ISLAMIC REFORM AND THE CHALLENGE OF NOMOCRACY: THE CONSTITUTIONAL THEORIES OF FAZLUR RAHMAN AND JAVED AHMAD GHAMIDI

A Dissertation

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ABSTRACT

This study describes and evaluates the constitutional theory of two influential scholars of Islamic thought from contemporary Pakistan who offer alternatives to the *sharia* state that incorporate representative self-government and individual rights: Fazlur Rahman and Javed Ahmad Ghamidi. Rahman promoted what I call an *ethicist* approach to Islamic reform, focused on discerning the underlying principles of the core sources of the Islam. Ghamidi promoted a *scripturalist* approach, focused on careful exegesis of the Qur'an. Each of these approaches contrasts with a third approach, which I refer to as *juristic constitutionalism*, which emphasizes the authority of religious scholars as guardians of Islamic law, independent of the state. This study argues that the institutional implications of the ethicist approach, favored among Western advocates of Islamic reform, tends to undermine the nomocratic principle of a law above the state, a principle widely thought essential to Islamic society and political thought, and that some scholars consider a contributor to the rule of law dimension of liberal constitutionalism. On the other hand, traditional jurisprudence does not support equal rights, notably in the area of family law and with regard to freedom of religion and free expression. Herein lies the paradox of divine law and liberal constitutionalism. Not only the content, but also the institutional context, must be of concern to the advocate of liberal constitutionalism in societies where belief in divine law is prevalent. Even though Rahman found problematic the notion of "reform through tradition," an approach that incorporates an authoritative role for traditional jurists in determining the content of Islamic law, it is one that merits serious consideration.

DEDICATION

In memory of John Maple, my undergraduate professor and advisor at Oklahoma Christian University.

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I adopt a critical posture toward Islamic modernist and reformist ideas in the dissertation. I am, or hope to be, a friendly critic, supportive of efforts at intellectual and political reform, while noting what I see as theoretical and practical problems with some such efforts. I would like to acknowledge and honor the personal courage and sacrifice many reformist thinkers have exhibited. That includes Mr. Ghamidi, who has faced personal threats and loss as a result of his intellectual work. Dr. Rahman also faced significant opposition, leading him to spend most of his career in the U.S. The government of Sudan executed Mahmoud Mohammed Taha, the mentor of Abdullah an-Na'im, as an apostate. Nasr Abu Zayd left Egypt after a court likewise declared him apostate based on his interpretation of the Qur'an. I also acknowledge the work of two exponents of liberal Islam who have furthered my interest in the topic: Ed Husain and Mustafa Akyol.

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CHAPTER II

INTRODUCTION

Ideas, institutions, and actors associated with Islam are of great concern to scholars, government officials, and citizens in the United States and around the world. Even as some scholars have challenged the supposedly essentialist perspective of Bernard Lewis and Samuel Huntington on the nature of Islamic civilization as uniquely resistant to the distinction between religion and politics (Esposito and Voll 1996; Hefner 2000; Bayat 2007), the persistence of authoritarianism in Muslim-majority countries (Fish 2002; Kuru 2019) and the presence of Islamist movements continually attract scholars and the public to seek a better understanding of Islamic thought and practice around the world. Muslim and non-Muslim scholars have noted that prominent theories of Islamic constitutionalism and the Islamic State, the underlying interpretations of Islam on which they rest, and the practice of constitutionalism in many Muslim countries all diverge considerably from core elements of liberal constitutionalism including rule of law, civic equality, and religious toleration and liberty.

Some Muslim leaders and intellectuals have called for fundamental reconsideration of core tenets of Islam and its relationship to government and politics. In response to the mass murder of 51 worshippers at two mosques in Christchurch, New Zealand in March 2019, Yaha Cholil Staquf, the leader of the world's largest Muslim organization, argued that this attack and others like it are responses to Islamic acts of terror, designed to perpetuate a cycle of violence. He urged Muslims to reconsider

elements of their own teaching that encourage this cycle of violence, suggesting a need for thoroughgoing intellectual reform:

> Among Muslims and non-Muslims, there is an urgent need to address those obsolete and problematic elements of Islamic orthodoxy that underlie the Islamist worldview, fuelling violence on both sides. The world's largest Muslim organisation, Indonesia's Nahdlatul Ulama, of which I am General Secretary, has begun to do exactly that.
>
> The truth, we recognise, is that jihadist doctrine, goals and strategy can be traced to specific tenets of orthodox, authoritative Islam and its historic practice. This includes those portions of Shariah that promote Islamic supremacy, encourage enmity towards non-Muslims and require the establishment of a caliphate. It is these elements – still taught by most Sunni and Shiite institutions – that constitute a summons to perpetual conflict. (Staquf 2019)[1]

In a report for the United States Institute of Peace, political scientist Abdeslam M. Maghraoui (2006, 2) wrote in support of a nascent "Islamic renewal":

> Today… the major battle is over the soul of Islam and will require substantive, normative, and institutional reforms. The outcome of this religious and ideological contest will be determined by the balance of power and influence between radical Islamists, bent on imposing a puritanical form of Islam through intimidation and violence, and moderate Muslims who aim to renew Islam from within.

[1] See also Marshall (2019).

Further, some scholars and commentators have suggested that the development of an Islamic alternative to the Islamist and jihadist worldviews is an essential prerequisite for increasing liberty and security amidst the spread and revival of Islam worldwide (Hefner 2005; Esposito & Mogahed 2007; An-Na'im 2008; Akyol 2011) and should be a central focus of U.S. policy (Maghraoui 2006; Ali 2017).

Government leaders around the world have been similarly interested in the idea of Islamic reform. In a move that provoked resistance from traditional scholars associated with Al-Azhar, a prominent institution of Islamic study in the Sunni world, President Abdel Fattah el-Sisi of Egypt (quoted in Ford, Abdelaziz, & Lee 2015) called for a "religious revolution," a reform of Islamic thought to counter extremist tendencies among Muslims. President Emmanuel Macron of France (quoted in Momtaz 2020) has argued for the need to promote an "Islam of Enlightenment" to combat what he describes as separatist tendencies among French Muslims.

In contrast to Islamists' and many traditional scholars' advocacy of states instituting a comprehensive form of *sharia*, hereafter the "*sharia* state" (Ahmad 2009, 65; Tibi 2013), both Sunni and Shi'a intellectuals in a variety of regional settings have argued that Islamic premises are compatible with or even require institutions of state typically associated with liberal constitutionalism, including participatory legislative bodies and a broad range of human rights (Sachedina 1999; 2001; Abou El Fadl 2003b; El-Affendi 1991/2008; Akyol 2011; Quraishi-Landes 2015; Kamali 2012; Fadel 2018). One group of such theorists, whom we might call proponents of "modernist" or "neo-modernist" (Bektovich 2016) Islam, differs from both secularists and the Islamists and

traditional *ulama*.[2] I follow Zaman's (2018, 3) definition of Islamic modernism: "a complex of religious, intellectual, and political initiatives aimed at adapting Islam—its beliefs, practices, laws, and institutions—to the challenges of life in the modern world." Modernists interpret Islam and its political implications in a manner supporting institutions associated with democratic self-government and individual rights.[3]

Lewis (1993) himself, writing in *The Atlantic* and considering the prospects for liberal democracy in the Islamic world, pointed to "older elements in the Islamic tradition… that are not hostile to democracy and that, in favorable circumstances, could even help in its development." Specifically, he referred to an elective principle, the notion of a contractual relationship between rulers and ruled (*bay'a*), the principle of consultative government (*shura*), the acceptance of pluralism, and the notion of mutual obligations if not human rights as examples of such "older elements" of the Islamic tradition that could support liberal institutions in favorable circumstances. The modernist tradition has roots in the nineteenth century reformist movements in Egypt and the Ottoman Empire, when Muslim political leaders came into close contact with European powers via colonial enterprises and trade relationships.

The goal of this study is to explicate the political theology and constitutional theory of Islamic modernism and the arguments some of its major proponents have

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[2] '*Ulama*' (sing., *alim*) refers to "traditionally educated Muslim scholars" responsible for interpreting Islamic law (Zaman 2011, 209).
[3] The focus of this research is on arguments that are explicitly Islamic in the sense that they begin from the premise of revealed "ethical monotheism" at the core of Islamic thought (van Baaren 2018). I take affirmation of the confession, "There is no God but God. Muhammad is the Messenger of God," to be the core premise of Islamic belief, thought, and practice (Ruthven & Nanji 2004, 14).

advanced for liberal institutions in an Islamic polity (Zaman 2018).[4] Philpott (2007, 507) defines political theology as "the set of ideas that a religious body holds about legitimate political authority." According to Vile (1967, 9), constitutional theory involves both the normative and institutional elements of political systems.[5]

This study describes and evaluates the constitutional theory of two influential scholars of Islamic thought from contemporary Pakistan who offer alternatives to the *sharia* state that incorporate representative self-government and individual rights. I pose three guiding questions:

1) How do Muslim theorists argue for liberal institutions?[6]

2) What are the constitutional implications of their arguments?

