Not Your Father's Islamic State: Islamic Constitutionalism for Today's Sharia-Minded Muslims

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Abstract

This paper presents a structure for Islamic constitutionalism that is inspired by pre-modern 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 because it is built on legal pluralism rather than legal centralism. 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: a separation between (1) siyasa laws made by rulers in furtherance of the public good (maslaha) and (2) fiqh laws articulated by religious legal scholars based on scriptural interpretation and existing in a diversity of legal schools. Understanding sharia as an Islamic rule of law (rather than merely a collection of rules), encompassing both fiqh and siyasa, this paper builds an Islamic constitutional structure on the powerful foundation of legal pluralism represented by the fiqh-siyasa bifurcation of law.

There are three essential features of 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 government 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 which 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. This paper challenges these concepts by showing how an Islamic constitutionalism that is not secular and not theocratic is not impossible.

I. Introduction

The "Islamic state" of modern political Islamism starts with the central state as the location of all legal authority and the guardian of society's orthodoxy. Islamist political advocacy usually focuses on ways to bring sharia into the law of the modern state, typically through legislation and constitutional amendment. This brings them into regular battle with secular forces seeking control over the same political space. Islamists and secularists both operate with a presumption of legal monism, where all law is controlled by a central government. But this is not how law and legal authority always operated in these societies. Legal monism is an attribute of the European nation-state, brought to most Muslim-majority lands with colonialism. Nevertheless, Islamic state movements seem content on working to influence state power rather than exploring ways to diversify that power itself. Even reformist Muslim scholars and activists limit their attention to doctrinal, rather than structural, creativity about sharia. In other words, there is little, if any, new Islamic *constitutional* theory.

This paper is an early expedition into this territory. It describes what a sharia-based government could look like if sharia is understood as an Islamic rule of law rather than a collection of rules. 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

proposed framework shows that sharia-based government can mean something much more profound and constitutionally creative than anything that exists right now.

This paper 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 modern political Islam movements because it is built on legal pluralism rather than legal centralism. Unlike the centralized nation-state system inherited by most Muslim-majority countries, the present constitutional structure is built upon the separation of lawmaking power that had previously characterized Muslim legal-political systems for centuries: a separation between (1) siyasa laws made by rulers in furtherance of the public good (maslaha) and (2) fiqh laws articulated by a diversity of religious legal scholars based on their interpretation of scripture. This paper concludes that the legal pluralism represented by the classical bifurcation of fiqh and siyasa law should be an essential feature of any Islamic constitutional theory, and is largely missing in the world today. Lacking a clear differentiation of siyasa from fiqh has caused many Muslim-majority countries to create near-theocratic rule, where the government can 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 change. Offering an alternative, this paper begins with the idea of sharia as an Islamic rule of law encompassing both fiqh and siyasa and builds an Islamic constitutional framework based on that legal pluralism, translating and updating the fiqh and siyasa realms as appropriate for contemporary realities.

There are three essential features of 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. This paper challenges these concepts by showing that an Islamic constitutionalism that is not secular and not theocratic is not impossible.

II. Thinking Outside the "Islamic State" Box

Political Islamic movements (also called "Islamism") work for the "Islamization" of their state. They often support "sharia legislation" and constitutional provisions requiring sharia to be a source of legislation and a check on state action.[1] These legal markers often carry popular support in Muslim-majority countries, a phenomenon reflected in polls documenting widespread support for *sharia* as the "law of the land" in

[1] For a discussion of constitutional clauses setting up sharia as a/the source of legislation in several Muslim-majority countries, see Clark Lombardi, Constitutional Provisions Making Sharia "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 sharia-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).

Muslim-majority countries around the world.[2] In response, secular-minded citizens and observers point to conflicts between legislated sharia and global human rights norms, often actively opposing these movements on the ground that Islamization threatens individual rights. It is thus not surprising that strong tensions between secular and Islamist forces pervade social and political life in 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 modern interpretations of sharia instead of traditional and conservative ones that conflict with global norms, as a way to bridge Muslim desires for sharia with secular concerns for individual rights.[3] This strategy is popular with many because it offers Islamically-grounded arguments for gender equality, freedom of expression, and other global norms of civil and human rights. But a liberal sharia resolution of the Islamist-versus-secularism fight can be short-lived. No matter how persuasive an argument is made for the state to adopt liberal human-rights-affirming sharia interpretations, there is no conclusive reason to insist that others agree. Thus liberal Islam advocates in a given country may think they have solidly enacted, for example, woman-empowering sharia interpretations of family law only to see an election bring a new political majority passing new legislation based on sharia interpretations that are more restrictive of women's rights. In short, a political solution based on liberal Islam

[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.
[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).

is ultimately unsatisfying even to liberal Muslims 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 legislative, executive and judicial houses of Muslim states into battlegrounds for liberal and conservative (and everything in between) interpretations of sharia, each side hoping their preferred view will be the one imposed on everyone else 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 a bit to better understand the nation-state canvas upon which 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 a governing political power. This political power is characterized by legal monism and legal centralism - the idea that all law comes from a central state.

