering, identifying how best to determine the public good for a given polity. Rather it seeks only to identify the building blocks of Islamic constitutionalism (identifying siyasa based on the public good as one of those blocks) that can then be worked out in detail later as each Muslim country builds their own house on this foundation.

[32]. Many have been unable to untangle the apparent knot between divine law and democracy for Muslims because they collapse *Shari'a* and *fiqh*. This dilemma is fueled by understanding divine sovereignty as the idea that only scripturally-derived laws (i.e. fiqh) are as legitimate, ignoring the idea and history of *Shari'a* as a holistic rule of law that includes humanly created *siyasa* laws to serve the public good. Human-made siyasa is, of course, the appropriate place for democracy within an overall Shari'a-mindful system.

[33]. See John Esposito and Dalia Mogahed, Who Speaks for Islam: What a Billion Muslims Really Think 35 (Gallup Press 2008) at 35 (documenting that large majorities of Muslims around the world support democracy and also support Shari'a).

individual rights - all would be considered part of an Islamic government's Shari'a-mindful responsibility. Thus, for Muslim populations wanting to see Shari'a as a guide to their government's actions, understanding siyasa as part of a Shari'a rule of law system enables them to proudly look at state administration of important social services as Islamic efforts to follow Shari'a. Public support for such programs could be bolstered by the same religious passion that currently supports "Shari'a legislation," because it would now be understood that government service of the public good is itself part of God's Law.

B. The Second Pillar: A diverse realm of fiqh/religious law exists as a voluntary alternative to state law

Today, the legal systems of virtually every Muslim-majority country are all siyasa: the legal systems in these countries today are made up of only that which is enacted and enforced by the state. This began with the colonial dismantling and cooptation of the institutions of fiqh law and education and was not reversed with independence. The legal monism left by colonialism is not only a dramatic shift from the pre-modern fiqh-siyasa legal pluralism in these same lands, but it also ignores the reality of fiqh as a powerful socio-legal force that has always operated within Muslim populations, whether or not it was recognized by a state.

Fiqh is non-state law. It has never relied on government power to exist or evolve, and thus it can - and does - influence Muslim behavior even in a secular centralized state.[34] Most Muslims who follow fiqh rules do so not because a government is forcing their compliance, but rather, because they personally believe it important to living a virtuous life. That life covers more than just ritual practice; Muslims regularly go to their local mufti, imam, fiqh scholar, or online equivalent, for direction on things

[34] This is often difficult for secular positivists to appreciate, but even colonialism and the modern dominance of secularism has not completely eliminated the importance of *fiqh* in legally ordering individual Muslim lives. See, for example, the continued role of private muftis for Muslims living in British India described by Mohammad Qasim Zaman in The Ulama in Contemporary Islam: Custodians of Change (2007). This is also evident in the regular invocation of fiqh in Muslim lives, separate from any government-enforced compliance with Shari'a, even in secular western countries.

like how to marry and divorce, how to write a will, how to buy a home, and into what business transactions to enter. Thus, despite its being non-state law, fiqh has demonstrated an enduring power to direct individual Muslim behavior even when the siyasa power does not acknowledge it.

The Islamic constitutional theory presented here recognizes the central role that fiqh plays in Muslim lives, and seeks to rehabilitate the fiqh realm as a vibrant parallel sphere of non-state law by reviving the separation of legal authority that was characteristic of Muslim governments before they became monistic nation states. The second pillar of the proposed structure is therefore as follows: individual access to fiqh (and other religious laws, as needed) must be protected by the existence of a parallel legal realm available to those who choose to follow it. This second pillar brings constitutional recognition to non-state fiqh and entrenches respect for this parallel realm as the foundational constitutional structure of the overall system. The second pillar thus distinguishes the present proposal not only from most Islamist discourse today, but also from all constitutional discourse that presumes a nation-state template.

