

ISLAMIC CONSTITUTIONALISM:  
NOT SECULAR. NOT THEOCRATIC. NOT IMPOSSIBLE.

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I. INTRODUCTION

This Lecture Series asks us to engage in a thought experiment: what would a constitution look like if it integrated—rather than separated—church and state? As the Muslim respondent to this question, I have to start by reminding us that Islam does not have a “church” in the first place. This fact has some very important and relevant constitutional implications that will become clear later. But setting that aside for the moment, the thought experiment is still appropriate for a Muslim context if we broaden it to imagine the constitutional integration of state and “religion” (rather than “church”). As it happens, I have been working on the subject of Islamic constitutionalism for some time, so I will answer the question by summarizing a proposal for modern Islamic constitutionalism that is part of my current larger academic project. This proposal presents a structure for Islamic constitutionalism that is inspired by pre-modern Islamic jurisprudence and Muslim history, yet designed for contemporary realities. It also has the potential to solve the apparently endless “Islamist-versus-secular” political and social tensions that plague most Muslim-majority countries today.

In modern western constitutional discourse, theorizing about religious government typically encounters this immediate obstacle: fear of theocracy. Entrenched in western constitutional theory is the belief that any combination of religion and state is unacceptable because it too easily allows for theocracy; it is simply too dangerous to individual freedoms to enable a government to use its police power to impose religion and religious law upon its citizens. This concern is usually impossible to remove—and for good reason. European history tells a long and gruesome tale of religious wars and government oppression justified by states claiming to be enforcing divine law. Therefore, our modern age of constitutional protection of individual freedoms is strongly linked with the principle of separation of religion and state. Without this separation, we open the door to theocratic oppression of all those who disagree with the government’s chosen religious beliefs.

But this is a European telling of the story of religion and state. More precisely, it is a specifically Christian story of the

history of church and state. It ignores the rest of the world's experiences and the possibility that not every religion has had the same relationship with government power. Islam is one very significant counter-example to this Eurocentric narrative. In order to provide an Islamic answer to the thought experiment, therefore, I must begin with a brief summary of the nature of Islamic law and Muslim political history, pointing out its significant differences with the Christian church-state paradigm. With that foundation, I will then elaborate on what a contemporary Islamic constitutional framework might look like, based on what I find to be the essential characteristics of Islamic constitutionalism.

## II. ISLAMIC LEGAL DIVERSITY

The core principle of Islamic jurisprudence is that sharia, God's Law, cannot be known with certainty. Literally meaning "street," or "way," the term "sharia" in the Quran denotes the perfect Way of God—the way God advises people to live a virtuous life. This Way of God is described in the Quran and the Prophet Muhammad's life example. But of course not everything is clearly answered in those two sources, so Muslim scholars perform "ijtihad" (rigorous legal reasoning) to extrapolate from those sources more detailed guidance for life according to sharia. This guidance comes in the form of detailed legal rules called "fiqh" (literally "understanding"). Muslims never established any clerical establishment or central institution to establish Islam's official religious doctrine, so the religious rules of Islam are the result of the work of a diverse community of fiqh scholars operating according to their own collective standards of integrity and professionalism.

The epistemology of fiqh is important to understanding Islamic law, and especially how it differs from religious law as it appeared in Europe. Fiqh lawmaking happens with an awareness of its own fallibility. From the start, fiqh scholars acknowledged that their work of ijtihad is a fundamentally human endeavor that always carries the possibility of error.<sup>1</sup> Their use of the term "fiqh" is telling. "Fiqh" in Arabic means "understanding." This word linguistically signals that every fiqh rule is at best a given scholar's *understanding* of God's Law, nothing more. In short,

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<sup>1</sup> For further detail, see Bernard Weiss, *Interpretation in Islamic Law: The Theory of Ijtihad*, 26 AMER. J. COMP. L. 199 (1978).

although their job is to articulate God's Law, fiqh scholars are careful never to speak for God.

Looking at the discipline broadly, fiqh lawmaking is based upon an acceptance of the impossibility of knowing God's Law with certainty, but not the futility of trying.<sup>2</sup> This simultaneously humbling and empowering attitude among the fiqh scholars resulted in a natural and unavoidable diversity of fiqh doctrines. Because there is no way to know for sure which fiqh conclusions are correct (and no Muslim "church" to designate favorites), all fiqh rules are deemed to be equally valid understandings of sharia, even though they often contradict each other. As more and more fiqh scholars wrote more and more fiqh rules, several identifiable schools of law emerged, each with a different methodology of interpretation. (Once numbering in the hundreds, there remain about five dominant in the world today.)<sup>3</sup> In short, for a Muslim, there is one Law of God, but there are many versions of fiqh articulating that Law here on Earth. Thus, the tangible reality of sharia in the world is not a monolithic single code of law, but rather the different doctrines of many fiqh schools, each equally valid representations of the Law of God.

In pre-modern Muslim systems, the application of fiqh in individual lives occurred 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, seeking out scholars of that school for guidance when they were in need of specific legal answers, such as whether or not a contract was valid, or how to designate inheritance beneficiaries. The fiqh scholars' answers to these individual questions came in the form of legal responsa (fatwa) which were voluntarily self-enforced by the

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<sup>2</sup> See KHALED ABOU EL FADL, SPEAKING IN GOD'S NAME: ISLAMIC LAW, AUTHORITY AND WOMEN 39 (2001) ("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 (2013).

<sup>3</sup> 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 L. REV. 67 (2006).

questioner him or herself. If a fiqh-based dispute arose in which third party conflict resolution was necessary, (for example, a property dispute between neighbors), the parties would typically seek out a ruler-appointed qadi (judge) to resolve the dispute,<sup>4</sup> and the qadi's ruling would be enforced by the executive power of the Muslim ruler. This was possible because Muslim rulers generally accommodated the fiqh diversity of their populations by appointing a variety of judges from different fiqh schools reflecting the demographics of each geographic area.<sup>5</sup> 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 Muslim systems could receive official recognition of their preferred religious law without imposing it on everyone else.