3) What are the strengths and weaknesses of their arguments?

I focus on a fundamental concern of constitutional order, at issue in the intra-Islamic debate on the nature of the Islamic State and its institutions: the question of how law is to be determined in an Islamic polity. To ground this theoretical analysis in actual political experience, I treat thinkers who advanced modernist arguments in the particular context of the constitutional and political history of Pakistan as primary interlocutors.

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[4] Other scholars have used the terminology of "moderate" or "liberal" Islam (Muslih & Browers 2009; Kurzman 1998). Bayat (1996, 2007a) and Roy (2004) have suggested the term "post-Islamist" to describe Islamic movements since the 1990s advocating liberal institutions. Amin (2012) applies this language to Javed Ahmad Ghamidi, whom I treat as an interlocutor in this research.

[5] "It is… a type of political theory that is essentially empirical, yet which overtly recognizes the importance of certain values and of the means by which they can be safeguarded" (Vile 1967, 9). Lane (1996/2011, 1) likewise suggests that "constitutional theory encompasses both the IS and the OUGHT, offering tools to describe and [analyze] the existing constitutions of the world as well as to discuss what a good or just constitution amounts to in terms of, for instance, justice."

[6] What interpretive strategies do Muslim theorists employ to support liberal institutions based on Islamic premises and sources? To which authoritative texts and traditions do they appeal? How do they respond to their intellectual opponents who argue for a *sharia*-enforcing Islamic State as the ideal for Muslims?

Pakistan is home to the third-largest national Muslim population in the world (Pew Research Center 2012). As Zaman (2018, 1) notes, "All the key facets of modern Islam worldwide were well represented in colonial India and they have continued to be so in Pakistan."[7] When Pakistan separated from India in 1947 and its elites faced the challenge of establishing a constitution, Pakistan became the center of what Arjomand (2007, 119) calls the "ideological" stage of Islamic constitutionalism. It was in this context that the Jamaat-e-Islami, which Abul A'la Maududi (1903-1979) established in 1941 and which has become a major player in South Asian politics, advocated the complete reformation of society on Islamic terms and the formation of a *sharia* state.

Competing visions of the Islamic State generated amidst constitutional and legal disputes in Pakistan exhibit parallels with other Muslim-majority societies facing similar situations in the post-colonial period. At several points in Pakistan's history, rulers and elites have sought to promote an alternative, liberal theory of the Islamic State (Qasmi 2010; Zaman 2018). Two scholars who aided such rulers and elites in this effort will serve as key interlocutors throughout the dissertation: Fazlur Rahman (1919-1988) and Javed Ahmed Ghamidi (b. 1951).[8] During and after the presidency of General Mohammed Ayub Khan (r. 1958-1969), Rahman advanced a conception of Islam and

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[7] Pakistan is thoroughly Islamic in terms of its social institutions and intellectual climate, and that Pakistani society includes a diversity of Islamic viewpoints and traditions including "Sufism; traditionalist scholars, the 'ulama, and their institutions of learning, the madrasas; Islamism; and Islamic modernism" (Zaman 2018, 1).

[8] There is debate about how to situate Ghamidi vis-à-vis Islamic modernism. Zaman (2011, 215) describes him as at most an "uncertain member" of the "fragmented" modernist camp. Masud (2007) argues he is not an Islamic modernist because, while "he comes to conclusions which are similar to those of Islamic modernists… he never goes out of the traditional framework." Amin (2012) counters that he can be considered a modernist because of his positive attitude toward Western liberal democracy.

methodology of Qur'anic interpretation characterized by what he termed "neo-modernism" (Rahman, quoted in Bektovic 2016, 160). As head of the government-sponsored Central Institute of Islamic Research from 1963-1968, he engaged in debates about the character of the Islamic State, responding directly to Maududi's arguments (Rahman 1958; 1967). In his later academic career based at the University of Chicago, Rahman taught the prominent Indonesian scholars and activists Nurcholish Majdid (1939-2005) and Ahmad Syaffi Maari (b. 1935), who built on his neo-modernist paradigm (Burhani 2013; Bektovich 2016). Mustafa Ceric, former Grand Mufti of Bosnia-Herzegovina and current president of the World Bosniak Congress, also studied under Rahman at the University of Chicago (Esposito 2010, 108). Contemporary theorists continue to cite Rahman's work and advance his methodological innovations as they make arguments for liberal institutions (An-Na'im 1990; Abou El Fadl 2001; Saeed 2005). Tibi (2013, 32) includes Rahman "among the basic authorities of enlightened Muslim thought," following the Moroccan scholar Abdou Filali-Ansary (2003).

Pakistani journalist and public policy analyst Raza Rumi Ahmad (2015) has called Ghamidi "Pakistan's foremost progressive scholar of Islam." Ghamidi is a popular religious scholar and media figure, and a former member of Jamaat-e-Islami and associate of Maududi. He gained prominence as a religious scholar and supporter of President Pervez Musharraf's "Enlightened Moderation" (Zaman 2018, 86) initiative, serving on an advisory body called the Council of Islamic Ideology for two years before leaving Pakistan in 2010 after a failed attempt on his life (Walsh 2011). He also founded the Al-Mawrid Institute of Islamic Sciences in Lahore, with branches in several other

countries and the Ghamidi Center of Islamic Learning in Carrolton, Texas to advance his ideas.[9] Ghamidi's interpretive approach differs from Rahman's, but he likewise has developed arguments against Maududi and proponents of the *sharia* state (Iftikhar 2004; Amin 2012). He argues that, though an Islamic State is desirable, Muslims are under no obligation to establish it; further, Muslims should work to establish a state he describes as democratic (Iftikhar 2004; Ghamidi 2014a; Baksh 2017). Ghamidi's efforts highlight the degree to which intra-Islamic debates about government institutions that Muslims should support also entail debates about the teachings and the very essence of Islam.

Focusing on Rahman and Ghamidi allows for consideration of two other facts relevant to the theory and practice of Islamic modernism: the "authoritarian streak" Zaman (2014: 5) noted and the resistance it has provoked from traditional religious authorities in Muslim-majority countries. Regarding the authoritarian streak, political leaders in several Muslim-majority countries have used state-funded educational and *waqf* institutions and regulation of religious practice to promote moderate or liberal forms of Islam, counter Islamic extremism, and attempt to maintain legitimacy (Brown 2017; Sheline 2017). Authoritarian leaders have often championed modernist political theology and constitutional theory to support modernization policies, including changes in family and criminal law, and to bolster their legitimacy; this relationship has contributed to the difficult position of modernists in Muslim-majority contexts such as Pakistan and raises challenging normative questions for constitutional and political

[9] More information is available at the website for Al-Mawrid Institute (http://www.al-mawrid.org/) and for the Ghamidi Center (https://www.ghamidi.org/).

theory in socially conservative societies. Like other scholars and activists of intellectual reform, Rahman and Ghamidi each faced resistance from established religious authorities, each eventually leaving Pakistan for the United States.

As Khadduri (1947: 330), points out and a number of contemporary writers echo, the system of government envisioned in Islam is a "divine nomocracy," in which the divine law reigns supreme, as opposed to a theocracy in which God rules directly (Khadduri 1984; Akyol 2011; Kamali 2012).[10] While the notion of a nomocracy might be inimical to democratic self-government and individual rights, and some theorists treat the nomocratic principle as a hurdle for Muslim advocates of such institutions to overcome, the idea of nomocracy might also contribute to the notion of limited government and rule of law. Contemporary expressions of Islamic political thought are distinguishable according to how they propose to institutionalize the nomocratic principle that divine law ought to limit human legislation in the context of a modern, constitutional state.

In Chapter 1, I first propose a working definition of liberal constitutionalism emphasizing the concepts of rule of law, self-government, and individual rights. I survey the most relevant literature on Islamic modernists' arguments for self-government and individual rights, arguing that they appear in three modes: an 'ethicist' mode, a 'scripturalist' mode, and 'juristic constitutionalism.' This chapter also introduces the

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[10] "It is therefore the Law, embodying the principles of Divine authority, which indeed rules and therefore the state becomes not, strictly speaking, a theocracy, but a form of nomocracy. The Islamic State, whose constitution and source of authority is a Divine Law, might be called a Divine nomocracy" (Khadduri 1984, 4).

argument that the ethicist approach, championed among Western scholars, participates in the common assumption that theological liberalism is a necessary precondition for liberal constitutionalism. In Chapters 2 and 3, I draw from the works of Rahman and Ghamidi to explicate their political theologies and constitutional theories. I focus on Rahman's writings from the 1960s, during his association with a state effort to promote a liberal, progressive version of Islam that would serve state purposes. I argue that his theory is deeply shaped by the imperative of state building and development and that its institutional implications fundamentally undermine the position of traditional religious scholars. Rahman fails to institutionalize the nomocratic principle since his theory makes the state the authoritative interpreter of divine law. In explaining Ghamidi's theory of Muslim democracy, I draw from his mature writings and personal interviews, arguing that his theory is closer to solving the challenge of nomocracy because it preserves the notion of a divine law that is independent of state law.