In short, the Islamic constitutional structure presented here is one of legal pluralism, not legal monism.[35] More specifically, it is a legal pluralist constitutional system in which non-state religious law is one of the recognized realms of law. As scholars of tribal, customary and other forms of non-state law have pointed out, state law can be relied upon to organize a lot, but not everything. [36] Where a community has a recognized

[35] Legal pluralism is the existence of multiple legal systems or layers of law, usually with different sources of legitimacy, that coexist within a single state or social field. For more, see Griffiths, What is Legal Pluralism?, 24 Journal of Legal Pluralism 1 (1986); Sally Engle Merry, Legal Pluralism, 22 Law and Society Review 869-901 (1988) at 870. Note that the academic discourse on legal pluralism defines it not as a diversity of interpretations of the same source material (as in different justices' opinions on the meaning of constitutional text), but rather, where different laws originating from different sources exist simultaneously in the same space. Thus, fiqh diversity (i.e. the different madhhabs) is not legal pluralism under this definition, but a legal system composed of fiqh and siyasa realms is.

[36] In the famous words of Marc Galanter, " [j]ust as health is not found primarily in hospitals or knowledge in schools, so justice is not primarily to be found in official

body of non-state law and respected authorities to interpret, apply, and expand it, a constitutional system could give appropriate space for that non-state law to play its part in that society's rule of law.[37] Recognizing the importance of fiqh is especially important for an Islamic constitutional theory because of the substantial and sophisticated body of fiqh that exists and the enduring desire among so many Muslims to make it legally effective in their lives.

Moreover, any framework for Islamic constitutionalism that does not create a separate protected realm for fiqh to flourish sets itself up for a tug-of-war for power over its monist lawmaking institutions. "Shari'a legislation" is the most obvious example. In a legal monist system, the only way for an individual Muslim to have his or her legal disputes resolved according to his or her chosen fiqh school is for that fiqh school to also be the law of the land for everyone. If, however, a parallel fiqh realm were available to facilitate every Muslim's preferred fiqh school in their lives, then they would have much less motivation to pressure the state to enact their fiqh preferences over everyone.

An officially-recognized fiqh realm could likewise redirect the attention of Islamist advocacy away from the state as the only way to recognize Shari'a. Current political Islamism simply lacks the peripheral vision to think of ways to accommodate non-state fiqh, so it ends up pushing for its recognition in the wrong place - enacted into law as "Shari'a legislation" by the state. Put in Islamic constitutional terms, "Shari'a legislation" merges two types of law that should be kept separate in order to perform their distinct functions in a Shari'a rule of law system. The proposal of Islamic constitutionalism is freed of this mistake because it does not start from a legally monistic state. By constitutionally protecting a separate realm of fiqh that is facilitated - but not controlled - by the

justice-dispensing institutions." Marc Galanter, Justice in Many Rooms: Courts, Private Ordering, and Indigenous Law, 19 Journal of Legal Pluralism 1 (1981).

[37] As Sherman Jackson has said, "[t]oday's global constitutional discourse . . . tends to operate on the presumption that all law comes from the state, but this premise may not be fully effective with populations that recognize a role for law that exists separate from the state (as is true today of the role of fiqh for many Muslims)." Jackson, supra note 7.

siyasa power, the framework proposed here offers a way to return fiqh back to its proper place -- not mined as raw material in support of political agendas, but living in its own separate sphere, making a variety of fiqh options available at the individual request of each Muslim.

How would this fiqh realm be constitutionally recognized? It is crucial to think outside the paradigm of legal monism when answering this question. Recognition of the fiqh realm should *not* be accomplished by legislating multiple fiqh codes or subdividing state institutions into fiqh and siyasa offices. That would just be another version of legal monism - putting fiqh under the control of the siyasa state.[38] Instead, there must be a protected space for fiqh to operate in a non-hierarchical relationship with state authority. Thus, the non-state nature of fiqh must be respected by giving fiqh scholars full independence from the state, including in creating their own institutions and lawmaking norms. This independence is crucial for the credibility and relevance of the fiqh realm because it recognizes that the real source of fiqh authority (and, importantly, fiqh reform) is the fuqaha themselves. Recall that it is the process of ijtihad that gives a fiqh rule validity for Muslims, not enactment by a state. It is thus up to the fuqaha to create whatever educational, professional, and administrative institutions will support the authoritative production and application of fiqh law in their society. This should include making available fiqh experts from the various schools, including new and emerging ones, to be utilized by Muslims on an advisory basis through legal responsa (fatwas), as well as a appointment of a variety of qadis for formal judicial resolution of fiqh-based legal disputes.