The European nation-state model of government was imported into the Muslim world with colonialism. In countries colonized by European powers, the pre-existing Muslim legal and political systems were dismantled and replaced with national legal

[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).

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.[5] 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.

Some Muslims in these in these newly independent states sought to remedy the wound of the colonialist purging of sharia in Muslim lands by organizing themselves into social and political Islamist movements. But what is remarkable about these Islamist movements from the perspective of Islamic constitutional theory is that in their work to "Islamize" their governments they did not question the European nation-state formula. Instead, they concentrated their efforts on making the central state "Islamic." 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 political thinkers and 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. In Jackson's words, "the Islamic state is a nation-state ruled by Islamic law."[7]

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[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").
[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).

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 "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.[9] This focus represents a rather stunning amnesia. Rather than looking to Islamic history for alternative arrangements of legal authority, modern Islamists instead reinforce 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 sharia in these countries.[10] What these movements fail to recognize is that, far from restoring sharia to those places from which it was removed, these sharia legislative projects have

[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 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." 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 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).

fundamentally transformed the nature of sharia'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

The core principle of Islamic jurisprudence is that sharia, God's Law, cannot be known with certainty. Literally meaning "street," or "way," 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 Prophet Muhammad's (PBUH) life example (sunnah), 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").

The epistemology of fiqh is important. Fiqh lawmaking happens with an awareness of its own fallibility. The fiqh scholars (fuqaha) acknowledged that their work of ijtihad is a fundamentally human endeavor that always carries the possibility of error.[11] Their use of the term "fiqh" - literally meaning "understanding" - is telling. It 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 for God.

[11] See Bernard Weiss, "Interpretation in Islamic Law: The Theory of Ijtihad," 26 American Journal of Comparative Law 199 (1978). 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 sharia.

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 doctrines. Because there is no way to know for sure which fiqh conclusions are correct (and there is 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).[13] 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 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,

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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).

such as whether or not a contract was valid, or how to distribute inheritance proceeds. The fuqahas' answers to these individual questions came in the form of legal responses (fatwa) which were voluntarily self-enforced by the questioner herself. When a fiqh-based dispute arose between 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 generally accommodated the fiqh diversity of their populations by appointing a variety of judges from different fiqh schools, according to the demographics 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, their power extended no further.[15] Substantive control over the content of fiqh laws always remained with the

[14] Significantly, Muslim governments did not view this fiqh diversity as a threat to their sovereignty. See Jackson, supra note 10, 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 is 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 12, 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.").

fuqaha, outside of ruler authority.[16] 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 having to impose it on everyone else.[17]

B. The Nature of Siyasa Authority

Muslim rulers' deference to fuqaha 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 fuqaha.[18] 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

[16] See 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 2008), at 46 ("[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."); Khaled 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 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.").

[17] 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 "too severe to force the people of different regions to give up practices that they believed to be correct and which were supported by the *hadith* and legal opinions that had reached them." Umar Faruq Abd-Allah, Malik's Concept of 'Amal in the Light of Maliki Legal Theory (Ph.D., University of Chicago 1978) at 100.

[18] 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 9, at 31 (describing siyasa and fiqh as "macrocosmic" and "microcosmic" law).

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.[19] 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.[20] 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."[21]

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).[22] 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

[19] See Vogel, supra note 9 at 52, 171-73; Kristen Stilt, Islamic Law in Action: Authority, Discretion, and Everyday Experiences in Mamluk Egypt (OUP 2012) (describing the mixed fiqh-siyasa role of the muhtasib).
[20] Fadel, supra note 16, at 55 ("[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."); Mohammad Fadel, Adjudication in the Maliki Madhhab: A Study of Legal Process in Medieval Islamic Law 99-104 (1995) (Ph.D. thesis, University of Chicago) (describing the "political judgments" of the siyasa realm as not derived "directly from God's revelation, but rather... upon a discretionary judgment of what course of action would result in the maximum welfare of the community"); Abou El Fadl, supra note 16, at 30-31 (describing Muslim ruler broad range of discretion over matters of public interest).
[21] Sadiq Reza, Torture and Islamic Law, 8 Chicago Journal of International Law 21 (2007), at 27.
[22] Vogel, supra note 9, at 529 ("The whole basis and foundation of sharia 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).

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).[23] Though the siyasa shariyya scholars differed widely in their ideas about the proper sharia scope of siyasa power, the practical impact of siyasa shariyya scholarship as a whole was to expand the concept of sharia to include pragmatic considerations of good governance. This genre of Islamic legal literature solidified the idea that sharia 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 sharia can work as an Islamic rule of law rather than just a collection of (fiqh) rules. 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. 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 ijtihad to extrapolate rules from the Quran and Sunnah.

[23] Vogel, supra note, 9, 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 16, 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 (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).

To use contemporary terminology, legal pluralism — not legal monism — was the constitutional structure of pre-modern Muslim governments.[24] This structure was 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 the different doctrines of the different fiqh schools are all equally valid, it is not possible to just declare one of them 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 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.[25] 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.

C. The Problems with Legal Monism for Islamic Government

We can now see more clearly why the nation-state may be the source — not the playing field — of the destructive cycles of religious politics in Muslim-majority countries today. The dominance of nation-state legal monism in Muslim politics has obscured what is arguably the most constitutionally relevant aspect of Islamic history:

[24] 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 6, at 46.
[25] 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.