In Chapter 4, I contrast the ethicist approach to Islamic reform with juristic constitutionalism. I argue that, even though the same thinkers sometimes draw from both lines of thought, they have contradictory institutional implications. I illustrate these differing implications as applied in the area of family law. This chapter also raises issues relevant to the more general relationship between the idea of divine law and liberal constitutionalism, revealing a paradoxical relationship between the two. Finally, I conclude with some policy-relevant recommendations and suggestions for future research.

Rahman and Ghamidi each offer solutions to this problem that are outside the mainstream in Islamic political thought. Rahman does not solve the problem of institutionalizing nomocracy because he identifies state law fully with divine law. Ghamidi maintains the notion of a divine law that constraints state power, but he proposes to institutionalize it in a manner that is not as straightforward as other approaches in contemporary Islamic political thought.

This study argues that the institutional implications of a favored approach among Western advocates of Islamic reform, the ethicist approach, tends to undermine the nomocratic principle, a principle widely thought essential to Islamic society and political thought, and that some scholars consider a contributor to the rule of law dimension of liberal constitutionalism. On the other hand, traditional jurisprudence does not support equal individual rights, notably in the area of family law and with regard to freedom of religion and free expression. Herein lies the paradox of divine law and liberal constitutionalism, at least for the Abrahamic faiths. The institutional problem of building democratic, constitutional nomocracies in societies where jurists once served as authoritative guardians of divine law may be greater than the philosophical challenge of providing philosophical grounding for liberal constitutionalism.

CHAPTER III

MUSLIM ARGUMENTS FOR SELF-GOVERNMENT AND INDIVIDUAL RIGHTS

The persistence of authoritarianism in many Muslim-majority countries continues to attract scholars and analysts (Kuru 2019; Philpott 2019; Akyol 2020). Both Muslim and non-Muslim scholars have concluded that prominent theories of Islamic constitutionalism and the Islamic State, the underlying interpretations of Islam on which they are built, and the practice of constitutionalism in Muslim countries diverge considerably from core elements of liberal constitutionalism, notably with regard to the rule of law and human rights (Mayer 1991/2013; An-Na‘im 2008; Gouda 2013; Gutmann & Voight 2015; Kuru 2019). Kuru (2019, 169) points to the development of an "ulema-state alliance," between religious scholars and political rulers, the roots of which emerged in the eleventh century, as a contributor to authoritarian theory and practice. Texts, historical practices, and interpretive perspectives with some weight in Islamic contexts that could support constitutionalism and liberal institutions have attracted interest in this context, and an extensive body of research addresses the compatibility of Islamic traditions and interpretations with democracy, liberalism, and constitutionalism (Esposito & Voll 1996; March 2009; Kleidosty 2011). Examples of Muslim scholars who promote such interpretations include Asma Afsaruddin (2006, 2008, 2011, 2015), Azizah al-Hibri (1992), Khaled Abou El Fadl (2001, 2003, 2012), Mohamed Fadel (2018), Mohammad Hashim Kamali (2012), Abdullahi Ahmed An-Na‘im (1990, 2008), and Asifa Quraishi-Landes (2012, 2015). Popular author Mustafa Akyol (2011) has also

made important contributions in this vein. Several contemporary Muslim scholars draw from and build on the work of Fazlur Rahman to make this argument (An-Na‘im 1990; Abou El Fadl 2001; Saeed 2005).[11]

Drawn from primary and secondary literature on the subject, this chapter provides a review of arguments by contemporary Sunni Muslim scholars for interpretations of Islam that support key elements of liberal constitutionalism, focusing on self-government and individual rights. In addition to establishing the relevance of Rahman’s and Ghamidi’s ideas to our understanding of the political theology and constitutional theory of Islamic modernism, I make two claims about Islamic arguments for liberal institutions. The first claim is that a good deal of literature on Islamic liberalism and modernism treats theological liberalism as a prerequisite for liberal constitutionalism. Indeed, current opinion among scholars and commentators in the West suggests that the embrace of a relativistic version of religion, if not outright secularism, is a prerequisite for a robust form of political liberalism. Second, there are three major approaches contemporary Muslim theorists take to argue that Islamic principles support the liberal institutions of self-government and individual rights.

The dominant approach in Western academia is what I call an *ethicist* approach, relying on the claim that the primary sources of Islam, especially the Qur’an, contain an ethical message relevant for all time. That message is delivered, however, in a literary vehicle shaped by a particular time and place; the sources of Islamic teaching thus also

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[11] As Kamali (2012, 32) notes, Muslim and non-Muslim scholars advancing interpretations of Islam that are compatible with democracy often reference Pakistani scholars.

contain guidance applicable only to that time and place. Proper interpretation of the Qur'an requires extracting the universally valid core message from the contextually bound vehicle of delivery. Rahman is an exemplar and forerunner of the ethicist approach. The second major approach is what I will call a *scripturalist* approach, which focuses on careful exegesis of the Qur'an. Ghamidi is an exemplar of the scripturalist approach. Each of these approaches are somewhat in conflict with each other, and they also they also each conflict with yet another approach, *juristic constitutionalism*, which emphasizes the authority of religious scholars as guardians of Islamic law, independent of the state. The *ethicist* and *scripturalist* approaches tend to elevate the Qur'an and Sunnah (traditions of the prophet) above the pre-modern legal tradition as the key source of knowledge about the divine will. *Juristic constitutionalism* rests on that tradition itself.

An Historical Overview of Islamic Liberalism

A chapter in Kurzman's (2011) book *The Missing Martyrs*, "Liberal Islam versus Revolutionary Islam," provides an overview of Islamic liberal thought and its prevalence in the contemporary political landscape. Kurzman tells the story of liberal Islamic political thought—while acknowledging that many such thinkers reject the "liberal" label (Kurzman 2011, 95)—as an evolution from a scripturalist to an ethicist approach. Late Ottoman thinkers such as Khayr al-Din al-Tunisi (1820-1890) "proposed that liberal ideals were a divine mandate required by the sources of Islam, if properly understood" (Kurzman 2011, 101). As Kurzman (2011, 96) notes, al-Tunisi included

both political and personal liberty as components of the European system of government that had generated economic and military success.

After the abolition of the Ottoman Caliphate in 1924, when renewed debate about the political implications of Islam ensued, Egyptian jurist Ali ‘Abd al-Raziq (1888-1966) advanced a new approach, arguing that the Islamic sources are mostly silent about the best form of government. Islam is mainly a religious message and not a political one. He argued in the controversial book *Islam and the Foundations of Political Power* (1925) that, since Islam is a religious message, restoring the caliphate is not a duty for Muslims. There is no uniquely Islamic form of government; even Muhammad was not primarily a political leader but a prophet.

In another "interpretive leap," liberal Islamic thinkers emphasized the indeterminacy and fallibility of all human interpretation of divine guidance: "Instead of identifying particular subjects that the sacred sources left open to human devising, this new form of liberal Islam emphasized the inherently human and fallible nature of understanding *all* the sacred sources" (Kurzman 2011, 103). Thinkers such as Hassan Hanafi (b. 1935), Amina Wadud (b. 1952), and Abdullahi An-Na‘im (b. 1946) represent this approach, emphasizing diversity of interpretation in the Islamic legal tradition. Likewise, the Iranian thinker Abdolkarim Soroush (b. 1945) and some of his students have advocated this approach, which became relevant during the reformist regime of Muhammad Khatami, who served as president from 1997 to 2005.

Kurzman's work raises a few other important points. First, he argues that liberal Islamic parties and viewpoints have broad appeal in many Muslim countries. In

particular, “The dual ideals of *sharia* and democracy seem to be reconciled, for many Muslims, through a combination of political liberalism and cultural conservatism” (Kurzman 2011, 117). Kurzman cites polling data showing the popularity of both democratic governing procedures and support for conservative religious viewpoints in Muslim-majority nations—for example, that there is only one true interpretation of Islam and that good government involves implementing *Sharia*. Kurzman’s and Naqvi’s (2010) research also shows that liberal Islamic parties and secular parties tend to fair better than Islamist parties in elections in Muslim-majority nations, when elections occur.