Importantly, the fiqh applied in the qadi courtrooms was created by the fiqh scholars; it was not written by rulers. Moreover, rulers rarely attempted to consolidate the rules of divergent fiqh schools to create one fiqh code applied by all the qadis in the land. This reflected a basic appreciation by Muslim rulers that, even though they were responsible for enforcing fiqh rules when necessary, their executive power did not include the power to articulate God's Law. This is because it was established early in Muslim history that substantive control over the meaning of scripture would rest exclusively with the fiqh scholars, and outside of ruler authority.<sup>6</sup> But that does not mean that rulers did

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<sup>4</sup> 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.

<sup>5</sup> Significantly, Muslim governments did not view this fiqh diversity as a threat to their sovereignty. See Sherman A. Jackson, *Shari'ah, Democracy, and the Modern Nation-State: Some Reflections on Islam, Popular Rule, and Pluralism*, 27 *FORDHAM INT'L L.J.* 88, 106 (2003) ("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.").

<sup>6</sup> Scholarly 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. Scholar 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* 285-319, 479-89 (University of Chicago Press 1974); see Khaled Abou El Fadl, *Islam and the Challenge of Democratic Commitment*, 27 *FORDHAM INT'L L.J.* 4, 26 (2003)

no lawmaking at all. They most certainly did. But the laws they made were of a very different type than *fiqh*.<sup>7</sup>

### III. LAWMAKING BY MUSLIM RULERS

Muslim rulers' deference to the *fiqh* scholars' authority over the substantive 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 *fiqh* scholars.<sup>8</sup> 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. 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.<sup>9</sup> 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

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(“after the age of *mihna* . . . the *‘ulama* (religious scholars or jurists) were able to establish 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 jurists retained a near exclusive monopoly over the right to interpret the divine law.”).

<sup>7</sup> See Abou El Fadl, *supra* note 6, at 30–31 (“Only the jurists [were] qualif[ied] to investigate and interpret the Divine will . . . . However, pursuant to the powers derived 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*].”).

<sup>8</sup> See Asifa Quraishi, *The Separation of Powers in the Tradition of Muslim Governments*, in CONSTITUTIONALISM IN ISLAMIC COUNTRIES: BETWEEN UPHEAVAL AND CONTINUITY 67 (Tilman J. Roder & Rainer Grote eds., 2012); Gianluca Parolin, *Religion and the Sources of Law: Shari’ah in Constitutions*, in LAW, RELIGION, CONSTITUTION; FREEDOM OF RELIGION, EQUAL TREATMENT, AND THE LAW 95–97 (Durham et al. eds., 2013) (describing the difference between *fiqh* and *siyasa*); FRANK VOGEL, ISLAMIC LAW AND LEGAL SYSTEM: STUDIES OF SAUDI ARABIA 31 (2000) (describing *fiqh* and *siyasa* as “microcosmic” and “macrocosmic” law).

<sup>9</sup> See VOGEL, *supra* note 8, at 52, 171–73. For an insightful study of some interaction between *fiqh* and *siyasa* in Muslim legal history, see KRISTEN STILT, ISLAMIC LAW IN ACTION: AUTHORITY, DISCRETION, AND EVERYDAY EXPERIENCES IN MAMLUK EGYPT (2012), describing the mixed *fiqh-siyasa* role of the *muhtasib*.

political order.<sup>10</sup> The 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.”<sup>11</sup>

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 sharia is to promote the welfare of the people (*maslaha*).<sup>12</sup> 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 police power—that is, the *siyasa* power held by the 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 sharia-based system that rulers exercise *siyasa* lawmaking power for the purpose of serving the public good (*maslaha ‘amma*).<sup>13</sup> Though the *siyasa shariyya* scholars differed widely in their ideas about the proper sharia scope of *siyasa* power, the practical impact of *siyasa*

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<sup>10</sup> See Mohammad Fadel, *The True, the Good, and the Reasonable: The Theological and Ethical Roots of Public Reason in Islamic Law*, 21 CAN. J.L. & JURIS. 5, 59 (2008) (“this 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.”); Abou El-Fadl, *supra* note 6, at 30–31 (describing Muslim ruler broad range of discretion over matters of public interest).

<sup>11</sup> Sadiq Reza, *Torture and Islamic Law*, 8 CHI. J. INT’L. L. 21, 27 (2007).

<sup>12</sup> For more detail on *maslaha*, see FELICITAS OPWIS, *MASLAHA AND THE PURPOSE OF THE LAW: ISLAMIC DISCOURSE ON LEGAL CHANGE FROM THE 4<sup>TH</sup>/10<sup>TH</sup> TO 8<sup>TH</sup>/14<sup>TH</sup> CENTURY* 1–8 (2010).

<sup>13</sup> Frank Vogel, *Islamic Governance in the Gulf: A Framework for Analysis, Comparison, and Prediction*, in *THE PERSIAN GULF AT THE MILLENNIUM: ESSAYS IN POLITICS, ECONOMY, SECURITY, AND RELIGION* 259 (Gary G. Sick & Lawrence G. Potter eds., 1997) (“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 10, at 58 (quoting al-Qarafi’s *al-Furuq*). See generally OVAMIR ANJUM, *POLITICS, LAW, AND COMMUNITY IN ISLAMIC THOUGHT: THE TAYMIYYAN MOMENT* (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).

shariyya scholarship as a whole was to confirm that sharia as a holistic system for societal good includes pragmatic considerations of good governance. In this way, sharia as “God’s Law” is meant to cover more than just the fiqh elaboration of scriptural rules. In short, sharia is a rule of law, not a mere collection of rules.

Siyasa’s lack of direct grounding in sacred texts is important for Islamic constitutionalism because it illustrates how sharia works as an Islamic rule of law comprised of two different types of lawmaking. Even though siyasa laws were not derived directly from scripture, pre-modern Muslims did not think of siyasa as “outside” of sharia. Instead, they considered fiqh and siyasa both to be components of their rule of law systems. As understood in pre-modern Muslim political theory and practice, rulers and religious legal scholars together serve sharia, through their respective jobs, each serving different roles based on different sources of legitimacy. More specifically, 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 ijihad to extrapolate scripturally-directed rules from the Quran and Sunnah.