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 play separate roles in a sharia rule of law system, pre-modern Muslim governments worked with the reality of these different legal realms rather than using their political power 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 amounted to collapsing sharia into just fiqh, and then looking to state power (today's siyasa) to bring fiqh into the political realm. In pre-modern Muslim systems, the sharia 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 lawmaking for the public good — *not* legislating fiqh doctrine — is the Islamic duty of the ruler in a sharia rule of law system.

Moreover, so-called "sharia legislation," does not really legislate "sharia" 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 can be claimed of so-called "sharia legislation" is that it has enacted its preferred *understanding* of sharia from among many equally valid options. But 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.

Another way to see this is to see that "sharia 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 sharia, 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 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,[26] they usually do not question "sharia legislation," believing to do so would be to question God's Law. Many even defend "sharia legislation" as if defending their very faith, seeing opponents of

[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 pluralism and the centrality of human agency in fiqh lawmaking).

"sharia legislation" as enemies of Islam.[27] Thus, because it is so often immune from popular criticism, amendment, and most of all, repeal, sharia-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 being both author and enforcer of what is sharia. This creates dangerous potential for state-enforced religious dogma, a situation exacerbated by the creation of "sharia courts" with final authority to interpret the authoritative meaning of state-enacted "sharia 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 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 the public (and if it follows *stare decisis*, this includes the future public). 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. It is rather, the result of failing to think of sharia as a rule of law, encompassing both fiqh and siyasa realms. Often 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 a nation-state structure that has exclusive control over all law. Thus, "sharia 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

[27] 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 Columbia Journal of Gender and Law 173 (2011).

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 pluralism 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. Political Islamic movements also promote theocracy because they promote state enactment of liberal interpretations of sharia. 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: state control over which fiqh doctrine will be enforced upon the entire population. As long as the power to define sharia 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.

In contrast, the framework for Islamic constitutionalism presented here is specifically designed to prevent theocracy. It is based on an appreciation of the fallibility

[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). Although Fadel's terms are slightly different than the ones used in this model (he uses "sunni public law" where this model would use "siyasa", and "rational good" where it would say "public good"), Fadel advocates along lines similar to that proposed here. In his words, "there is a much firmer ground on which modernizing reforms can be justified other than modernist religious interpretation: they are the product of legitimate public deliberation on what constitutes the rational good of the community and they do not violate any peremptory norms of Islamic law, even if they make major or minor revisions to the scope of rights and the manner by which they can be exercised." Id. at 30.

of any understanding of sharia, especially those holding police power over others. It starts with the concept of sharia as rule of law rather than a collection of rules. It shows that the way to prevent the theocratic tendencies of current Islamic states is not by liberal reform of sharia legislation. Rather, the entire project of "legislating sharia" 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 illustrated in 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 Reconstitutionalism: Three Essential Pillars

The Islamic constitutional structure presented here is based on the idea of sharia as an Islamic rule of law rather than a collection of rules. It is based on three essential pillars, each inspired by the lessons of Muslim legal and political history summarized above. The first pillar is that all government action must be based on the public good, as determined by democratic means. This draws upon the principle articulated by siyasa shariyya scholars that siyasa power is an essential part of a sharia rule of law system, and that the sharia responsibility of a Muslim ruler is to serve the public good. This general principle is updated for contemporary realities by adding democracy as the best mechanism by which to identify the public good. The second pillar, inspired by the historical bifurcation of siyasa and fiqh legal realms, states 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 citizen. This pillar sees legal pluralism as the most important and most unique feature of pre-modern Muslim

systems, and therefore makes it the core 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. The final pillar states that a sharia check on state action should review the legitimacy of government action based on the purposes (maqasid) of sharia. This pillar is drawn from principles found in the siyasa shariyya literature, along with an appreciation of contemporary Muslim desires for sharia compliance by their governments. Together, these three pillars form the constitutional framework for a system of government that enables Muslims to have sharia as the "law of the land," but not a state that imposes religious doctrine upon its population.

A. The First Pillar: Government action must be based on the public good (maslaha 'amma)

The first pillar comes from the classical Islamic legal-political literature that addressed the sharia power of rulers. As discussed above, the fuqaha who wrote in the field of 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 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.[29] 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.