However, Kurzman (2011, 118) also describes the resistance to liberal Islam. While he implies that this resistance is mainly from “Islamist opponents,” some examples he supplies refer to mainstream Islamic organizations. For example, he cites a 2005 *fatwa*, or legal opinion, that the Indonesian Council of Islamic Scholars, also called the Indonesian Ulama Council (MUI) released against “pluralist, secularist, and liberal religion” (cited in Kurzman 2011, 118). This body, instituted by the Suharto government in 1998, is the main representation of religious scholars in that country, not a fringe group of oppositionists.

Another example of resistance that Kurzman cites relates directly to the ethicist theological and hermeneutical approach many modernists rely on: the trial and eventual exile of the Egyptian scholar Nasr Hamid Abu Zayd (1943-2010) in 1995. Abu Zayd’s approach to the Qur’an emphasizing the necessity of interpretation and attention to the historical context of the divine message “prompted the fierce criticism of both the

religious establishment and Islamists," according to Bälz (1997, 135). Rahman resigned from his position as director of the government-instituted Institute of Islamic Research in 1966 due to opposition from Pakistani *ulama* to similar arguments in his book *Islam* (Zaman 2018, 74). The approaches to interpreting the core source of divine guidance in Islam that are central to some expressions of modernist political theology and constitutional theory are anathema to the religious establishment in many Muslim-majority countries.

The Theoretical Challenge for Muslim Advocates of Liberal Institutions

Central to the idea of "constitutionalism" is the goal of limiting government power by law.[12] Common definitions of liberalism or liberal constitutionalism typically add desiderata. Liberalism and liberal constitutionalism are complicated and much-discussed terms, but the notions of the rule of law, broad participation in legislation (self-government), and of protecting individual rights, often described as human rights, are essential components of these concepts. Each of these components are integral to common definitions of liberal constitutionalism, and some Islamic scholars consider them to be core points of divergence between the liberal and Islamic traditions.

Ginsburg, Huq, and Versteeg (2018: 239), describe "liberal constitutionalism" as a "style of constitutionalism" that "typically hinges on a written constitution that

[12] "The most ancient, the most persistent, and the most lasting of the essentials of true constitutionalism still remains what it has been almost from the beginning, the limitation of government by law" (McIlwain 1940/2005, 21). "The great theme of the advocates of constitutionalism… has been the frank acknowledgment of the role of government in society, with the determination to bring that government under control and to place limits on the exercise of its power" (Vile 1967, 1). "Today the idea of constitutionalism comprises a cluster of particular jurisprudential and sociological attributes, summed up as 'limited government under a higher law'" (Fellman 1973, 485).

includes an enumeration of individual rights, the existence of rights-based judicial review, a heightened threshold for constitutional amendment, a commitment to periodic democratic elections, and a commitment to the rule of law." Philpott (2019, 189) defines liberalism as "a constitutional regime marked by the rule of law, equal citizenship, an elected legislature, civil liberties, free markets, and… religious freedom." The additional desiderata might be grouped into the three categories of self-government, rule of law, and individual rights, though the definitions and precise institutional requirements of each are contested. Tadjdini (2019, 16) describes "equal liberty," defined as "acknowledgement of persons as equal with respect to having constitutional rights" as a core element of modern constitutionalism.[13] Abou El Fadl (2012, 36) adopts a definition of constitutionalism that, while distinct, is largely consistent with the definitions of liberal constitutionalism above: "A political system in which there are limits imposed on the powers of the government, an adherence to the rule of law, and the protection of fundamental individual rights." I propose grouping the desiderata of liberal constitutionalism into the three categories of the rule of law, self-government, and individual rights, though the definitions and precise institutional requirements of each are contested.

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[13] Burns (2019) points to the notion of "equal freedom" as the core of liberalism, and as connected to "rule of law": The most distinctive feature of liberal politics is the equal freedom of all citizens, which means first of all our equal subjection to the rule of law. This includes legal guarantees for private property and for the freedoms of speech, press, and religion. It includes the absence of a legal caste or class system, and hence the right of every citizen to a bare minimum of dignity or public honor. It includes due process for the accused, punishments corresponding to crimes, and (at least for Anglosphere liberals) trial by jury. He goes on to identify "self-government" through elected representatives as also connected to political freedom.

A significant challenge for Islamic theorists supporting liberal institutions, particularly institutions of self-government, is to reconcile a commitment to *sharia*, or divine law, as the guiding norm for an Islamic polity with a commitment to state-based, participatory procedures for establishing legislation. The sacred law, as scholars of Islam have observed, is central to Islamic identity (Schacht 1964; Weiss 1998/2006). Scholars like philosopher Roger Scruton (2002) and political scientist Shadi Hamid (2016) consider the connection between *sharia* as the divine law and the origin of Islam as a polity, not simply a religion, as distinctive of Islam and a contributor to the rise and popularity of Islamism. Abou El Fadl (2003a, 7) tackles the challenge directly:

> As far as Islam is concerned, democratic theory poses a formidable challenge. Put simply, if Muslim jurists considered law derived from a sovereign monarch to be inherently illegitimate and whimsical, what is the legitimacy of a system in which the law is derived from a sovereign, but where the sovereign is made up of the citizens of a Nation? The brunt of the challenge to Islam is: If God is the only sovereign and source of law in Islam, is it meaningful to speak of a democracy within Islam, or even of Islam within a democracy, and can an Islamic system of government ever be reconciled with democratic governance?

Abou El Fadl (2012, 38) notes that theorists in the pre-modern Sunni tradition of political theory treated institution of the *sharia* as the "quintessential characteristic of a legitimate Islamic government." The caliph was responsible for implementation of *sharia* and rule according to its dictates, while the jurists identified the content of that law. The related idea of divine sovereignty has become central to the theory of modern

scholar-activists in the mold of Maududi and the Egyptian Sayyid Qutb (1906-1966), commonly referred to as Islamists (Asfarruddin 2011; March 2013). The notion of institutionalizing divine sovereignty in the constitutional and legal structure of the state is the core of Islamist advocacy, as manifest in the activity of organizations like the Jamaat-e-Islami and the Muslim Brotherhood, for an Islamic State. They claim that, like the caliphs, the modern state should implement the clear requirements of *sharia*. The desirability and practicability of institutionalizing "divine sovereignty" in constitutional arrangements is central to the argument for the *sharia* state (Asfaruddin 2006, 161; 2011).[14]

The precise nature of the obstacle is important to highlight: it concerns not just the question of whether democratic procedures for legislation are legitimate, but of whether human lawmaking is acceptable in any form. As Zaman (2015, 390) writes:

> In influential formulations, twentieth-century Islamist ideologues like Sayyid Abul-A`la Mawdudi (d. 1979) of Pakistan and Sayyid Qutb (d. 1966) of Egypt have argued, for instance, that anything less than exclusive submission to God's law and all that it entails in religious and political terms is idolatry — the most heinous of sins in a monotheist's universe.

Zaman points out that Maududi's approach did allow for some human legislative activity, but in a very restricted and disciplined manner, and only in areas not explicitly covered in the Islamic sources.

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[14] "The greatest sticking point between most Islamists and modernist Muslims remains the concept of 'divine sovereignty' or 'divine governance,' termed *al-hakimiyya* in Arabic" (Afsaruddin 2006, 161).

In addition to the notion self-government, the idea of equal individual rights is central to liberal constitutionalism. Such rights can both limit the sphere of state activity and burden the state to secure or provide them for citizens. Three issues confront Islamic modernists in their attempt to root rights in the Islamic tradition: whether such rights can genuinely be rooted in Islamic sources, whether such rights would contradict Islamic teachings about non-Muslims and their place in an Islamic society, and the question of women's rights.

Abou El Fadl (2009, 113) argues that, "of all the moral challenges confronting Islam in the modern age, the problem of human rights is the most formidable." What is needed, he argues, is "a rethinking of the meaning and implications of divinity, and a reimagining of the nature of the relationship between God and creation" (Abou El Fadl 2009, 127). Just as he based his argument for constitutional democracy on the claim that justice is a central ethical imperative of the Qur'an and of the divine will, he proposes rooting an Islamic conception of human rights in the desideratum of justice:

> The Qur'anic celebration and sanctification of human diversity, in addition to the juristic incorporation of the notion of human diversity into a purposeful pursuit of justice, creates various possibilities for a human rights commitment in Islam. This discourse could be appropriated into a normative stance that considers justice to be a core value that a constitutional order is bound to protect. (Abou El Fadl 2009, 144)

Once again, Abou El Fadl insists that developing an Islamic basis for liberal institutions, including individual rights, is a matter of taking raw materials in the Islamic tradition

and adapting them to the task, not a matter of whether the tradition intrinsically or essentially supports such institutions.