To use contemporary terminology, legal pluralism<sup>14</sup>—not legal monism—was the constitutional structure of pre-modern Muslim governments. In Sherman Jackson’s words, “legal pluralism was to the premodern Muslim state what legal monism has become to the modern nation-state.”<sup>15</sup> It really could not have been any other way. Because of the epistemology of Islamic jurisprudence. Muslim legal systems had to figure out how to accommodate the unavoidable and inherent diversity of fiqh. More specifically, if different doctrines of the different fiqh schools are all equally valid, then it is not possible to declare one of them the law of the land (and those who tried, failed). So, unlike law (especially religious law) in Europe, legal centralism simply was

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<sup>14</sup> 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 John Griffiths, *What is Legal Pluralism?*, 24 J. LEGAL PLURALISM 1 (1986); Sally Engle Merry, *Legal Pluralism*, 22 LAW & SOC’Y REV. 869 (1988). Note that the academic discourse on legal pluralism defines it as the situation of different laws originating from different sources exist simultaneously in the same space, and *not* as a diversity of interpretations of the same source material (as in different justices’ opinions on the meaning of constitutional text). Following this terminology, fiqh diversity is not legal pluralism, but a legal system composed of fiqh and siyasa is.

<sup>15</sup> Sherman Jackson, *Islamic Reform Between Islamic Law and the Nation-State*, in THE OXFORD HANDBOOK OF ISLAM AND POLITICS 46 (John L. Esposito & Emad El-Din Shahin eds., 2013).

not an option. Muslim societies had to figure out another way to set up their legal-political 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* served general public needs such as safety and justice and order, whereas *fiqh* provided 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.<sup>16</sup> 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*.

#### IV. THE COLONIAL DISRUPTION

Today, the norm of constitutional ordering is legal monism, not legal pluralism, even in Muslim-majority countries. This norm comes from the European nation-state model—the idea that a culturally and ethnically distinct people (a “nation”) form a territorially-bound sovereignty that gives legitimacy to a governing political power. This political power is characterized by legal centralism—the idea that everyone is governed by the same law, and that law comes from a central state. The European nation-state model of government was imported into Muslim lands with colonialism. In countries colonized by European powers, the pre-existing Muslim legal and political systems (described above) were dismantled and replaced with national legal codes and judicial systems. With independence in the mid-twentieth century, the new Muslim-majority states in Arabia, Africa, Asia, and Eastern Europe retained most of the law and legal systems set up by their former European rulers, now woven into the socio-economic infrastructure of these countries.<sup>17</sup> In virtually every Muslim-majority country, whether it was actually colonized by a European power or not, European nation-state legal centralism became the norm.

This colonialist mutation of legal-political systems in Muslim-majority lands has, sadly and ironically, created theocratic-leaning Muslim governments. But it is not the integration of religion and state that has caused these new Islamic

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<sup>16</sup> 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 judgment of a *qadi*.

<sup>17</sup> See WAEL B. HALLAQ, AN INTRODUCTION TO ISLAMIC LAW 85–124 (2009).

theocracies. Rather, it is the integration of religion with *legal monism* that has created this phenomenon. To explain further: with independence in the twentieth century, many Muslims organized themselves into social and political organizations (often called “Islamism”) to remedy the wound of the colonialist purging of sharia in Muslim lands. But these Islamists operated with a rather stunning amnesia. Rather than looking to Islamic history for alternative arrangements of legal and political authority, they instead took the nation-state structure inherited from their European colonizers for granted, and simply concentrated their efforts on making that central state “Islamic.”<sup>18</sup>

This was a dangerous turn of events. Because Islamists did not challenge the monist presumptions of the nation state, monolithic legal positivism has shrunk Muslim constitutional horizons to the narrow realm of state law, contributing to dangerous power monopolies in contemporary Muslim governments. 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. Now that all law in these countries is defined by the state, the state now has control over the substantive content of sharia in these countries.<sup>19</sup> This is the reason for the proliferation of “sharia legislation.” Following the legal monist presumption that the central state controls all law, Islamist movements consistently look to state lawmaking bodies to officially recognize sharia, usually in the form of legislating it.<sup>20</sup>

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<sup>18</sup> As Sherman Jackson puts 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 thinkers and activists is not the propriety of the nation-state as an institution but more simply—and urgently—whether and how the nation-state can or should be made Islamic.” Jackson, *supra* note 15, at 42. Even those calling for an “Islamic state” did not challenge the nation-state presumptions of legal monism. In Jackson’s words, “the Islamic state is a nation-state ruled by Islamic law.” SHERMAN A. JACKSON, *ISLAMIC LAW AND THE STATE: THE CONSTITUTIONAL JURISPRUDENCE OF SHIHAB AL-DIN AL-QARAFI* xiv (1996). Frank Vogel comments that this is apparent “when Islamic thinkers assume that to return to sharia 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.” VOGEL, *supra* note 8 at 219.

<sup>19</sup> For a commentary on this phenomenon in a discussion of legal pluralism, see Sherman A. Jackson, *Legal Pluralism Between Islam and the Nation-State: Romantic Medievalism or Pragmatic Modernity?*, 30 *FORDHAM INT’L L.J.* 158 (2006).

<sup>20</sup> See Mohammad Hashim Kamali, *Methodological Issues in Islamic Jurisprudence*, 11 *ARAB L. Q.* 3, 9 (1996) (“The advent of constitutionalism and

What these movements fail to recognize is that, far from restoring sharia to those places to where it was removed, these sharia legislative projects have fundamentally transformed the nature of sharia's engagement with Muslim societies.