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

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 sharia compliance should be measured by comparing its laws to the laws found in classical fiqh. The better the correlation with classical fiqh laws, the more Islamic the government, so goes the thinking. In other words, 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. In a word: theocracy. But this is an extremely narrow understanding of sharia — limiting it to only with the doctrinal rules of fiqh — and ignores the entire field of siyasa shariyya. It also perpetuates oppositional politics between secular and religious forces rather than seeing past them to imagine sharia as a holistic Islamic rule of law. When 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. Instead, serving the public good is what gives sharia 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 revolutionary change in political discourse in Muslim-majority countries. 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.[30] After all, if the goal of lawmaking of an Islamic government is the public

30. 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

good, then citizens of all religions and no religion can participate in this conversation with equal relevance and credibility. Public discourse could focus on practical evaluations of social need rather than oppositional arguments about the role of Islam and Islamic law. 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."[31] 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 purported 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.[32] Keeping this in mind can help explain to western observers why Muslim affinity

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politics of Christians. See Anver 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 (Sujit Choudhry, editor) (Oxford University Press 2008). It should also be noted that this Islamic-inspired lawmaking activity cannot be explained away by simply pointing to an increased Muslim religiosity in these countries. Other factors include: ethnic identity politics (including residual influences of colonial favoritism), Christian missionary efforts and evangelism, official corruption and the idea that Islam can check these injustices, the political power of religious rhetoric in general, socio-economic alliances, and the association of secularism with European/Western imperialism, and more. See, e.g., Rhoda E. Howard-Hassmann, The flogging of Bariya Magazu: Nigerian politics, Canadian pressures, and women's and children's rights, 3 Journal of Human Rights 3, 12 (2004) (noting that Christian-Muslim conflicts in hitherto religiously tolerant Nigeria began in the 1980s, resulted in part from "the historic ethnic and regional splits in Nigeria, a federation created by British fiat at the time of decolonization").

31. Mohammad Fadel, The Challenge of Human Rights, Seasons 59, 69 (2008).

32. Many have been unable to untangle the apparent knot between divine law and democracy for Muslims because they collapse *sharia* and *fiqh*, thus obscuring the idea of *sharia* as a holistic rule of law that includes human *siyasa* lawmaking, and thus the appropriate place for democracy. An example is an essay by Khaled Abou El Fadl in which he struggles over which should prevail – popular sovereignty or divine sovereignty. Khaled Abou El Fadl, Islam and the Challenge of Democracy (Princeton University Press 2004) (publishing Abou El Fadl's original Boston Review essay along with scholarly responses). Mohammad Fadel aptly identifies the mistaken premise that leads Abou El Fadl into this dilemma:

> "Abou el Fadl is forced into this dilemma... because he thinks that *all* rules of Islamic law — understood in this context as those rules derived from revelation through the juristic methods of interpretation described in theoretical jurisprudence (even if there can be in fact numerous and

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[33] 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 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 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 individual rights - all would be considered part of an Islamic government's sharia-mindful responsibility. Thus, 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 efforts to follow sharia. Moreover, public support for such programs could be bolstered by the same religious passion that currently supports "sharia legislation,"

> even conflicting opinions regarding the content of revealed law) are peremptory. Clearly, such a conception of Islamic law would require a system of government in which the only effective legislators are a designated class of people who are recognized as having the authority to interpret revelation in a binding fashion."

Fadel, *supra* note 28. To avoid this theocratic dead end, Mohammad Fadel points out (as do I, but with different terms) that *sharia* contemplates an equal and important sphere of lawmaking where political authority (*siyasa*) makes laws based on something other than interpreting scripture — namely, the public good. As I argue here, realizing that *sharia* as a rule of law system includes a prominent role for *siyasa* lawmaking for the public good opens up an appropriate space for democratic lawmaking within an overall sharia-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 sharia).

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. This began with the colonial dismantling or cooptation of the institutions of fiqh law and education and was not reversed with independence. Built on nation-state legal monism, the legal systems in these countries today are made up of only that which is enacted and enforced by the state. Whatever is not incorporated into state law has no formal recognition.[34] This 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.[35] Most Muslims who follow fiqh rules do so not because a government is forcing

[34] See John Griffiths, What is Legal Pluralism?, 24 Journal of Legal Pluralism 1 (1986) 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"); G. R. Woodman, The possibilities of Co-Existence of Religious Laws with Other Laws, in Law and Religion in Multicultural Societies at 25 (DJOF Publishing Copenhagen 2008) (R. Mehdi, et al. editors) ("customary laws and religious laws are not properly called 'law' except in so far as the state has chosen to adopt and treat any such normative order as part of its own law").

[35] 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 Mohammad Qasim Zaman, The Ulama in Contemporary Islam: Custodians of Change (2007). This is evident in the regular invocation of fiqh in Muslim lives, separate from any government-enforced compliance with sharia. This is most starkly illustrated by the desire of Muslims living in secular western countries to seek fiqh authorities for these sorts of legal issues.

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 the fiqh realm as a vibrant parallel sphere of 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 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, 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.[36] More specifically, it is a legal pluralist constitutional

[36] 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, supra note 34; 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

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.[37] Where a community has a recognized body of non-state law and respected authorities to interpret, apply, and expand it, it is important for the government to find a way to give appropriate space for that non-state law to play its part in that society's rule of law.[38] Recognizing the importance of non-state fiqh law is especially important for an Islamic constitutional theory because of the substantial and sophisticated body of fiqh and the enduring desire among 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. "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 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 enforce her chosen fiqh school in her life, 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 the state as the only way for the state to recognize sharia.

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originating from different sources exist simultaneously in the same space. Thus, fiqh diversity is not legal pluralism under this definition but a legal system composed of fiqh and siyasa is.

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

[38] 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 6.