Only in the last category - judicial dispute resolution - need there be direct interaction between the siyasa and fiqh realms. Where a fiqh-based dispute requires resolution backed by the police power of the state, a state-appointed qadi should be made available to resolve the dispute. Appointing qadis and enforcing their judgments has long been seen as part of the siyasa responsibility to serve the public good because it honors

[38] Some would call this "weak" legal pluralism, but I agree with John Griffiths and others in seeing this as just a more complex version of legal monism. See Griffiths, supra note 41.

the public need for effective remedies of fiqh legal rights. It is important to remember that these qadis' decisions would be backed by the enforcement power of the state but the content of the law they apply would be non-state fiqh - laws which the state has no part in creating. This principle, also drawn from Muslim historical practice, is crucial to maintaining the independence of fiqh from siyasa. Historically, not only was fiqh law distinct from siyasa law in both origin and application, but rulers and religious legal scholars mutually respected each other's autonomy over their respective legal realms[39]

An important attribute of the fiqh realm should be legal diversity. This would honor both the epistemology of Islamic jurisprudence as well ensuring meaningful choice for those choosing to use fiqh instead of the state law. As described earlier, all fiqh understandings of Shari'a are equally valid, making the world of fiqh law inherently and unavoidably one of legal diversity. According to Islamic legal theory, individual Muslims are free to choose whichever fiqh school best suits them. To borrow modern constitutional terms, the freedom to choose a madhhab is a matter of Islamic religious freedom. Moreover, a sufficiently diverse fiqh realm -- including established fiqh educational institutions as well as new fiqh scholarship -- will help ensure that those opting to use this fiqh realm are doing so by full consent.

The importance of choice also means that there should be freedom to *not* utilize the fiqh realm at all. This means that a full and robust body of state laws (created through democratic determinations of the public good) should exist parallel to the fiqh realm, covering all the doctrinal areas covered by fiqh. In this, the constitutional structure proposed here diverges from classical Muslim legal pluralism. In pre-modern Muslim systems, siyasa laws were typically limited to logistical and administrative needs of society and generally did not overlap with the topics covered by fiqh. Pre-modern Muslims could thus have their legal issues decided according to their chosen fiqh school but they could not

[39] For further elaboration of this relationship, see Quraishi, supra note 19 (using the phrase "separation of powers" to describe the historical relationship between fiqh and siyasa).

choose to follow no fiqh school at all.[40] In contrast with this historical norm, the proposal made here takes into account the changed circumstances of a much stronger central state as well as the reality that many people do not necessarily identify with a fiqh school (or indeed a particular religion at all). So the constitutional framework proposed here imagines a much more robust siyasa realm covering a wider range of legal issues, thus offering a tangible alternative to the fiqh realm for those who do not have a strong fiqh affiliation.[41] There should, in other words, always be sufficient state law to serve anyone, Muslim or not, who does not want to follow any fiqh at all. This would help ensure that those opting in to the fiqh realm are really choosing to do so, rather than being forced into fiqh by default.

A healthy diversity in the fiqh realm could also breathe new life into fiqh itself. In most Muslim countries today, the uniformity demanded by a centralized legal system combined with the phenomenon of "Shari'a legislation" has muted the colorful diversity that was once the hallmark of Islamic jurisprudence. Modern codification of fiqh by Muslim states has resulted in freezing what was once a dynamic and evolving body of law. Many Muslims are unaware of fiqh diversity altogether.[42] A

[40] This arrangement is well known as the Ottoman "millet" system, which has been borrowed by in edited variations by some colonial powers and contemporary states such as Israel and India. The framework proposed here differs significantly from millet systems because it has a fully-formed body of state law parallel to fiqh law in all major topic areas. Thus, one is not automatically designated a millet based on one's religion. Rather, individuals choose when they want to use fiqh and when they want to use state law, both being available to them for every legal issue.

[41] For example, if both the fiqh and siyasa realms have rules regulating divorce, individuals will have a fully-realized opportunity to choose which legal realm best suits them if a marriage ends.