The dominance of nation-state legal monism in Muslim politics has obscured what is arguably the most constitutionally relevant aspect of Islamic history: *siyasa* respect for a separate and autonomous realm of *fiqh* law. This respect enabled a bifurcation of legal authority between *fiqh* and *siyasa* law that directed pre-modern Islamic government away from theocratic rule. Because *fiqh* and *siyasa* each played separate roles in sharia rule of law systems before colonialism, 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 "sharia legislation" ignores this fundamental feature of pre-existing Muslim legal systems. Rather than thinking of sharia as a rule of law system composed of both *fiqh* and *siyasa* legal realms, the "Islamization" of Muslim governments has collapsed sharia into just *fiqh*, and then looked to state power (today's *siyasa*) to bring *fiqh* into the political realm.

Moreover, so-called "sharia legislation," does not really legislate "sharia" at all. It merely legislates one (or several) among many *fiqh* possibilities. Recall that, 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 can be claimed of so-called "sharia legislation" is that the government has enacted its preferred *understanding* of sharia from among many equally valid options. To call such legislation "sharia" is to use religion in a politically manipulative manner—implying divine mandate for rules that are in reality fallible human interpretations of divine law.

In reality, "sharia legislation" is simply 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. They cannot be enactments of divine law because we can never know with certainty which *fiqh* rule is

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government under the rule of law brought the hegemony of statutory legislation that has largely dominated legal and judicial practice in Muslim societies. The government and its legislative branch tend to act as the sole repository of legislative power."); see also Jackson, *supra* note 5.

the correct understanding of sharia. In truth, then, enacting one and not another must be on some other basis than its “being” divine law. Usually, it is some combination of political majorities, social pressure, and administrative preference (whether this is admitted publically or not). So, even when they “legislate sharia,” Muslim governments are 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 for. The problem with “sharia legislation” is that by calling it “sharia,” its promoters pretend that this is not happening. Sharia legislative projects are typically presented to a Muslim public as if they are obligatory divine law, with no mention of the human element between God and the statute books.

Unfortunately, most religious Muslims do not see this as a problem. To the contrary, because most Muslims around the world have an incomplete understanding of sharia, *fiqh* pluralism, and the role of *siyasa* before colonialism,<sup>21</sup> they usually do not question “sharia legislation,” believing to do so would be questioning God’s Law. Many even defend “sharia legislation” as if defending their very faith, seeing opponents of “sharia legislation” as enemies of Islam.<sup>22</sup> “Sharia legislation”—because it is so often immune from popular criticism, amendment, and most of all, repeal—has a powerful (and often manipulative) strategic advantage in Muslim-majority countries.

To see this another way, the nation-state is the source, not the victim, of the destructive cycles of religious politics in Muslim-majority countries today. The legal monism of the nation state has created a state-church quality to Muslim rule that is unprecedented in Muslim history. Muslim governments can now occupy the powerful position of being both author and enforcer of what is sharia. This creates oppressive potential for state-enforced religious dogma, a situation exacerbated by the creation of “sharia courts” with final authority to interpret the authoritative meaning

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<sup>21</sup> See e.g., Tamir Moustafa, *Islamic Law, Women’s Rights, and Popular Legal Consciousness in Malaysia*, 38 *LAW & SOC. 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 pluralism and the centrality of human agency in *fiqh* lawmaking).

<sup>22</sup> For details on this phenomenon in the context of Islamic law and women’s rights, see Asifa Quraishi, *What if Sharia Weren’t the Enemy? Rethinking International Women’s Rights Advocacy on Islamic Law*, 22 *COLUM. J. GENDER & L.* 173 (2011).

of state-enacted “sharia law.” This is a very odd thing for Muslims to do. For centuries, Muslims rejected the establishment of any clergy with the power to declare “the” Islamic rule on any given topic. Today, however, “sharia courts” have the sole authority to interpret the meaning of sharia for a given Muslim-majority country. This is arguably the closest thing to a Muslim “state church” that has ever existed.

It is important to appreciate that it is not sharia itself that has caused this situation. Rather, it is the result of failing to think of sharia as a pluralist rule of law, encompassing both *fiqh* and *siyasa* realms. Using sharia and *fiqh* as interchangeable terms, Islamist movements not only miss the important role of *siyasa* in a sharia-based system but also contribute to this new theocratic trend by inserting (selected) *fiqh* rules into monist nation-state structures that have exclusive control over all law. This is why “sharia legislation” is a wholly modern, post-colonial invention: it relies upon the centralized power of the nation-state to exist. These governments would not be able to uniformly enforce their selected *fiqh* rules if the premodern Muslim 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 *fiqh* scholarship.

#### V. ISLAMIC CONSTITUTIONALISM: THREE ESSENTIAL PILLARS

Given all this history, my answer to the proposed thought experiment begins with this rather radical idea: what would a constitution look like if it began with legal pluralism, not legal monism, as its core structure? My framework for modern Islamic constitutionalism presented here begins with that premise. Rejecting legal monism and reclaiming the legal pluralism illustrated in the historical Muslim bifurcation of *fiqh* and *siyasa* law, this paper describes what a sharia-based government could look like if sharia is understood as an Islamic rule of law comprised of two forms of law: *fiqh* and *siyasa*. This takes sharia all the way up the theoretical ladder to the rung of constitutional theory, opening up new ways of thinking about the allocation of legal and political power and how to create checks and balances on that power. The result is a framework for Islamic constitutionalism that is based on sharia but is not about

“Islamizing” the nation-state. Rather than accepting the current constitutional norm that locates all legal authority in a central sovereign power—and then debating whether that power should or should not be used to enforce sharia (and if so, which version)—the framework proposed here shows that sharia-based government can mean something much more profound and constitutionally creative than anything that exists right now.

Unlike the centralized nation-state system inherited by most Muslim-majority countries, the proposed Islamic constitutional structure is built upon the separation of lawmaking power that had previously characterized Muslim legal-political systems for centuries: a separation between *siyasa* laws made by rulers in furtherance of the public good (*maslaha*) and *fiqh* laws articulated by a diversity of religious legal scholars based on their interpretation of scripture. There are three essential pillars to the proposed structure: (1) government political action must be based on the public good, as determined by democratic means, (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 “sharia check” reviewing the Islamic legitimacy of political action should be based on the purposes (*maqasid*) of sharia. Together, these three pillars form the essential structure for a system of government that enables Muslims to have sharia 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 apparent conflicts 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. A brief summary of the three essential pillars follows.