Current political Islamism 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 "sharia legislation" by the state. Put in constitutional terms, "sharia legislation" merges two types of law that should be kept separate in order to appropriately perform their distinct functions in a sharia rule of law system. The present theory of Islamic constitutionalism is freed of this mistake because it does not presume a legally monistic state. By constitutionally protecting a separate realm of fiqh that is facilitated — but not controlled — by the siyasa power, the proposed framework 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.

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 parallel 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.[39] Instead, there must be a protected space for fiqh to operate in a heterarchical — not hierarchical relationship — with state authority. The non-state nature of fiqh must be respected by giving fiqh scholars full independence from the state, including creating their own institutions and lawmaking norms. This independence is crucial for the credibility and relevance of the fiqh legal realm because it recognizes that the real source of authority of fiqh (and fiqh reform) is the fuqaha. Recall that it is the process of ijtihad that gives a fiqh rule validity

[39] 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 34.

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 variety of tribunals 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 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, in 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[40]

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 as their governing law. As described earlier, all fiqh

[40] For further elaboration of this relationship, see Quraishi, supra note 19. I should note here that my use of the phrase "separation of powers" in that chapter may serve to confuse present readers, since this phrase is normally used to describe separation *within* a (legal monist) state structure. Because the fiqh and siyasa realms proposed here are not both within the state structure, I therefore do not use that phrase here, thus emphasizing the fiqh-siyasa relationship as one of legal pluralism.

understandings of sharia 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'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 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, including on 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.[41] In light of the changed circumstances of modernity in which many people do not directly identify with a fiqh school (or indeed any religion), the proposed constitutional framework imagines a much more robust siyasa field covering a wider range of legal issues, thus offering a tangible alternative to the fiqh realm for those do have a strong fiqh affiliation.[42] There should, in

[41] 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 the millet system because of the inclusion of a fully-formed body of state law parallel to fiqh law in all major topic areas.
[42] 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.

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 life into new fiqh rules. The uniformity demanded by a centralized legal system 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 most Muslims are consequently unaware of fiqh diversity altogether.[43] Modern codification of fiqh by Muslim states has resulted in freezing what was once a dynamic and evolving body of law. A constitutionally-protected fiqh realm separate from state law could provide the space necessary for 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, with no control by the state, 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

[43] When a state selects one fiqh rule (and even worse, calls it "sharia"), it usually selects the majority opinion, leaving out all dissenting alternative views that have equal ijtihad weight. Over the years, the public becomes unaware of these alternative views, and even less aware that new ijtihad could create new fiqh rules on these same questions. As Tamer Moustafa says of the average Malaysian's knowledge of sharia, "codification and institutionalization not only transformed Islamic jurisprudence from a flexible and pluralistic legal tradition to one that is fixed, singular, and monopolized by the state, but also that this transformation reshaped people's fundamental understanding of the nature of Islamic law itself." Moustafa, supra note 26.

dramatically expand the available corpus of fiqh laws.[44] 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. Importantly, established and conservative 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.[45]

This is the logical place for "liberal Islam" to thrive. Liberal and reform interpretations of sharia would have much more potential in an autonomous and pluralistic fiqh realm than in the form of "liberal sharia 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), legislated fiqh does not alter the existence of fiqh rules grown from the ijtihad process, nor create new ones. Therefore, for those really interested in changing the fiqh-based behavior of Muslims, it is important to realize that focusing on state law will never achieve that goal, no matter how much feminists hope for or religious conservatives fear it. Rather, fiqh reform with

[44] A quick review of the new ijtihad ideas currently being produced by scholars who are not straightjacketed by government control indicates that such ijtihad is very much alive today. To take just one example, consider Mohammad Fadel's fiqh-based critique of the classically-established fiqh doctrine limiting women's testimony. Mohammad Fadel, Two Women, One Man: Knowledge, Power and Gender in Medieval Sunni Legal Thought, 19 International Journal of Middle East Studies 185 (1997).

[45] 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 which tend assume only one doctrinal option for a given religious community. See, for example, Ayelet Schachar, Multicultural Jurisdictions: Cultural Differences and Womens' Rights (Cambridge University Press 2001).

the power to influence voluntary Muslim behavior 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 liberal fiqh interpretations can thrive could change the game completely. A diverse fiqh environment can change Muslim behavior not by enacting a particular interpretation of sharia, but by giving each Muslim a colorful landscape of equally valid fiqh alternatives to choose from when desiring to live a sharia-mindful life. This honors the agency of each Muslim, rather than paternalistically selecting religious 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 public 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; she just turns to the fiqh realm instead. This fiqh realm thus exists as a tangible alterative for those wishing 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,[46] and should be made up of multiple fiqh school doctrines from which to choose.

[46] Access to these parallel fiqh courts must be with the full consent of the parties. This honors the principle that only those laws that are believed to be in the public good should be enforced on people against their will.

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, and defeating the very *raison d'etre* of an Islamic government?[47] This is a very real concern in Muslim populations, memorialized in several constitutions with clauses prohibiting state lawmaking that is contrary to sharia.[48] Any theory of Islamic constitutionalism that does not address this concern risks being rejected by one of its primary audiences — Muslims committed to Islamic government. This is why the third pillar of the present model provides for a sharia-based check on government action.