Thinkers including Fadel (2018) are skeptical that Islam—or indeed other religious or philosophical traditions that promote a substantive conception of the good—can be reconciled with contemporary notions of human rights, which he identifies with "negative freedom" from external interference (Fadel 2018, 14). He argues that religious and philosophical systems, including Islam, with commitments to a particular conception of the good and of happiness can never be fully reconciled with human rights. We should note that this contrasts with the assessment of Mayer (1991/2013), for example, who argues that examples of Islamic constitutional theory that are inimical to international human rights law should not be taken to as representative of Islamic thought as such; rather, those expressions draw selectively from both Western and Islamic sources to serve political purposes.

Brown (2002, 128) points to an "emerging constitutionalist consensus" among Muslim scholars in the twentieth century, including thinkers like Maududi, that aim to establish states geared toward the substantive goals of Islam. Rutherford (2008) likewise describes what we might call moderate Islamist theories that bear similarity to the modernist positions, focusing on general principles that can be derived from the Islamic sources. Such theorists nevertheless remain committed to establishing *sharia* states. March (2019a) likewise describes a prominent theory of dual sovereignty, divine and popular, as a prominent attempt to establish religious nomocracy in the context of a constitutional democracy.

Meeting the Challenge: Ethicist, Scripturalist, and Juristic Approaches

The ethicist, scripturalist, and juristic constitutionalism approaches all are alternatives to this widespread theory of Islamic democracy. We will first turn to the ethicist approach.

The Ethicist Approach

A chapter of Esposito's (2010) *The Future of Islam* entitled "Where are the Muslim Reformers?" captures the key elements of the modernist approach to Islam and its implications for society and politics. Contemporary reformers follow a tradition of reform that many argue is rooted in the early period of Islam, and that especially relates to efforts to respond to European colonial domination in the nineteenth century. Now, as then, advocates of reform attempt to update interpretations of Islam so that it serves the needs of the current day. A core element of the Islamic modernist framework is "making the important distinction between unchanging, divinely revealed principles and values (*Sharia*) and historically conditioned human interpretations (*fiqh*), or man-made laws. These man-made laws must be able to respond to changing circumstances and new problems arising in modernity" (Esposito 2010, 92-93). As we will see, this ethicist hermeneutic underlies many scholars', including Rahman's, arguments for institutions of self-government and human rights. Two prominent figures Esposito associates with reform, the Indonesian scholar-activist Nurcholish Madjid (1939-2005) and Mustafa Cerić (b. 1952), former Grand Mufti of Bosnia-Herzegovina and current president of the World Bosniak Congress), who studied with Rahman at the University of Chicago. Islamic feminist scholar Amina Wadud (b. 1952), author of *Qur'an and Woman* (1999), also cites Rahman and applies his hermeneutic in her work.

Esposito (2010, 96) describes how modernist reformers tend to reject traditional interpretations and rulings based on the Islamic sources, instead advocating a return to the sources, especially the Qur'an, with the aim of producing "fresh interpretations of the Quran" that meet contemporary needs. Common arguments for religious freedom and democratic pluralism draw directly from Qur'anic verses that emphasize the spiritual nature of the Islamic message and the Qur'anic roots of religious freedom (Q. 3:85, 18:29), and democratic forms of governance. Wadud's advocacy for "gender jihad" (Esposito 2010, 122) is a good example of Rahman's (1982/2017, 5) "double movement" hermeneutic in action.[15] As Esposito (2010, 122) describes it,

> To get at 'the spirit of the Quran,' a reader must first understand the implications of the passage for the particular time and context in which it was first revealed and then derive universal principles from that meaning… Texts must also be interpreted within the context of the Quran's worldview and in light of overriding Quranic principles.

A particular method of interpretation and application of Islam and its social implications—the ethicist approach—underlies many modernist arguments for self-government and individual rights.

Afsaruddin's (2008; 2014; 2015) works provide descriptions and analyses of ethicist approaches to Qur'anic interpretation, *sharia*, and Islamic history. She also

[15] "The process of interpretation proposed here consists of a double movement, from the present situation to Qu'rānic times, then back to the present."

helpfully contrasts these views with those of the Islamists.[16] She positions Rahman's work as the "culmination" (Afsaruddin 2015, 20) of a tradition of reform beginning in the late nineteenth century with Jamal al-Din al-Afghani and Muhammad 'Abduh, "the founders of Islamic modernism" (Afsaruddin 2015, 16). Afsaruddin describes Rahman's work as a call for a "return to the Qur'anic text as a corrective to the legal and exegetical accretions" of the last several centuries and a new theology based on an interpretation that recognizes the underlying worldview of the Qur'an. That worldview, Rahman argued, had been "obfuscated by the rise of Sunni orthodoxy, especially in its Ash'ari form" (Afsaruddin 2015, 41). She also makes the case that Rahman's influence and approach remains relevant to contemporary issues including "Muslim re-engagement with the *Sharia* which entails… the development of a modern Qur'anic hermeneutics and hadith criticism, democracy and democratization, war and peace, and gendered identities, among others" (Afsaruddin 2015, 21). In particular, Rahman's argument for re-centering the Qur'an and a worldview derived from it in matters of law and ethics, is central to Islamic feminism—and indeed "subversive of parts of the classical tradition and legal status quo," emphasizing "foundational principles of equality, justice, and compassion" (Afsaruddin 2015, 41). As Afsaruddin (2015, 102-5) notes, Islamic feminist scholar Amina Wadud, author of *Qur'an and Woman* (1999), modeled a progressive reading of the Qur'an, which draws on Rahman's "double-movement" hermeneutical approach. Wadud co-founded Sisters of Islam, a Malaysia-based civil

[16] Afsaruddin (2015, 18) defines Islamists as "activist individuals and groups in various contemporary Muslim-majority societies whose primary wish is to govern and be governed politically only by Islamic principles, understood by them to be immutably enshrined in the Sharia or religious law."

society organization dedicated to "promoting an understanding of Islam that recognises the principles of justice, equality, freedom, and dignity within a democratic nation state."[17] El-Nagar and Tønnessen (2017) argue that progressive readings of the Qur'an, employing a modernist hermeneutic, have been crucial to successful family law reforms in several Muslim-majority nations.

Abou El Fadl (2003a) makes a negative argument against the idea of institutionalizing divine sovereignty based on the practical point that, in reality, human beings always determine legislation, or at least identity the content of divine law. Institutionalizing divine sovereignty and God's law means institutionalizing a fallible human being's interpretation of the law. Abou El Fadl (2003, 10) also presents a positive an argument that "constitutional democracy" is "the system most capable of promoting the ethical and moral imperatives of Islam" that expresses ethicist reasoning. To advance his argument for a conception of Islam consistent with constitutionalism and constitutional democracy, Abou El Fadl (2003a, 9) argues that there is not a single form of Islamic government. Instead, Islamic sources suggest a set of ethical principles to which governments must adhere.[18] The next step is to argue that these principles are consistent with or require liberal institutions.[19] For example, Abou El Fadl (2001, 27; 2012, 42) emphasizes "justice" as the essential ethical imperative of the Qur'an. He argues that the "juristic discourse" of pre-modern Islamic thought "offers formidable

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[17] See the website: https://www.sistersinislam.org.my/.
[18] Other scholars and writers supporting the modernist approach also make this move (Kamali 2012: 33; Afsaruddin 2008: 186; Akyol 2011: 250).
[19] See also Kamali (2012: 31-32).

normative possibilities for democratic thought in modern Islam" (Abou El Fadl 2003a, 39). He is more circumspect in a restatement of the argument but maintains that, "this discourse could be appropriated into a notion of delegated powers in which the ruler is entrusted to serve the core value of justice in light of systematic principles that promote the right of assembly and cooperation in order to enhance the fulfillment of this core value" (Abou El Fadl 2012, 43). This form of argument is quite in keeping with Rahman's approach to Qur'anic interpretation.

Scholars such as Sachedina (2000; 2001; 2009) and Saeed (2006; 2011) root arguments for individual rights, with a focus on acceptance of pluralism and religious liberty, in a Qur'anic anthropology. For Sachedina (2000, 1088), this means jettisoning traditional interpretations of *sharia* that undermined this deeper ethical vision: "Buried under the traditional interpretations of Islamic revelation, there lies the Koranic vision of individual dignity, personal liberty, and freedom from arbitrary coercion." Other scholars promoting religious freedom likewise emphasize the Qur'an over the Sunnah and the juristic tradition (Afsaruddin 2008). Afsaruddin (2008) and Johnston (2007) describe another strategy of promoting an Islam-rooted conception of human rights based on the notion of the *maqasid al-sharia*, the purposes or objectives of *Sharia*. The key purpose is *maslaha*, or public benefit. Muhammad Khalid Masud (b. 1939), a prominent Pakistani legal theorist and Islamic modernist, has championed this notion (Zaman 2018).