*A. The First Pillar: Government Action Must be Based on the Public Good*

The first pillar comes from the classical Islamic legal-political literature addressing the sharia power of rulers. As discussed above, the legitimacy of *siyasa* power was based upon service of the general public good. Today, *siyasa* power comes in the form of presidents and parliaments and kings rather than sultans and caliphs, but the essential nature of the power is the

same—*siyasa* authority is held by whoever holds police power, i.e. the government. Thus, the first pillar of the present framework for Islamic constitutionalism is that all government 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 commonly assumed (by Muslims as well as non-Muslims) that a country's sharia compliance should be measured by comparing its legal codes to the laws found in classical fiqh. The closer the match, the more Islamic the government—or so goes the thinking. But that is a very narrow (and very legal monist) way of thinking about sharia-based government. In pre-modern Muslim systems, the sharia mandate for *siyasa* power was not to enact and impose a singular fiqh doctrine on everyone, but rather, simply to maintain public order and serve the public good. Thus, state lawmaking for the public good—*not* legislating fiqh doctrine—is the core Islamic duty of the government in a sharia rule of law system.

This concept has profound implications for Muslim societies today. If sharia is understood as a rule of law system that includes *siyasa* service of the public good, then it becomes clear that “sharia legislation” is not the only way to make a government Islamic. If it is appreciated—as an *Islamic* matter—that a Muslim government should not be selectively enforcing its preferred religious doctrine but instead should be seeking to serve the public good, this could cause a revolutionary change in the secular-versus-religious debates in Muslim-majority countries today. Rather than debating “should we have religious law or not?” the people would be asking “what serves our public good?” Not only does this open up the public conversation to everyone regardless of religious credentials, but it also may lessen the tensions of identity politics that has been part of “*sharia* politics” in these countries.<sup>23</sup> After all, if the goal of lawmaking of an Islamic government is the public good, then citizens of all religions and no religion can participate in this conversation with equal credibility. Public discourse could focus on practical evaluations of social need rather than oppositional

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<sup>23</sup> Support for sharia legislation is often fueled by identity politics such that it has come to symbolize what it is to be a religious Muslim, as against secularism as an extension of cultural imperialism and the politics of Christians. See Anver M. Emon, *The Limits of Constitutionalism in the Muslim World: History and Identity in Islamic Law*, in CONSTITUTIONAL DESIGN FOR DIVIDED SOCIETIES: INTEGRATION OR ACCOMMODATION? 258, 259 (Choudhry ed., 2008).

arguments about the role of Islam and Islamic law.<sup>24</sup> Moreover, sharia-minded Muslims should support this shift as the proper sharia role for their state, rather than as a concession to secularism or international pressure.

This shift is also the key to solving the supposed conflict between Islam and democracy. Democratic decision-making is, after all, one method by which a society decides what is in the public good. Accordingly, a sharia-based rule of law system could choose to use democracy as its mechanism for determining the public good in the *siyasa* realm. Keeping this in mind can help explain to western observers why Muslim affinity for both democracy and sharia is not an oxymoron. Statistics showing that a large majority of Muslims around the world are pro-democracy and also support sharia<sup>25</sup> are confusing only if we insist on limiting the meaning of sharia to *fiqh*. However, once we recognize that sharia is larger than *fiqh*—that it also encompasses *siyasa* as the Islamic realm of state lawmaking based on the public good—the paradox disappears. In short, if human lawmaking in the interest of the public good is part of God’s Law, then there is no inherent conflict between human lawmaking and God’s Law.

Moreover, if it is realized that serving the public good is what gives sharia legitimacy to state action, then a whole range of what are now considered “secular” laws would gain support from religious Muslims. Laws about environmental protection, city zoning, traffic, health care, labor, antitrust, public education, criminal procedure, individual rights, and so on, all could now be considered part of an Islamic government’s sharia-mindful responsibility. For Muslim populations wanting to see sharia as a guide to their government’s actions, understanding *siyasa* as part of a sharia rule of law system enables them to proudly look at state administration of important social services as Islamic work. Public support for such programs could be bolstered by the same religious passion that currently supports “sharia legislation,” because it would now be understood that government service of the public good is itself part of God’s Law.

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<sup>24</sup> As Mohammad Fadel has said, “Muslims should not ask whether the human rights standard is the same as that under Islamic law, but only whether the human rights standard represents a legitimate act of government.” Mohammad Fadel, *The Challenge of Human Rights*, SEASONS: SEMI-ANNUAL JOURNAL OF ZAYTUNA INST. 59, 69 (2008).

<sup>25</sup> See JOHN L. ESPOSITO AND DALIA MOGAHED, WHO SPEAKS FOR ISLAM: WHAT A BILLION MUSLIMS REALLY THINK 35 (2008) (documenting that large majorities of Muslims around the world support democracy and also support sharia).

*B. The Second Pillar: A Diverse Realm of Religious Law Exists as a Voluntary Alternative to State Law*

Today, the legal systems of virtually every Muslim-majority country are all *siyasa*. Built on nation-state legal monism, the officially-recognized law in these countries today is that which is enacted and enforced by the state. Whatever is not incorporated into state law has no formal recognition.<sup>26</sup> This 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. 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 like how to marry and divorce, how to write a will, how to buy a home, and what business transactions to enter into. 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 formal recognition of that *fiqh* realm as a vibrant parallel sphere of law. Therefore, the second pillar of the proposed structure is 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 a parallel *fiqh* realm in the foundational constitutional structure of the overall system. The second pillar thus distinguishes the present proposal not only from most Islamist discourse, but also from all constitutional discourse that presumes a nation-state template.