[42] When a state selects one fiqh rule (and even worse, calls it "Shari'a"), it usually selects the majority opinion, leaving out all dissenting alternative views that have equal ijtihad weight. When this is done for many years, the public becomes unaware of the unchosen alternative views, and is even less aware that new ijtihad could create new fiqh rules on these same questions. As Tamer Moustafa has documented, the average Malaysian's knowledge of Shari'a, for example, has been transformed through codification from one of "flexible, plural, and open nature inherent in Islamic jurisprudence, to "singular and fixed understandings of God's will." Moustafa, supra note 28, at 170.

constitutionally-protected fiqh realm separate from state control could provide the space necessary for dynamic and sophisticated fiqh to grow again. New legal and social questions could prompt new fiqh rules as fuqaha directly engage with a wide swath of the Muslim public. This could actively invite old and new fiqh scholars to undertake new levels of legal analysis, regularly engage in healthy debate and thus dramatically expand the available corpus of fiqh laws. The result would be not only new fiqh rules, but a wider marketplace for the application of those rules, which in turn would influence their further evolution. Established traditional fiqh interpretations of Shari'a would still exist, but they would exist alongside new ones, all equally available to those making choices in the marketplace of the fiqh realm.[43]

This is the logical place for "Islamic law reform" to thrive. New and non-majority interpretations of Shari'a would have much more potential in an autonomous and diverse fiqh realm than in the form of "Shari'a legislation" where they have to fight and compromise for political majorities in order to survive. A constitutional system that allows freedom of fiqh choice in a parallel fiqh realm is thus especially empowering for those who follow a minority fiqh rule that is unlikely to gain a popular majority. Moreover, deep and lasting fiqh reform (liberal or otherwise) can never result from state-sponsored efforts at amending or changing established fiqh through state legislation. Because fiqh is non-state law (and all legislation is siyasa state law), legislating fiqh rules as "Shari'a legislation" does not alter the content of fiqh literature. Thus, it is important to remember that for those really interested in changing the fiqh-based behavior of Muslims, focusing on state law will never achieve that goal, no matter how much feminists hope for it or religious

[43] The constitutional framework proposed here imagines a fluidity of movement inside the fiqh realm: Muslims choosing to access it could choose among the many different fiqh interpretations available, and would not be forced to stick with one school. This differentiates the present framework not only from the millet system, but also from contemporary theories of multicultural accommodation that tend to assume only one doctrinal option for a given religious community. See, for example, Ayelet Schachar, Multicultural Jurisdictions: Cultural Differences and Women's Rights (Cambridge University Press 2001).

conservatives fear it. Real fiqh change can happen only in the world of fiqh scholarship, through authentic and credible ijtihad work by fuqaha.
That is why creating a fiqh realm where both conservative and progressive fiqh interpretations can thrive could change the game completely. A diverse fiqh environment can change Muslim behavior not by enacting a particular interpretation of Shari'a, but by giving each Muslim a colorful landscape of equally valid fiqh alternatives from which to choose to live a Shari'a-mindful life. This honors the agency of each Muslim, rather than paternalistically selecting fiqh rules for them, and also respects the Islamic jurisprudential principle that not every Muslim has to understand scripture in the same way.
Combined with the first pillar, this second pillar provides a workable and non-theocratic way for fiqh to exist -- even thrive -- in Muslim lives. Thus, if someone strongly believes in a fiqh rule, but cannot convince the rest of the public that it serves the general good for everyone, then it would fail the test of the first pillar and would not become the law of the land. But that does not mean that the person must relinquish her desire to live by this fiqh rule himself or herself; rather, he or she would just turn to the fiqh realm instead. This fiqh realm thus exists as a tangible alterative for those wishing follow a given fiqh doctrine rather than the legislated state rules on that topic. It would be available by the full consent of the parties using it, and should be made up of multiple fiqh school doctrines from which to choose.

C. The Third Pillar: The Islamic legitimacy of state law is evaluated by the purposes (maqasid) of Shari'a

With *fiqh* protected in a separate non-state legal realm and all government action based on the democratically-determined public good, it might reasonably be wondered if there is anything particularly Islamic about the constitutional theory presented here. Worse, if state lawmaking must be based only on the public good, what would stop it from enacting legislation that violates Shari'a - thus defeating the very *raison d'etre* of an Islamic government? This is a very real concern for Muslims around the world, memorialized in several constitutional clauses prohibiting state

lawmaking that is contrary to Shari'a.[44] Any theory of Islamic constitutionalism that does not address this concern risks being rejected by its primary demographic: Muslims committed to Islamic government. This is why the third pillar of the present model provides for a Shari'a-based check on government action, but in an innovative way.