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[47] As the classical scholar al-Jawzi put it, "no maslaha may be justified if it contravenes the sharia." Jamal al-Din Ibn al-Jawzi, al-Shifa' Fi Mawa'iz al-Muluk wa al-Khulafa' 57 (n.d.), quoted in Abou El Fadl, supra note 12, at 14.

[48] The precise language of these clauses differs from country to country, and do not always using "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 of the Holy Prophet... and no law shall be enacted which is repugnant to such Injunctions." The Constitution of the Islamic Republic of Pakistan (as modified 2004), Art 227(a).
- "No law shall contravene the beliefs and ordinances ("mu'taqadat wa ahkam") and provisions of the sacred religion of Islam in Afghanistan." The Constitution of the Islamic Republic of Afghanistan (Jan 26, 2004), Art. 3.
- "No law may be enacted that contradicts Islam's settled [legal] rules [or settled Islamic (legal) rules] (thawabit ahkam al-Islam") Constitution of Iraq (2005), Art 2.1.
- "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." Constitution of the Islamic Republic of Iran (1989), Art. 72.

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 in the Arab Republic of Egypt") 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 (Brill 2006). For more on Islamic supremacy in Constitutions, see Ahmed & Ginsburg, supra note 1.

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 any 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 such a check 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? Current literature and public discourse indicate three strong possibilities for what a sharia-based check on state lawmaking would look for: (1) conflict with *any* fiqh rule, (2) conflict with fiqh consensus, or (3) conflict with what fiqh has deemed mandatory or prohibited. The first possibility would be the most restrictive of government power — perhaps so restrictive as to be unworkable. 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 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, classical fuqaha themselves acknowledged that some determinations of that public good will touch on topics that are also covered in the fiqh, and that preventing all siyasa lawmaking on those topics would straightjacket the government's ability to do its primary sharia-serving job. It is for that reason that even classical siyasa shariyya scholars rejected the idea that siyasa action must not contradict *any* fiqh rules.

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. As long as a topic has been addressed in fiqh literature in any way, state law on the same topic would be struck down as a violation of this sharia cchek. This means that siyasa and fiqh would not operate as parallel systems of law, but rather siyasa 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 appropriate check for the fiqh-siyasa structure proposed here.

A second possibility is to review state law for conflict not with *any* fiqh rule, but rather with only those fiqh rules upon which there is consensus (ijma'). But this standard also turns out to be quite problematic.[49] 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).[50] 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 signifcant power to achieve important policy goals that would be restricted under the first ("sharia as any fiqh") check, 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 some fiqh scholars allowed the use of torture by siyasa authorities.[51] Thus, this standard may thus not appropriately fulfill the desires of Muslim populations who want some tangible Islamic control on state corruption and oppression. Instead, any state action could be upheld simply by finding any fiqh opinion that is consistent with it. Such a

[49] It is worth noting that an early version of Iraq's "sharia check" constitutional clause included the ijma' term explicitly ("thawabit al-Islam *al-mujma*` 'alayha"), but this term were dropped in favor of "settled Islamic (legal) rules" the final version. The significance of this change is still unclear. For some commentary, see Intisar Rabb, "We the Jurists": Islamic Constitutionalism in Iraq, 10 Journal of Constitutional Law 527, 539 (2008).
[50] 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).
[51] See Reza, supra note 21.

sharia standard of review would likely prove to be a dangerously lenient check on state power — perhaps even no check at all.

Alternatively, consensus could be described as the fiqh majority. Quite different from defining consensus as unanimity, a sharia check based on fiqh majority 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 to be witnesses in courtroom proceedings, their evidence having equal weight as the testimony of men, this gender-equal testimony policy would be struck down as inconsistent with the 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 check standard of review that defines any majority fiqh position as definitive consensus would pit social evolution directly against fidelity to past interpretive trends.[52] 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.[53]

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[52] 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 (forthcoming, article on file with author).

[53] 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 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, http://www.tariqramadan.com/spip.php?article264, accessed August 23, 2009. 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," http://www.readingislam.com/servlet/Satellite?c=Article_C&cid=1153698300075&pagename=Zone-English-Discover_Islam %2FDIELayout.

The third possible sharia check has strong grounding in classical Islamic literature. As Mohammad Fadel has articulated, despite wide divergence in their individual theories, siyasa shariyya scholars shared the following common denominator for permissible siyasa ruler action: siyasa action cannot prohibit what fiqh doctrine has found to be mandatory ("wajib"), and cannot require action that fiqh doctrine has prohibited ("haram").[54] To take two obvious examples, this would mean that it would be illegitimate for a ruler to prohibit prayer or to require wine drinking. Anything between those sorts of extremes, however, would be legitimate siyasa action. This deferential attitude toward siyasa authority has historical roots in the particular circumstances of Muslim history and the ultimate acquiescence by scholars to the fact that their political rulers would not be the ideal sharia-minded leaders that were hoped for in the earliest periods. Because it is so deferential to state power, this standard of sharia review would operate much like the "unanimous consensus" standard described earlier. The mandatory and prohibited correspond to a small minority of fiqh doctrinal rules, thus leaving a very large playing field for siyasa 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. This bare minimum sharia check on siyasa power provided a red flag test for when a ruler has gone too far, thus relieving the average Muslim of the obligation to follow their orders. But it says very little about what a government should be aspiring to if it is genuinely sharia-minded. That is, this standard of review may be a good bare minimum for what a Muslim should tolerate from their government, but it does not respond to what Muslims *want* out of their government. It

[54] See Mohammad Fadel, supra note 16 at 58 ("the public policy power could not be used to oblige conduct that was sinful, nor could it prohibit conduct that was morally obligatory").

does not prioritize the apparent desire among today's Muslim-majority populations that sharia be the "law of the land."