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 monistic lawmaking institutions. “Sharia legislation” is the most obvious example. In a legal monist system, the only way for an individual Muslim to have her legal disputes resolved according to the *fiqh* school of her

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<sup>26</sup> See Griffiths, *supra* note 14, at 3 (describing legal centralism as where “law is and should be the law of the state, uniform for all persons, exclusive of all other law, and administrated by a single set of state institutions.”).

choice is for her fiqh school to also be the law of the land for everyone. If, however, a parallel fiqh realm were available to her to enforce her preferred fiqh school, then she would have much less motivation to pressure the state to enact her personal fiqh choices over everyone. An officially-recognized fiqh realm could likewise redirect the attention of Islamist advocacy away from state law as the only way for fiqh rules to be enforced. By constitutionally protecting a separate realm of fiqh that is facilitated—but not controlled—by the *siyasa* power, the proposed framework thus offers a way to return fiqh back to its proper place—not mined as raw material in support of political agendas, but rather living in its own separate sphere, making a variety of fiqh options available at the individual request of each Muslim.

An important attribute of the fiqh realm should be legal diversity. This would honor both the epistemology of Islamic jurisprudence as well as ensuring meaningful choice for those choosing to use fiqh as their governing law. As described earlier, all fiqh understandings of sharia are equally valid, making the world of fiqh law inherently and unavoidably one of doctrinal diversity. According to Islamic legal theory, individual Muslims are free to choose whichever fiqh school's interpretive methodology best fits them. To borrow modern constitutional terms, the freedom to choose a fiqh school is a matter of Islamic religious freedom. Moreover, a sufficiently diverse fiqh realm—with fiqh rules and scholars from every classically-established school as well as new and reform fiqh scholarship—will help ensure that those opting to use this fiqh realm are doing so with full consent.

The importance of choice also means that there should be freedom to *not* use 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, including topic 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. Accordingly, pre-modern Muslims could have their legal issues decided according to their chosen fiqh school but they could not choose to follow no fiqh school at all, for there were no *siyasa* laws written for the general public on many important legal

topics.<sup>27</sup> In light of the changed circumstances of modernity in which many do not directly identify with a fiqh school (or indeed with any religion), the proposed constitutional framework imagines a much more robust state legal field covering a wider range of legal issues than *siyasa* law did in the past, thus offering a tangible alternative to the fiqh realm for those who do not have a strong fiqh affiliation. There should, in other words, always be sufficient *siyasa* 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 affirmatively exercising this option, rather than being forced into fiqh by default. This also would ensure that the bifurcation of fiqh and *siyasa* legal realms is not a split between public and private law, nor is it a strict assignment of separate legal jurisdictions based on religious affiliation.

A healthy diversity in the fiqh realm could also breathe new life into fiqh rules themselves. Today, the uniformity demanded by centralized legal systems combined with the phenomenon of “sharia legislation” has muted the colorful diversity that was once the hallmark of Islamic jurisprudence. Today, there is no official legal recognition of fiqh rules different from those enacted into state law, and consequently, most Muslims are unaware of fiqh diversity altogether.<sup>28</sup> A constitutionally-protected fiqh realm could build awareness, and provide the space necessary for new, dynamic and sophisticated fiqh to grow again. If this fiqh realm is set up so that its legal content is autonomously generated by fiqh scholars, new legal and social questions could prompt new fiqh rules as these scholars directly engage with a wide swath of the Muslim public. Old and new fiqh scholars might undertake new levels of legal analysis, regularly engaging in healthy debate and thus dramatically expanding 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 could influence their further evolution. Importantly, classical and conservative

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<sup>27</sup> This arrangement is well known as the Ottoman “millet” system, which has been borrowed in edited variations by some colonial powers and contemporary states such as Israel and India. The framework proposed here differs significantly from the millet system because of the inclusion of a fully-formed body of state law parallel to fiqh law in all major topic areas.

<sup>28</sup> For example, Tamer Moustafa has shown how the average Malaysian’s understanding of sharia 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 21, at 170.

interpretations of sharia would still exist, but they would exist alongside new and liberal ones, all equally available to those making choices in the marketplace of the fiqh realm.<sup>29</sup>

Combined with the first pillar, this second pillar provides a workable and non-theocratic way for fiqh to exist—even thrive—in Muslim societies. Thus, if someone strongly believes in a fiqh rule, but cannot convince the rest of the public that it serves the general public, 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 this person must relinquish her desire to live by this rule; she just turns to the fiqh realm instead. Thus, the fiqh realm exists as a tangible alternative for those wishing to follow a particular fiqh doctrine rather than the legislated *siyasa* rules on a given legal 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 Sharia*

With fiqh relegated to a separate non-governmental sphere 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 is based only on the public good, what is to stop a state from deciding that it is in the public good to enact legislation that violates sharia (banning public prayer, perhaps?), and defeating the very *raison d'être* of an Islamic government?<sup>30</sup> This is a very real concern in Muslim populations, especially those who have experienced militant secularist rule, and the sentiment is memorialized in several constitutions with

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<sup>29</sup> The constitutional framework proposed here imagines a fluidity of movement inside the fiqh realm: Muslims choosing to access it could easily 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 e.g., AYELET SHACHAR, *MULTICULTURAL JURISDICTIONS: CULTURAL DIFFERENCES AND WOMEN'S RIGHTS* (2001).

<sup>30</sup> As the classical scholar al-Jawzi put it, “no *maslahah* may be justified if it contravenes the *Shari'ah*.” quoted in ABOU EL FADL, *supra* note 2, at 14.

clauses prohibiting state lawmaking that is contrary to sharia.<sup>31</sup> Any theory of Islamic constitutionalism that does not address this concern risks being rejected by its primary audience: Muslims committed to Islamic government. This is why the third pillar of the present model provides for a sharia-based check on government action.