The idea of a Shari'a check on state action simultaneously raises resistance from another important demographic – secularists and indeed all those who do not want democratic decision-making to be trumped by religious law. They legitimately worry that checking government action with Shari'a will bring theocracy in through the back door. This concern must be addressed by any theory of Islamic constitutionalism that is to have any traction in a globalized world with internationally-recognized human rights norms. This proposal answers this concern - again, in an innovative way.

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[44] The precise language of these clauses differs from country to country, and do not always use "Shari'a" explicitly, but they are often interpreted with some reference to Shari'a. Some examples of these clauses are:

- "All existing laws shall be brought in conformity with the Injunctions of Islam as laid down in the Holy Quran and the Sunnah . . . and no law shall be enacted which is repugnant to such Injunctions." PAKISTAN CONST. art. 227(1).
- "No law shall contravene the beliefs and ordinances ("mu'taqadat wa ahkam") of the holy religion of Islam in Afghanistan." THE CONSTITUTION OF THE ISLAMIC REPUBLIC OF AFGHANISTAN, 26 Jan. 2004, art. 3.
- "No law may be enacted that contradicts Islam's settled [legal] rules [or settled Islamic (legal) rules] (thawabit ahkam al-Islam")." Article 2(A), THE CONSTITUTION OF THE REPUBLIC OF IRAQ OF 2005.
- "The Islamic Consultative Assembly cannot enact laws contrary to the usul [roots of Islamic jurisprudence] and ahkam [rules] of the official religion of the country or to the Constitution." ISLAHAT VA TAQYYRATI VA TATMIMAH QANUNI ASSASSI [AMENDMENT TO THE CONSTITUTION] art. 72 [1989] (Iran).

Some constitutions do not have clauses specifically invalidating laws made contrary to Islam (as defined), but do have "Shari'a as a source of legislation" provisions that have been interpreted to prohibit lawmaking contrary to Shari'a. An example is the interpretation of Article 2 of the Egyptian Constitution ("The principles of the Shari'a are the main source of legislation") by Egypt's Supreme Constitutional Court. *See* CLARK LOMBARDI, STATE LAW AS ISLAMIC LAW IN MODERN EGYPT: THE INCORPORATION OF THE SHARI'A INTO EGYPTIAN CONSTITUTIONAL LAW (2006). For more on Islamic supremacy in Constitutions, see Ahmed & Ginsburg, supra note 2.

Given the reality of fiqh diversity, the idea of a Shari'a check on state power immediately creates a puzzle: *which* Shari'a? We could solve this this puzzle by defining Shari'a as "fiqh consensus" or "fiqh majority," but these definitions are both problematic.[45] First, because the madhhabs themselves disagree on what consensus means, it is exceedingly difficult to conclusively identify fiqh consensus.[46] Alternatively, a Shari'a check based on the fiqh majority is also problematic because it would severely limit modern state action in a number of important substantive areas. For example, if the population decided democratically that it is in the public good to allow women to be witnesses in courtroom proceedings, with equal weight as male testimony, this gender-equal policy would be struck down for conflict with the majority fiqh position rejecting it, even though

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Another possible Shari'a check is the classically-established position that a ruler's action should be followed unless it prohibits that which is mandatory ("wajib") or requires action that is prohibited ("haram").[45] See Mohammad Fadel, supra note 21 at 58 (noting the classical position that "the public policy power could not be used to oblige conduct that was sinful, nor could it prohibit conduct that was morally obligatory"). This principle has historical roots in Muslim history and the ultimate acquiescence by scholars to the fact that their political rulers would not be ideal Shari'a-minded leaders. Taking this as the Shari'a standard of review would be incredibly deferential to state power: because the mandatory and prohibited are only a tiny part of fiqh doctrine, it would leave a very large playing field for state action. This may have been quite appropriate for past Muslim societies ruled by hereditary sultanates where the average Muslim had very little hope of influencing the actions of government But it says very little about what a democratic Muslim government should be aspiring to if it is genuinely Shari'a-minded. That is, this standard of Shari'a review may be a good bare minimum for what a Muslim should tolerate from an absolute ruler, but it does not respond to what Muslims *want* out of their government - justice and respect for Shari'a. Because it does not take these Muslim desires seriously," I find it unhelpful to a contemporary theory of Islamic constitutionalism.