Given the substantial problems with these three possible sharia standards of review, I propose a fourth option: siyasa power by a Muslim government should not contradict the underlying purposes ("maqasid") of sharia. This purpose-based standard of sharia review is inspired by the established and sophisticated field of Islamic jurisprudence known as maqasid al-sharia, a robust field that continues to grow today. Based on inductive study of the existing corpus of fiqh rules, classical fiqh scholars concluded that these rules all serve several identifiable underlying purposes, and these purposes together make up the the objectives of sharia itself.[55] At the most macro level, said the fuqaha, the greatest purpose of sharia 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." These five maqasid are accepted by all the schools as the essential attributes of the public good (maslaha).

Given the centrality of maslaha to the legitimacy of the siyasa realm in the first place, the maqasid are a logical place to go for sharia standard of review of state power. A maqasid-based standard would create a very different environment for sharia review than that of the more directly fiqh-based standards. Because it draws upon higher

[55] See Vogel, *Objectives*, supra note 52 (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 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, even among quite conservative circles.

concepts of fiqh theory, is not caught up in the weeds of the details of specific fiqh rules, and is disentangled from questions of fiqh consensus. Rather than focusing on the fiqh rules themselves, this standard would filter state action through the overall goals that the fiqh rules ultimately are believed 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 both realms of fiqh and siyasa. In this 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 nor 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. What is Islamically appropriate for a state doing maslaha for the people requires a different calculation than the ijtihad work behind a mufti's extrapolation of rules of right action for the individual Muslim. It therefore makes sense to check government action against the purposes of sharia, but not the particularized rules of fiqh. A purpose-based sharia review would evaluate siyasa action with a strong appreciation of the public good as its primary function, and that sharia-compliance for government action may very well mean approving of actions that conflict with some fiqh rules, as long as they do not subvert the overall guiding principles of sharia. 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.[56] The central question for the

[56] 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 doctrines. 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 purposed-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

constitutional sharia 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 be 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 near-total deference standards described above. This means that it has the potential for Muslim popular support because it reflects a sharia-consciousness desired by Muslim majorities today.

Muslim sharia-consciousness today comes with a desire for democracy, and the combination of the two creates a new reality and new possibilities that was not present in pre-modern times. If democracy is part of siyasa governance, the average Muslim can do more in the siyasa realm than was possible before, and it is logical that more is demanded of it. Thus, rather than the "hands off" tolerance with which siyasa shariyya scholars advised Muslims treat autocratic siyasa rulers, Muslims today operate with the hope of influencing every aspect of their government. This comes with lot less tolerance for

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

injustice and corruption and a lot more hope for positive change. An appeal to sharia as ultimate justice and good government is part of that hope.

Another reason for a less hands-off sharia review standard is the changed reality of the modern state. Pre-modern Muslim governments had relatively little reach the individual's day-to-day life. Today's states have wide-reaching power over a large swath of legal, social, and political life that was not addressed by Muslim rulers of the past. Global realities of environmentalism, international business technology, surveillance, and more have made the modern state progressively bigger and more powerful than ever before, and that reality is not likely to change. In the face of the larger more powerful state, it is less and less reasonable to ask Muslims to tolerate government action merely because it has not obligated its citizens to do something sinful. If that is all that is required of a sharia check, sharia-minded Muslim-majorities are likely to turn to sharia legislation as the only plausible way to bring some sharia controls to their government's actions. As explained above,[57] that would be an unfortunate and unnecessary turn to theocracy.

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 straight-jacketing (and theocratic) way. A purpose-based standard of review should dispell secular concerns that democratic lawmaking must always comport with established fiqh doctrine. For example, a contradiction between global human rights norms on slavery and established fiqh doctrine allowing slavery should not be cause for secular alarm in a system with a maqasid-based sharia review. A state law prohibiting slavery in such a system would be checked against the greater objectives of sharia, not the particular fiqh

[57] See supra section I.

rules on slavery. In short, a purpose-based sharia check creates a religiously-based boundary on state action, but it does not require the *legislation* of religious law. Speaking in modern constitutional terms, there is a significant difference between sharia-based review of state lawmaking and sharia-based enumerated powers for state lawmaking. Making sure that government action is "not contrary to sharia" is not the same thing as making sure the "government has *based* its actions on sharia." The latter limits the sources of government lawmaking, while the first puts an outer boundary on government action, regardless of its source. Both of these seek to ensure that siyasa power complies with sharia (and both are found in present-day constitutions in Muslim countries[58]), but one creates the potential for a theocratic state and the other does not. The constitutional theory presented here seeks to articulate a non-theocratic framework for Islamic constitutionalism and thus designates sharia as a boundary around state lawmaking, but does *not* designate sharia as its source.[59]

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.