The Scripturalist Approach

Turning to the scripturalist approach, Ghamidi (2014) founds his argument that "the basis of the Islamic system of governance is democracy" on a more straightforward reference to the Qur'an. He appeals to the concept of *shura* in Qur'an 42:38, mentioning those, "whose affairs are settled by mutual consultation."[20] *Shura* is the main concept scholars employ to argue that self-government and participation is essential to Islamic polity.[21]

Binder (1988) is critical of 'Abd al-Raziq's argument, which provoked great controversy when he published the book. Binder says the problem is that the argument is essentially negative; it is based on what the Qur'an does not say, rather than on positive injunctions of the Islamic sources. The negative reaction to 'Abd al-Raziq's project exposed the "scriptural limits beyond which any liberal doctrine cannot go" (Binder 1988, 22). A firm Islamic liberalism requires a more solid basis in the Islamic texts and sources:

> 'Abd al-Rziq's failure defines the need for an Islamic liberalism which accommodates the traditional scripturalist conception of Islamic government, but which adds an interpretive framework, the function of which is to link liberal political practices to an acceptably authentic hermeneutic of the Islamic tradition. (Binder 1988, 22)

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[20] The quotation from the Qur'an is from the translation by Ali (1984/1993).

[21] Scholars often also point to specific concepts from the Qur'an and the early history of Islamic government that suggest a participatory model of government. The main concepts are consultation (*shura*), allegiance (*bay'a*), and consensus (*ijma'*) (Asfaruddin 2008: 169). We should note that Abou El Fadl (2003: 61) refers to appeals to such concepts as "vacuous approaches," arguing that in many cases their historical usage does not comport with the modernists' spin (Abou El Fadl 2012: 44-50).

Binder contrasts 'Abd al-Raziq's argument for secularization—separation of religion and the organization of government—with other Islamic thinkers who argue for an Islamic basis for democracy. For such thinkers, like Ghamidi, Islam does indeed contain a political element, suggesting liberal as opposed to illiberal institutions. While the "interpretive leap" Kurzman narrates may be occurring among Muslim scholars based in the West, Zaman (2011, 215) suggests that divergences between the thought of Rahman and Ghamidi show the opposite trend may be occurring among modernists in Pakistan, in a sort of reversion from the ethicist to the scripturalist approach.[22]

Juristic Constitutionalism

Yet another approach is what I will call juristic constitutionalism, emphasizing the traditional role of religious scholars (*ulama*) as purveyors and guardians of the divine law, independent of the state. As Esposito (2010) notes, some scholars have championed a revitalized version of the classical model of Islamic law as an alternative to the state-based, Islamist vision of the Islamic State. For example, English scholar Timothy Winter (b. 1960) argues against a rigid model of the Islamic state, but he does so by relying on the Islamic legal tradition. Esposito (2010, 107) says

> Modern fundamentalism, Winter insists, has diminished or eliminated the traditional institutional separation between rulers and religious men. While historically the sultan or caliph claimed religious legitimacy in Islamic empires

[22] "[Ghamidi's] work also illustrates, perhaps, the considerable distance Pakistani modernism has traveled in a conservative direction since the days of intellectuals like Fazlur Rahman."

> and sultanates, the ruler did not legislate or have any control over religion. And religious scholars have no formal control over the sultan.

While Winter joins modernists in opposing theocracy, his arguments rely on the Islamic legal tradition; his approach conflicts with other modernists', particularly in matters of women's rights and individual rights more generally. As I will argue in Chapter 4, some other jurists rely on reasoning based on juristic constitutionalism in addition to the ethicist approach, even though these approaches conflict with each other in important ways.

Scholars of Islamic law including Hallaq (2004; 2005; 2009; 2013; 2015), Layish (1978; 2004), and Feldman (2008; 2008a) have advanced the argument that the system of government in classical Islam, roughly from the seventh to the nineteenth century, constituted a form of the rule of law. *Sharia* was a jurists' law. The jurists operated independently of the governing authorities, holding them accountable for upholding *sharia* (Weiss 1998/2006). As Khadduri (1947, 330), points out and a number of contemporary writers echo, the system of government Islam envisions is a nomocracy, as opposed to a theocracy (Khadduri 1984; Akyol 2011; Kamali 2012).

The crucial point is that the state largely did not make law (Hallaq 2004; 2015; Akyol 2011). Rather, the jurists, considered the legitimate interpreters of the law, served in theory—and at least to some extent in practice—as a check on the state's executive power. March (2019) provides a slight corrective to this claim, noting that pre-modern Islamic states in fact exercised legislative power in a realm of the public good for which specific *sharia*-based mandates were unavailable. The transition to the modern state

represents “the collapse of traditional legal and political dualism into monism” (March 2019, 561). The transition from classical *sharia* governance to the monist system of state-based legislation, both as a result of internal reforms in the late Ottoman Empire and of colonial imposition, fundamentally transformed the system and brought about new points of conflict regarding legitimacy and authority in the Muslim world.

Layish (1978) points out that Islamic modernists played a key role in this transition. In arguing for the prerogative of state authorities to promulgate legislation, modernists including Rahman arguably undermined the core element of the Islamic version of the rule of law: the independent prerogative of jurists to determine the law in an Islamic polity. Further, state elites used modernist interpretations and arguments to advance goals such as the liberation of women that provoked strong resistance and reaction from both traditional scholars and Islamists. Zaman (2011; 2014; 2018) argues that Islamic modernism, particularly as articulated and pursued by Rahman during the Ayub Khan administration, contains a heavy element of statism. Binder (1988, 156-57) likewise recognizes the statist element of the modernist theory and project, raising the concern that modernist arguments could in fact support an illiberal regime, concentrating power in the hands of state leaders, empowered to enact legislation deemed in the public interest. Longo (2019), who provides a useful review of relevant literature on Islamic constitutionalism, argues that it must incorporate a renewed role for the jurists in order to truly be Islamic in nature. Ghamidi is also said to champion a return of the jurists to an

independent status, not as legislators but as critics above politics (Mufti 2007). The role of the jurists in the modern state is a central question of Islamic constitutionalism.[23]

Rahman and Ghamidi

One way in which this work will advance the literature is to flesh out the constitutional theories of Rahman and Ghamidi in a systematic way. In doing so, I will build on prior work of several recent scholars. Rahman and Ghamidi each feature prominently in Zaman's historical (2018) and theoretical (2014; 2015) analyses of modernist political thought and practice in contemporary Pakistan. Zaman (2018) highlights the early debates in Pakistan over the constitution, family law, and criminal law, arguing that the modernists held a good deal of sway over the outcomes, despite heavy opposition from some *ulama* and Islamists. He also points out that some *ulama* exhibit modernist tendencies. Nevertheless, as noted above, he describes a shift from Rahman's ethicist to Ghamidi's scripturalist approach, which, while perhaps less statist and more in keeping with the approach of traditional legal establishment, has also provoked negative reactions from such elites.

Other scholars have compared and contrasted both Rahman's and Ghamidi's thought with that of Maududi. O'Sullivan (1998) has provided a general introduction, along with a comparison and contrast of Sayyid Qutb's (1906-1966), Maududi's, and Rahman's thought with a focus on Qur'anic interpretation, social activism, and

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[23] The idea of judicial independence is often thought central to liberal constitutionalism. Hayek (1973) also makes the interesting argument that systems of judge-made law, for reasons related to the nature of rulemaking, have tended to foster the idea of individual liberty. Makdisi (1998) has also compared the pre-modern system of *sharia* law to the English common law, arguing that some of its characteristic institutions originate in Islamic law.

education. Berry (2003) and Armajani (2015) likewise compares and contrasts Rahman's and Maududi's thought with a focus on their approaches to democracy. Berry's (2003) treatment is fairly in-depth and introduces key concerns about the relationship between theology, hermeneutics, and political thought that will be central to this dissertation. Armajani (2015) notes Rahman's argument that equality, justice and consultative governance are the underlying ethical norms that the Qur'an and the Prophet Muhammad's life communicate, and he describes Rahman's idea that the *ulama* should play a leadership role but not a legislative role in society. He also argues that Rahman's argument for democratic institutions contains both Qur'anic and "Lockean" elements (Armajani 2015, 41). Nevertheless, Armajani's treatment is brief and cursory.