[46] See Wael Hallaq, On the Authoritativeness of Sunni Consensus, 18 International Journal of Middle East Studies 427 (1986); Zaki al-Din Sha'ban, Usul al-Fiqh al-Islamic ("The Principles of Islamic Jurisprudence") (2d ed. 1971) at 104 (concluding that it is rare to find any ijma' that meets the standard). It is worth noting that Iraq's Interim Constitution had a "Shari'a check" constitutional clause that included the ijma' term explicitly ("thawabit al-Islam *al-mujma*` 'alayha"), but this term was dropped in favor of "settled Islamic (legal) rules" in the new constitution. The significance of this change is still unclear. For some commentary, see Kristen Stilt, *Islamic Law and the Making and Remaking of the Iraqi Legal System*, 36 GEO. WASH. L. REV. 695, 709-26 (2004), Intisar Rabb, *"We the Jurists": Islamic Constitutionalism in Iraq*, 10 U. Pa. J. Const. L. 527, 539 (2008).

there are some classical (and many more contemporary) fiqh scholars who would allow women to serve as courtroom witnesses. This would put modern Muslim government in extremely frustrating positions, especially where there is prevailing popular sentiment and respected scholarly support for non-majority fiqh rules.[47] In short, a Shari'a check calibrated to the "dead hand" of past fiqh majorities would pit societal needs against fidelity to past interpretive trends, and would stifle the ability of modern Muslim governments to effectively respond in Islamically-supported ways to modern realities and changed social norms.[48]

I take a very different approach. I believe it is a mistake to base Shari'a review on fiqh doctrine in the first place. That is because if Shari'a as a rule of law encompasses both fiqh and siyasa realms of law, each serving different but complementary roles in society, then the Shari'a check of one should not be based on the doctrine of the other. That is, if siyasa is supposed to serve the public good whereas fiqh is supposed to provide Muslim rules of right action, then the question of what is Islamically appropriate for siyasa requires a different analysis than the ijtihad behind the rules of right action for individual Muslim lives. Rather than focusing on the fiqh rules themselves, Shari'a review of state action should therefore look the broader goals that both fiqh and siyasa ultimately seek

[47] Similar to Frank Vogel's critique of a consensus-based Shari'a check, a majority fiqh check would likely "fall into the trap of adopting medieval legal views as permanent constitutional principles, even when disagreement as to them has emerged in modern times." Frank Vogel, *Objectives of the Shari'a* (on file with author).

[48] The public reaction to Tariq Ramadan's call for a moratorium on the death penalty in Muslim countries could be described as an example of this "dead hand." His call almost certainly serves the public good, but yet, because it contradicts past *fiqh* consensus about the use of the death penalty, it has met with great resistance in many Muslim circles. See Tariq Ramadan, "An International Call for Moratorium on Corporal Punishment, Stoning and the Death Penalty in the Islamic World" April 5, 2005, *available at* http://www.tariqramadan.com/spip.php?article264. Ramadan was severely criticized by Muslim leaders and academics from around the world who asserted that he was attempting to ban a God-decreed punishment. *See* Dina Abdel-Majeed, *Tariq Ramadan's Call for a Moratorium: Storm in a Teacup,* (Apr. 18, 2005), *available at* http://www.onislam.net/english/Shari'ah/contemporary-issues/critiques-and-thought/439960-tariq-ramadans-call-for-a-moratorium.html?Thought=.

to serve. These goals are commonly known as the maqasid (purposes) of Shari'a.

I propose that state action should be checked by these purposes of Shari'a, and not the particularized rules of fiqh. The third pillar of the present proposal, therefore, provides that state action may not contradict the underlying purposes ("maqasid") of Shari'a. The field of maqasid al-Shari'a is a classically-grounded and robust field of Islamic jurisprudence accepted by all madhahib. More specifically, classical fiqh scholars interpolated that all the rules of fiqh ultimately serve several identifiable underlying purposes - the essential ones being religion, life, intellect, family, property and dignity. The greatest purpose of Shari'a, they concluded, is maslaha—the public good.[49]