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[58] Unfortunately, along with "contrary to sharia" checks on state lawmaking power, many modern Muslim constitutions also include "sharia as a source of legislation" clauses. Some examples include Article 2 of the Egyptian Constitution ("The principles of the Sharia are the main source of legislation in the Arab Republic of Egypt."), Article 2 of the Constitution of Kuwait ("The religion of the state is Islam and the Islamic Sharia is a principal source of legislation."), Article 21 of the Constitution of Bahrain ("The Islamic shari'a is a principle source for legislation?"). As emphasized above, requiring sharia to be a (or the) source of state legislation is antithetical to the constitutional framework proposed here.

[59] It is worth noting that the selection of a sharia check standard is itself a matter of siyasa, to be decided based on social determination of what would best serve the public good. The present model uses the third, "purposes of sharia" standard of review, for the reasons set forth above, but there is no "correct" choice for how to define "contrary to sharia." The only basis upon which a society can decide which sharia review standard to constitutionalize is which standard it believes best serves the public good. This will involve evaluating the particular political and social affinities of the population, and what sort of central *siyasa* government they wish to have. Likewise, the particular mechanism created to implement this sharia check is also a matter of siyasa choice for each country. Given the standard of review posed here, it would probably serve the society well to (whether a Sharia Review Board, the Supreme Court, a constitutional court), include both both fuqaha as well as specialists in relevant law and society issues (such as economics, techonology, science, etc.), but the particular institutional mechanism (a Sharia Review Board, the Supreme Court, a constitutional court, or something else) would depend on the political and institutional particulars of each country.

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 the present proposal, that question depends on what the public decides is in the public good. 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 to strike it down. In the context of Islamic constitutionalism, this forces public debate about state lawmaking into what it should be – not over whether or not Islam requires it, but whether or not it is a good idea.

Moreover, it should also be noted that in selecting its sharia check standard of review, a society is not choosing between conservative or liberal substantive lawmaking, but whether it wants a state with far-reaching or limited siyasa power. As noted above, an "any fiqh"-based sharia check will create a very limited siyasa state because its lawmaking power will be very narrow, operating only in the small realm of areas not addressed by fiqh laws. On the other hand, a sharia check defined by the unanimous fiqh consensus or the mandatory and prohibited fiqh doctrine, creates the potential for an extremely far-reaching siyasa power. A purpose-based sharia check stands somewhere in the middle, allowing siyasa government action in subject areas where fiqh has already tread, but limiting it according to the greater objectives of sharia.

IV. CONCLUSION

This paper describes an Islamic constitutional structure built on legal pluralism. More aggressively, it argues that any sharia-based constitutionalism must necessarily be pluralistic — with separate legal realms for fiqh and siyasa — because of the inherent 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. To be sure, there is a strong critique of legal monism in the established and growing scholarship of legal pluralism, but Islamic legal history and the idea of sharia as a rule of law has not been noticed by the legal pluralist scholars undertaking that critique. Muslims and sharia do appear (quite frequently, in fact) in the literature of legal pluralism, but as an example of the many customary and tribal laws that pre-existed colonial rule. The genre of Islamic legal theory itself is not (yet) treated as an equal partner in the world of comparative legal theory, capable of offering sophisticated contributions to inform and inspire legal pluralist theory in its next evolution. In short, few contemporary legal scholars look at Muslim history as one of the earliest real-life examples of legal pluralism. This paper should prompt the following question: when legal pluralists theorize about what a constitution might look like if it *started* with the idea of legal pluralism as its founding principle (rather than as an add-on critique of existing legal monism), why do they not look at Islamic history for inspiration?

The omission is not completely the fault of legal pluralists. There is little in contemporary Muslim political science and practice to draw their attention in this direction. Unfortunately, the Islamic state paradigm advocated by modern political Islamism has adopted the legal monism of the nation-state wholesale, with very little internal Muslim critique. Sharia in the minds of Muslims has been reduced to the

religious legal rules of fiqh, and it is expected that an "Islamic state" will be directed to follow these rules in some way (as a source of legislation and/or as a check on their state lawmaking power). Few are theorizing about sharia as an Islamic rule of law that encompasses both fiqh and siyasa realms of legal authority, so it is no wonder that scholars of legal pluralism have been unable to see the larger potential for constitutionalized legal pluralism presented by sharia as an Islamic rule of law.

This paper seeks to help to broaden the spectrum of thinking about sharia to include its constitutional potential. It suggests a new Islamic constitutional model for Muslim-majority countries, showing why 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 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 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 framework harnesses the spirit of that Muslim past, reframed for modern 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 sharia principles. For secularists, it

requires state lawmaking to be justified on something other 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 the public good (maslaha). This provides a way for an Islamic 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 will be a paradigm shift, but one that is for the better, and also solidly grounded in classical Islamic principles. To sharia-minded Muslims who want an Islamic government: this is not your father's Islamic state. But it could be yours.