There is an emerging literature on Ghamidi's work, which also includes comparisons and contrasts of his work and Maududi's. Iftikhar's (2004) dissertation is a key entry in this literature, focusing on the contrasting worldviews that underlie Maududi's and Ghamidi's contrasting understandings of the duty of *jihad*. Masud (2007), Amin (2012), and Iqtida (2016; 2019) have helped position Ghamidi between traditional scholars, Islamists, and modernists. Masud (2007) suggests Ghamidi uses traditional methods of Qur'anic exegesis to reach modernist conclusions about issues like human rights. Amin (2012) positions Ghamidi as a post-Islamist; this is literally accurate as Ghamidi studied with Maududi before adopting a post-Islamist approach based on the work of Ahmin Ahsan Islahi (1904-1997). In describing Ghamidi's approach to "tolerance," Iqtidar (2019, 538) shows his view is grounded in a minimalist theory of the state, which in turn is based on a particular method of interpreting the

Qu'ran. That theory of state, she claims, is "a fairly classical Islamic position regarding the place of the state in everyday Muslim life: a limited, noninterventionist state that does not try to fill in the substantive details of Islamic norms for its citizens" (Iqtidar (2019, 538).

Nevertheless, as Zaman (2011) points out, Ghamidi's direct exegetical approach means his theory of state is not classically liberal. For example, according to Ghamidi, the state should institute the Hudud ordinances, ban interest, and require Muslims to perform the prayers, even without their consent, since these are clearly delineated in the Qur'an. Further, even as he rejects the idea that the state should identify as Islamic and that the constitution should include a *sharia* repugnancy clause, he accepts the principle that the Qur'an and Sunnah, and the political guidance they contain, should constrain legislation. My research will explicate Ghamidi's theory of parliamentary supremacy in a Muslim democracy.

Contribution of This Research

The primary contribution of this research will be to examine the political theology and constitutional theory of Islamic modernism as theory—that is, as a vision of political order that Islamic modernists offer to Muslims, and indeed to all people since Islam is a universal message, as an alternative to the theorists of the *sharia* state. Rahman and Ghamidi are two prominent figures that have offered such visions in a major Islamic polity and will serve as primary interlocutors. As mentioned above, I focus on a question of constitutional theory central to the intra-Islamic debate: how law is to be determined in a majority Muslim polity.

A second contribution pertains to what we may call external validity: I aim to show how the intra-Islamic debates on the implications of Islamic teaching, particularly the belief in divine law, relate more generally to the relationship between foundationalism and higher law in liberal constitutionalism. Do the character and limits of the state that liberal constitutionalism prescribes require philosophical foundations in an order of justice independent and somehow prior to the state, stemming from a higher law such as natural or divine law? If so, do natural law and divine law firmly support the forms of self-government and individual rights modern liberal constitutionalists defend? As Kraynak (2001) and Dalacoura (1998/2007) have argued, the relationship between divine law and liberal constitutionalism may be paradoxical: divine law may provide the surest foundations for institutions like self-government and human rights, but the content of divine law and its implications may not be liberal in character. As March (2019) points out, intra-Islamic debates on divine sovereignty represent specific examples of a more general problem of the relationship between the notion of divine law and constitutionalism. Challenges facing Islamic constitutionalism are similar to the challenges associated with the codification and operation of any set of unwritten principles supposed to be derived from a higher law.

CHAPTER IV

VISIONS OF THE ISLAMIC STATE: FAZLUR RAHMAN, THE ETHICIST APPROACH, AND ISLAMIC NOMOCRACY

Scholars working to extract and build on a tradition of Islamic constitutionalism and self-government describe the ideal of the Islamic political system as a "nomocracy," in contrast to a theocracy (Khadurri 1984, 4; Akyol 2011, 249). In the classical tradition of Islamic law, at least as envisioned in some treatments by respected contemporary scholars, jurists were the independent guardians of the law. This arrangement, with Islamic law institutionalized as a jurists' law, was essential to the project of Islamic nomocracy. Even while granting this, advocates of liberal reform often point to modernist theorist Fazlur Rahman, who explicitly rejected this arrangement in favor of a state-based system of law, as an exemplar of the necessary reform in Islamic thought (Akyol 2011, 2019, 2020; Hashemi 2019). Proponents of reform in Islamic political thought and practice frequently describe Rahman and his method of Qur'anic interpretation, the "double-movement theory," as a source of intellectual and political rejuvenation for contemporary Muslims (Rahman 1982/2017, 9; Afsaruddin 2015). His understanding of Islam as a progressive and dynamic force is appealing to Muslims promoting liberal reform and outsiders who wish to advance such reform.

This chapter describes the ethicist underpinnings and content of Rahman's democratic vision of the Islamic State, as expressed in his major writings of the 1960s, and contrasts that vision with other proposals for establishing an Islamic nomocracy in contemporary Pakistan. The context of state building fundamentally shaped Rahman's

constitutional theory, and his arguments expressly repudiate the traditional, independent position of the religious elites or *ulama* and aim at absorbing them into the state apparatus. To the extent the statist aspect of Rahman's thought is integral to the ethicist approach, it poses a significant challenge for advocates of intellectual and constitutional reform who champion the ethicist approach, failing to establish a framework for an Islamic nomocracy.

Competing Visions of Legislation in an Islamic State

Theorists and religious scholars propounded a number of visions of the Islamic State amidst the constitutional debates in the 1940s, 50s, and 60s. One major theoretical problem Pakistan's founders faced relates to the relationship of Islamic law and the form of constitutional democracy. The major parties in the early constitutional debates agreed both with the idea of Pakistan as an Islamic State and as a democracy, or republic. They also agreed with the idea of legislation limited by the *sharia*. Different visions of the Islamic Republic related to the content and scope of *sharia* and the method for determining its application.

The founders of Pakistan enshrined both the principle of the Sovereignty of God and the principles of "democracy, freedom, equality, tolerance and social justice as enunciated by Islam" in the Objectives Resolution of 1949, a statement of principles that should govern the constitution (Constitution of Pakistan 1973). The Resolution by no means settled the question of how to incorporate the higher law of Islam, the *sharia*, into the constitutional order. As Kennedy (1992) and Zaman (2018) note, while paying lip-service to divine sovereignty and *sharia*, the modernist vision essentially prevailed in the

1956 and 1962 constitutions, while an Islamist and traditionalist visions made some gains during the Zia al-Huq regime (1978-1988). The problem is still debated in Pakistan and other Muslim-majority polities today.

The problem of constitutionalizing *sharia* is an Islamic variant of the more general problem of "nomocracy," or rule of a higher law. One indicator of the continuing relevance of the problem of nomocracy in Islamic societies, increasingly common in Muslim-majority polities since the 1980s, is the establishment of *sharia* as the source of legislation, a limit on legislation, or both (Ahmed & Ginsburg 2013; Arjomand 2007). Such provisions do not really constitute a solution to the problem; rather, they serve only as a restatement of it. If legislation is to be based on *sharia*, or limited by it, relevant actors must know what *sharia* is and who will determine its content in cases of disagreement.

Theorists and politicians advanced several solutions, and four distinct views emerged. Rahman's constitutional theory was one among several visions of the relationship between constitutional democracy and Islamic law that theorists and politicians proposed, though scholars of Islamic political thought occasionally lump these visions together (Arjomand 2007; Kamali 2012). For Maududi, the Islamic sources, the Qur'an and the Sunnah, provide a good deal of guidance on both the structure and the law of the state. The challenge is to codify a law that is uncodified, but accessible based on study of the Qur'an and the Sunnah. *Ijtihad*, or independent effort aimed at producing new legislation, may be used, but only in matters where the Islamic sources are silent. Journalist and political theorist Muhammad Asad (1900-1992)

advanced a similar, but distinct vision based on divine sovereignty and *sharia* legitimacy (Asad 1961/1980). The difference is that he emphasized the Islamic sources provide only minimal, basic guidelines in terms of constitutional order and policy. Asad did propose a commission to determine key provisions of the constitution that derive directly from the Islamic sources. Naturally, prominent *ulama* advanced a vision and a practical proposal for the Islamic State that included a greater role for religious scholars in legislation. In some ways, Rahman's solution to the relationship between Islamic law and the form of constitutionalism is the most radical. In terms of the content of the law, he was consistently more permissive or progressive in his interpretation of the Islamic sources than any of the other groups. In terms of who will determine the law, we might question whether his vision would constitute a nomocracy, understood as a state limited by law. The state, or rather the community as represented by a representative legislature, would determine the content of the law.