Remembering that the legitimacy of siyasa power is based on maslaha in the first place, a maqasid-based Shari'a check is a natural choice for reviewing the legitimacy of siyasa power. A purpose-based Shari'a review of state law would include a strong appreciation of the public good as the primary job of the state. This means that Shari'a-compliance for state action based on the maqasid of Shari'a may very well uphold state actions that conflict with some fiqh rules, as long as they do not subvert the overall purposes of Shari'a. In other words, the central question for the Shari'a legitimacy of state action under such a standard of review is not whether it contradicts some *fiqh* rule (or majority of *fiqh* rules), but rather, whether it contradicts the ultimate purposes that Shari'a serves in the first place. For example, if there is a serious problem with pollution, there may be a strong public good reason to enact environmental regulatory legislation that may contradict fiqh property doctrine. Or there

[49] See Vogel, *Objectives, supra* note 57 (describing it as the "objectives doctrine"). Very prominent scholars took part in the development of maqasid theory – including al-Juwayni, al-Ghazzali, al-`Izz Bin Abd al-Salam, and Ibn Taymiyya. The doctrine acquired its complete, coherent statement in the fourteenth century with al-Shatibi, a Maliki scholar of Granada, who made the theory his life's work. Following Shatibi, the theory got little attention until al-Shatibi's work was published in Tunis in 1883, and thereafter attracted the attention of a series of important modernist Islamic scholars, such as Rashid Rida in Egypt. The popularity of the theory has continued to grow since, now peaking among both scholars and lay commentators on Shari'a today, even among quite conservative circles.

may be a serious social problem of women left destitute after unexpected and unwanted divorces, leading to state regulations of divorce procedures despite the fiqh consensus that husbands have an unconstrained unilateral right to divorce. Instead of judging these siyasa actions on the narrow question of what is allowed in the (majority or consensus of) fiqh doctrine, a maqasid-based Shari'a check would consider whether these proposed siyasa laws fly in the face of Shari'a's greater goals. (I believe it is likely that environmental legislation and state regulation of divorce would be determined to be consistent with the five maqasid). In other words, rather than trying to awkwardly fit one type of Islamic law (siyasa) into the other type of Islamic law (fiqh), the purpose-based approach honors the bifurcation of fiqh and siyasa, separating Shari'a review of state law from fiqh formalism, but still keeping it within the boundaries of Shari'a ideals, writ large.

A *maqasid*-based standard of review would create space for Muslim governments to do what they need to do when real life justice demands it — even in contradiction with established *fiqh* — while still keeping an eye on the spirit of Shari'a. It should thus garner support from those who want a functioning political realm empowered to operate on topics of public need. It would also provide a recognizable Islamic limit on the scope of government action and thus reflect the Shari'a-consciousness desired by Muslim majorities today. Moreover, the field of maqasid jurisprudence is extremely active today, with innovative and up-to-the moment scholarship, making it an especially powerful prong for a modern theory of Islamic constitutionalism.

A maqasid-based Shari'a check should also be satisfactory to secularists. True, it gives a role to religion as a check on democratic lawmaking, but not in a straight-jacketing or theocratic, way. A purpose-based standard of review would dispel secular concerns that democratic lawmaking must always comport with outdated *fiqh* doctrine. For example, the conflict between global human rights prohibitions on slavery and established fiqh doctrine allowing slavery should not be cause for secular alarm in a system with maqasid-based Shari'a review. In such a system, a state law prohibiting slavery (based on the public good) would

be checked against the greater objectives of Shari'a, not the particular fiqh rules that allow slavery.

Finally, it should be recognized that the Shari'a check is a structural constitutional element. It is designed to control the limits of power, not dictate substantive law. Approving of something as consistent with the purposes of Shari'a says nothing about whether or not it should be made law in the first place. In the present model for Islamic constitutionalism, that question depends on what the public decides is in the public good (the first pillar). The Shari'a check (the third pillar) only dictates the elbow room within which those decisions can be made. So, if one is worried about the abuse of legislative or executive power in such a system, the first control is not the Shari'a check, but the nature of public deliberation over what serves the public good. In other words, the best way to prevent oppressive lawmaking is to convince the public that it does not serve the public good to have such laws in the first place. If this is successful, then there will be no need to use a Shari'a check (or, indeed, *any* constitutional check) to strike them down.