But the inclusion of such a provision simultaneously raises resistance from another important audience: secularists and anyone who does not want democratic decision-making to be trumped by religious legal doctrine. Checking government action with sharia compliance, after all, could bring theocracy in through the back door. This concern must be addressed by any theory of Islamic constitutionalism that is to have traction in a globalized world with internationally-recognized human rights norms. The key to finding middle ground between Islamists who want an aggressive sharia check on government and secularists who want none is to carefully theorize the meaning and implications of a

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<sup>31</sup> The precise language of these clauses differs from country to country, and do not always use “sharia” explicitly, but they are often interpreted with some reference to sharia. 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 TAQYRATI 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 “sharia as a source of legislation” provisions that have been interpreted to prohibit lawmaking contrary to sharia. An example is the interpretation of Article 2 of the Egyptian Constitution (“The principles of the Sharia 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 Dawood I. Ahmed & Tom Ginsburg, *Constitutional Islamization and Human Rights: The Surprising Origin and Spread of Islamic Supremacy in Constitutions*, 54 VA. J. INT’L L. 1 (2013).

sharia check on state action as part of a comprehensive Islamic constitutional theory. The proposal presented here engages in this effort, investigating several alternatives for what a sharia review of state action could mean before proposing a standard of review based on the *maqasid* (purposes) of sharia as the third pillar of the proposed Islamic constitutional structure.

Given the reality of *fiqh* diversity, the idea of a sharia check on state power immediately creates a puzzle: *which* understanding of sharia? Does this mean that state lawmaking on a given issue may not conflict with *any* *fiqh* rule on that issue? Or does it mean that laws may not conflict with a consensus or majority of *fiqh* opinions on the issue? The first possibility would be very restrictive of government power—perhaps so restrictive as to be unworkable. That is, because there are so many different *fiqh* rules on so many different subjects, “contrary to sharia” defined as “contrary to *any* *fiqh* rule” would leave very little room for any state lawmaking. The only laws that would be allowed under this standard of review would be in those areas upon which there is *fiqh* unanimity (which is virtually nothing), or those areas where there is no comment at all by the *fiqh* scholars. Such sharia check would force out all but a very small scope of lawmaking in the *siyasa* realm of state law. Effectively, government power would become merely an add-on supplement to the *fiqh* realm, resembling more of an administrative and regulatory gap-filler rather than broad-based lawmaking for the public good.

A sharia check that restricts government action so drastically would likely be unworkable in a modern society. It would tie the hands of the state on a wide range of policy issues that are important today, such as environmental protection, labor relations, and economic regulation. As such, it contradicts the basic expectation of *siyasa* power: that it organize society for the public good. Moreover, if applied in the pluralist framework for Islamic constitutionalism presented here, this standard of sharia review would mean that nearly every legal issue would be forced into the *fiqh* realm. That is because, as long as a topic has been addressed in *fiqh* literature in any way, state law on that topic would be struck down as a violation of this sharia check. This means that *siyasa* and *fiqh* would not operate as parallel systems of law, but rather state law would be limited to a small corner of a legal world made up mostly of pluralistic *fiqh*. This springs an unacceptable trap on those who do not have any religious affiliation represented in the *fiqh* realm, because meaningful choice for opting out of the *fiqh* realm would evaporate. Thus, this

first option is not an appropriate check for the fiqh-siyasa structure proposed here.

The second possibility would be to review state law for conflict not with *any* fiqh rule, but rather with those fiqh rules upon which there is consensus (ijma'). But this standard also turns out to be quite problematic.<sup>32</sup> First, it is very difficult to identify fiqh consensus because the fiqh schools themselves disagree over what consensus means (some require unanimity while others consider a strong majority sufficient).<sup>33</sup> If consensus is defined as unanimity, very few if any, fiqh rules would qualify. That means that a sharia boundary based on fiqh unanimity would leave a virtually unchecked field of siyasa power: anything on which there is any diversity of fiqh opinions (which is nearly everything) would be fair game for any state action. Although this would give a Muslim government significant power to achieve important policy goals that would be restricted under the first possibility, it may be too lenient a standard to serve its purpose. For example, a Muslim government's use of torture would survive such a sharia check, because many classical fiqh scholars allowed the use of torture by siyasa authorities.<sup>34</sup> Thus, this standard may not appropriately fulfill the desires of Muslim populations who want some tangible Islamic control on state corruption and oppression. Indeed with such a check, any state action could be upheld simply by finding any fiqh opinion that is consistent with it. Such a sharia standard of review would likely prove to be a dangerously lenient check on state power—probably amounting to no check at all.

Alternatively, consensus could be described as the majority opinion of all fiqh scholars. Assuming we could overcome the practical difficulties of ascertaining when this actually exists, a sharia check based on the majority fiqh opinion on a given issue would severely limit modern siyasa 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

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<sup>32</sup> It is worth noting that Iraq's Interim Constitution had a "sharia 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).

<sup>33</sup> See Wael Hallaq, *On the Authoritativeness of Sunni Consensus*, 18 INT'L J. MIDDLE E. STUD. 427 (1986).

<sup>34</sup> See Reza, *supra* note 11, at 27.

to be witnesses in courtroom proceedings, their evidence having equal weight as the testimony of men, this gender-equal testimony policy would likely be struck down as inconsistent with the classically-established majority fiqh position, even though there are several classical (and many more contemporary) fiqh scholars who disagree with it. This would be a frustrating position in which to put a modern Muslim government, especially if there is prevailing popular sentiment and respected scholarly support for these non-majority fiqh positions. In other words, a sharia standard of review that defines any majority fiqh position as definitive would pit social evolution directly against fidelity to past interpretive trends.<sup>35</sup> In other words, a sharia check calibrated to the “dead hand” of past fiqh majorities would likely stifle the ability of modern Muslim governments to effectively respond in Islamic ways to modern realities and changed social norms.<sup>36</sup>

Given the substantial problems with these possible meanings of “contrary to sharia,” I propose the following alternative constitutional check for sharia compliance: actions by the government should not contradict the underlying purposes (maqasid) of sharia. This purpose-based standard of sharia review is inspired by the classically-established field of Islamic jurisprudence known as “maqasid al-sharia” (the “objectives” or “purposes” of sharia), a robust field of scholarship that continues to grow today. The maqasid were articulated by classical fiqh scholars who interpolated that all the rules of fiqh ultimately serve several identifiable underlying purposes. The greatest purpose of

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<sup>35</sup> Using Frank Vogel’s language, there is a very real risk that a consensus-based sharia check would, “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).