IV. Conclusion

This paper proposes an Islamic constitutional structure inspired by historic Islamic legal pluralism. It argues that any Shari'a-based constitutionalism must necessarily have separate legal realms for fiqh and siyasa, necessitated by the epistemology (and hence diversity) of fiqh. This type of constitutionalism is unique in a world where the legal monism of the nation-state is the norm. It also challenges the idea of Shari'a (often used interchangeably with "fiqh") dominant in contemporary Muslim discourse - especially political Islamist discourses. This paper shows that understanding Shari'a as an Islamic rule of law — not just fiqh rules — not only opens up a whole new world of Islamic constitutional theory, but also introduces the uniquely Islamic idea of

constitutionalized legal pluralism to global scholarship on constitutionalism.[50]

The paper broadens the spectrum of thinking about Shari'a to show its powerful constitutional potential. It suggests a new Islamic constitutional model for Muslim-majority countries, showing that a revival of historical Islamic legal pluralism would serve them better than their nation-state European import. Moreover, it shows how a constitutional structure based on Islamic legal pluralism provides a powerful way out of the theocratic problems presented when religion meets the legal monism of the nation-state. To skeptical secularists who believe that any recognition of religion will always invoke the threat of theocracy and oppression of religious freedoms, the paper responds to that. While this is probably true of a legally monistic state, it does not necessarily follow for a pluralist one that maintains a separation of fiqh and siyasa. Simply put, Muslim history shows that theocracy is not the inevitable result of every religious government, and secularism is not the only way to solve religious differences. The present framework harnesses the spirit of that Muslim past, reframed for contemporary constitutional norms.

This is a system of government in which religion is important, but not in a way that combines "church" and state. It allows secularists and Islamists to find middle ground without compromising their core values and purposes. For religious Muslims, it bases the legitimacy of state action directly on Shari'a principles. For secularists, it requires state lawmaking to be justified on something other than religious pedigree. It does this by articulating a model of government in which religious laws (fiqh) are only one of a two-part Shari'a-as-rule-of-law system, the other being state lawmaking based on the public good (maslaha 'amma). This provides a way for Islamic governments to formally recognize fiqh rules without imposing them on those who do not want them. This holistic system includes -- indeed, expects -- an integral role for democratic lawmaking

[50] For more on this contribution to the field of legal pluralism, see Quraishi-Landes, Healing a Wounded Islamic Constitutionalism, supra note 1.

for the public good, situating it as *part* of a Shari'a-based system, not in opposition to it. For Muslims who are used to thinking about Shari'a as it appears in public discourse today, this will be a paradigm shift, but one that is for the better, and also solidly grounded in classical Islamic principles. To Shari'a-minded Muslims who want an Islamic government: this is not your father's Islamic state. But it could be yours.

Biography of Author

Asifa Quraishi-Landes is a Professor of Law at the University of Wisconsin-Madison. She specializes in comparative Islamic and U.S. constitutional law, with a current focus on modern Islamic constitutional theory. She is a 2009 Carnegie Scholar and 2012 Guggenheim Fellow. Recent publications include *Healing a Wounded Islamic Constitutionalism: Sharia, Legal Pluralism, and Unlearning the Nation-State Paradigm,* and *Legislating Morality and Other Illusions about Islamic Government.* Currently, she is working on a book manuscript, *Islamic Reconstitutionalism,* in which she proposes a new model of Islamic constitutionalism for today's Muslim-majority countries. Professor Quraishi-Landes holds a doctorate from Harvard Law School and other degrees from Columbia Law School, the University of California-Davis, and the University of California-Berkeley, and has served as law clerk in the U.S. 9th circuit Court of Appeals. She has served as a Public Delegate on the U.S Delegation to the U.N. Commission on the Status of Women, the Task Force on Religion and the Making of U.S. Foreign Policy for the Chicago Council on Global Affairs, and as advisor to the Pew Task Force on Religion & Public Life. She is currently President of the National Association of Muslim Lawyers (NAML) and serves on the governing board of the Association of American Law Schools' Section on Islamic Law. She is an affiliate of the Muslim Women's League, past President and Board Member of Karamah: Muslim Women Lawyers for Human Rights, a Fellow with the Institute for Social Policy and Understanding and a member of the "Opinion Leaders Network" for the British Council's "Our Shared Future" project.

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