<sup>36</sup> 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 would almost certainly have served the public good, but yet, because it contradicted past fiqh consensus about the use of the death penalty, it was 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*, (Apr. 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/shariah/contemporary-issues/critiques-and-thought/439960-tariq-ramadans-call-for-a-moratorium.html?Thought=>.

sharia, they concluded, is *maslaha*—the public good. Elaborating further, they concluded that *maslaha* is made up of five essential purposes or objectives: (religion, life, intellect, family, and property) that sharia protects, to which the scholars added a nested collection of further purposes that serve life’s “needs” and then “enhancements.” The five essential *maqasid* are accepted by all the schools as core attributes of the public good (*maslaha*).

Given the centrality of *maslaha* to the core legitimacy of *siyasa* power, a purpose-based check is a logical focus for reviewing the sharia legitimacy of *siyasa* state power. Because it draws upon higher concepts of *fiqh* theory, a *maqasid*-based standard of review is not caught up in the details of specific *fiqh* rules, is disentangled from questions of *fiqh* consensus, and instead filters state action through the overall goals that sharia writ large is ultimately meant to serve. In short, it focuses on the spirit of God’s Law.

This standard of review fits well with the constitutional theory presented here because it takes seriously the idea of sharia as a rule of law encompassing the legal realms of both *fiqh* and *siyasa*. In the present constitutional framework, both *fiqh* and *siyasa* work together to (seek to) achieve God’s Law here on earth. *Fiqh* rules are not superior to *siyasa* or vice versa. They serve different roles as part of an overall sharia rule of law: *siyasa* serves the public good and *fiqh* articulates Muslim “right action” (to borrow a Buddhist term). Thus, what is Islamically appropriate for a state serving the public good requires a different calculation than the *ijtihad* work behind a mufti’s extrapolation of rules of right action for an individual Muslim. It therefore makes sense to check government action against the purposes of sharia, but not the particularized rules of *fiqh*. This sharia check would make sure that the democratic determinations of the public good do not interfere with the greater sharia vision as they perform their *siyasa* job, regardless of what rules are operating in the *fiqh* realm.<sup>37</sup> The central question for the constitutional sharia

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<sup>37</sup> For example, if there is a serious problem with pollution, there may be a strong public policy reason to enact environmental regulatory legislation that may contradict *fiqh* property rules. Or there 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 (unanimous or majority) *fiqh*, a purpose-based sharia check would consider whether these proposed *siyasa* laws fly in the face of sharia’s greater goals. (Here, it is likely that environmental legislation and state regulation of divorce could be determined to be consistent with the five *maqasid*). In other words, rather than trying to

legitimacy of government action in such a standard of review is not whether it contradicts some fiqh rule (or consensus of fiqh rules), but rather, whether it contradicts the ultimate reasons that sharia exists in the first place.

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 sharia. This standard thus occupies a middle ground between the alternatives described above. It provides much more room for state lawmaking than the first option under which state law may not contradict any fiqh rule. It would thus garner support of those who want a functioning political realm empowered to operate on topics of public need. On the other hand, it would provide a recognizable Islamic limit on the scope of government action that is more directive of state action than the more deferential standards of sharia review addressed earlier. This means that it has the potential for Muslim popular support because it responds to the sharia-consciousness desired by Muslim majorities today.

A maqasid-based sharia check should also be satisfactory to secularists. True, it gives a role to religion as a check on democratic lawmaking, but not in a straightjacketing (and theocratic) way. A purpose-based standard of review should dispel secular fears that democratic lawmaking must always comport with established fiqh doctrine. For example, the contradiction between global human rights norms condemning slavery and established fiqh doctrine allowing slavery should not be cause for secular alarm in an Islamic constitutional system with a maqasid-based sharia standard of review. A state prohibition on slavery in such a system would be checked against the greater objectives of sharia (and would arguably be upheld by reference to the purpose of protecting human dignity), not the particular fiqh rules that allow slavery.

Finally, it should be recognized that the sharia check is a structural constitutional element. It is designed to control the limits of power, not dictate substantive law. Approving or disapproving of something as consistent with the purposes of sharia says nothing about whether or not it should be made law in the first place. In a system following the present proposal, that

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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 sharia review from *fiqh* formalism altogether, but still keeping it within the boundaries of sharia ideals, writ large.

question depends on what the public decides is in the public good in the first place. The sharia check simply dictates the elbow room within which those decisions can be made. In terms of the quality of everyday lives under such a system, therefore, the first control is not the sharia 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 constitutional check (religious or otherwise) to strike such laws down. As I have argued, it is a fundamental principle of Islamic constitutionalism that public debate about state lawmaking should not be over whether or not Islam requires it, but whether or not it is a good idea.

## VI. CONCLUSION

This paper seeks to broaden the spectrum of thinking about sharia as a unique type of constitutionalism. Based on this understanding of sharia, it suggests a new constitutional model for Muslim-majority countries. In particular, it argues that a revival of historical Islamic legal pluralism would serve these countries better than their nation-state European imports. It shows how a constitutional structure based on Islamic legal pluralism provides a powerful way out of the theocratic problems presented when religion meets legal monism. To skeptical secularists who believe that any recognition of religion will always invoke the threat of theocracy and oppression of religious freedom, this paper responds 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* types of law.

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 proposal harnesses the spirit of the Muslim past, reframed for modern constitutional norms. This is a system of government in which religion is important, but not in a way that merges “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 sharia 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 sharia-as-rule-of-law system, the other being state lawmaking based on human determinations of the public good (maslaha). This bifurcated system of law provides a way for a Muslim government to formally recognize fiqh rules without imposing them on those who do not want it. This holistic system includes—indeed, expects—an integral role for democratic lawmaking for the public good, situating it as *part* of a sharia-based system, not in opposition to it. For Muslims who are used to thinking about sharia as it appears in public discourse today, this would be a paradigm shift, but one that I believe is for the better, and also solidly grounded in classical Islamic principles. In sum, Islamic constitutionalism is not theocratic, not secular, and not impossible.