Visions of the Islamic State

The place of Islam and the *ulama* in the constitutional order of Pakistan has been a major source of division and conflict since Pakistan's independence from India in 1947, and differing visions of the proper character and functioning of a Muslim-majority state emerged in this context. Maududi developed his vision of the *sharia* state, which writers such as Sayyid Qutb, still widely read by jihadists and more broadly among Muslims, adopted. The constitutional theory of Islamic modernism also developed within this context. One key issue throughout these debates relates to the role of the *ulama* in determining law. In contrast to Zaman's (2018) interpretation, Rahman (1970a) thought

the modernists had conceded too much by enshrining the idea of the Sovereignty of God in the Objectives Resolution and the first constitution. The *ulama* essentially sought veto power regarding legislation, or the power to declare it repugnant to Islam. Rahman (1967, 205) rejected a direct role for the *ulama* in legislation, instead declaring, “The state organization in Islam receives its mandate from people, i.e., the Muslim community, and is, therefore necessarily democratic.” According to Rahman, the function of the *ulama* is to exercise broad religious leadership, not participate in legislation. He appealed to the early history of Islam, arguing that administrative leaders, not religious leaders, made laws for the polity.

A 1963 article published in the Islamic Research Institute’s *Islamic Studies* outlines the “Islamic Aspects” of Ayub Khan’s 1962 constitution (Ahmed and Shaerif 1963). The authors describe the competing visions of the Islamic State that different groups advanced: traditionalists, fundamentalists, and the modernists. These debates involved different interpretive approaches to the Islamic sources and their application in the modern world. The traditionalists, or *ulama*, argued that an Islamic State should be based on the early political experience of the Islamic community. The fundamentalists, or Islamists as they are now called, focused on the Qur’an and the *Sunnah*, or the customary practices of the Islamic community, as the key sources of guidance. Many traditionalists agreed with this approach, and argued that clear examples and principles of governance can be found in the Qur’an and in Hadith, or accounts of the Prophet Muhammad’s activities and sayings attributed to him, which came to be associated with the *Sunnah*. Finally, the modernists, who exercised power in the Muslim League at the

start of Pakistan's history as an independent nation-state, aimed at "striking a synthesis between Islamic principles and modern life within a democratic constitutional framework" (Ahmed and Shaerif 1963, 50).

In order to distinguish Rahman's version of the Islamic State and how law is to be determined from others propounded during Pakistan's early constitutional history, I first outline the other major visions on offer in the 1950s and early 1960s. I focus on how these visions conceived of the method for determining law their different applications of key terms including *sharia*, *ijtihad*, and *shura*.

Maududi's Theo-Democracy

For Maududi, the basis of Islamic law is the sovereignty of God: Muslims are simply people who have submitted to the sovereignty of God and agreed to a contract to follow his Law. "*It is God and not Man whose Will is the Source of Law in a Muslim Society*" (Maududi 1960, 51). Maududi (1960, 60-64) understands *sharia* to contain both unalterable elements and "flexible" components that Muslims must determine in light of core principles. The three permanent components consist of clear injunctions, "directive principles," and limits on human behavior found in Qur'an or the Sunnah. The flexible elements consist of *Ta'weel*, or interpretation of injunctions; *Qiyas*, or reasoning by analogy; *Ijtihad*, or legislation by jurists in matters for which no clear injunctions or precedents exist; and *Istihsan*, or juristic framing of rules for unclear matters in conformity with the general spirit of Islamic law.

Maududi's understanding of divine sovereignty does allow for human legislation.[24] Yet, even where independent interpretation and legislation may be employed, Maududi emphasizes that jurists' independence is quite limited. In a paper entitled "Role of Ijtihad and Scope of Legislation," delivered at Lahore in 1958, he explains that, "the real law of Islam is the Qur'an and the Sunnah. The legislation that human beings may undertake must essentially be derived from this Fundamental Law or it should be within the limits prescribed by it for the use of one's discretion or the exercise of one's opinion" (Maududi 1960, 79)." Human discretion is critical for interpretation, reasoning by analogy, making inferences based on the principles of *sharia* and independent legislation—within the bounds described above. Even as he describes the province of independent legislation, or matters for which there are no clear Qur'anic or Sunnah-based injunctions or sources for analogy, as encompassing a "vast range of human affairs," his emphasis is on the claim that *sharia* provides clear guidance and limitations relevant for the reconstruction of society on Islamic terms (Maududi 1960, 78). Despite all these limitations on the scope of legislation, Maududi characterizes the form of the Islamic State and Constitution as democratic. Here, Maududi emphasizes the difference between the Islamic state and ecular democracy, founded upon the sovereignty of the people (Maududi 1960, 155). Maududi's Islamic democracy, or "theo-democracy" (Maududi 1960, 147), is based on the idea that all members are equally

[24] "Islam does not totally exclude human legislation. It only limits its scope and guides it on right lines. Human legislation, according to Islam, is and should be subject to the Supremacy of Divine Law and within the limits prescribed by it" (Maududi 1960, 74).

commissioned as "repositories of the Caliphate."[25] Here, the limits derived from the sources of Islamic Law serve as a check on popular sovereignty, serving as the lines of demarcation between secular democracy and Islamic "theo-democracy."

Maududi argues that the selection of the Head of State must take account of the Muslim masses, and that no restrictions to any particular tribe, class, or clan are permissible. Maududi also envisions a "Consultative Assembly" that advises the Head of State, which Maududi conceives of as a legislative function.[26] Finding no Qur'anic or *hadith*-based discussion of the actual role of this body, he turns to the conventions of the early caliphs and rulings of jurists for guidance, concluding that the Islamic system of government gives ultimate "veto" power to the Caliph as Head of State, although he is bound to consult with the representatives of the people (Maududi 1960, 245-46).[27]

Maududi (1960, 257) derives a democratic principle from the early examples of consultation: "From the conventions of the Caliphs, nay, even from the conduct of the Prophet himself, the inferred rule is that the Consultative Assembly is not to consist of his hand-picked men but only of those persons who enjoy the confidence of the masses."

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[25] "The vicegerency of God is not the exclusive birthright of any individual or clan or class of people; it is the collective right of all those who accept and admit God's absolute sovereignty over themselves and adopt the Divine Code … This concept of life makes the Islamic *Khilafat* a democracy, which in essence and fundamentals is the antithesis of the Theocratic, the Monarchical and the Papal forms of government, as also of the present-day Western Secular Democracy… whereas in the Western system a democratic state enjoys the right of absolute authority, in our democracy the *Khilafat* is bound to keep within the limits prescribed by the Divine Code" (Maududi 1960, 158, 235).

[26] This feature appears as the first in a list of "Basic Principles of Islamic State" endorsed by a Convention of the ulama in January 1951 in Karachi, first in the group related to "Governance of the State": "The Head of the State shall function not in an autocratic but in a consultative (*Shura'i*) manner, i.e., he will discharge his duties in consultation with persons holding responsible positions in the Government and with the elected representatives of the people" (Maududi 1960, 357).

[27] As Ghamidi has pointed out, Maududi later reversed his position on this question in a Qur'anic commentary, treating the results of the consultative process as binding on the caliph (Hassan Forthcoming).

During Islam's founding, a "natural process of selection" based on merit determined the composition of the Consultative Assembly, but since caliphs and consultants of such high moral caliber cannot be guaranteed, an elective process should be instituted.

The primary manner in which Maududi proposes to institutionalize the nomocratic principle, the limits on law derived from divine sovereignty, is rather straightforward: direct, front-end involvement on the part of jurists in the process of legislation. In other words, the majority of jurists in a polity have to agree for a valid law to be enacted. This becomes clear as Maududi explains that a jurist's *fatwa* is not law but simply an opinion or research conclusion; a legislative council composed of "the men of authority and learning," or jurists, makes law (Maududi 1960, 88).[28] A judicial branch also plays a role in "enforcing the Divine Code," but Maududi is less specific about how such a body is to be constituted and operate (Maududi 1960, 225). The system of courts seems to be primarily concerned with deciding particular cases rather than judicial review of legislation. Another means of institutionalizing the nomocratic principle appears to be through civil disobedience, which Maududi clearly endorses in cases where legislation, administrative policy, or court rulings contravene *sharia*.[29]

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[28] "It is indispensable that the legislature consist of a body of such learned men who have the ability and the capacity to interpret Qur'anic injunctions and who in giving decisions, would not take liberties with the spirit or the letter of the *Shari'ah*" (Maududi 1960, 222). For further discussion, see March (2019a, 93-97).

[29] "In an Islamic State the legislature has no right to make laws, the executive has no right to issue orders and the law courts have no right to decide cases in contravention of the teachings of the Qur'ān and the *Sunnah*; and if they do so, the Muslims have no obligation to obey them. Not only that, the fact of the matter is that if they disobey them, they will be perfectly within their right and will not be committing any sin. Furthermore, if anything is proved to be right in the light of the Qur'ān and the *Sunnah*, it cannot be rejected by any judge or authority on the ground that it is in conflict with any order of the Government [or] any law enacted by the legislature. In such a case it is that order or the legislative enactment which is in

Muhammad Asad and the Principles of Islamic Constitutionalism

Asad's vision, outlined in a 1961 publication called *Principles of State and Government in Islam*, is similar to Maududi's, but it diverges in important ways. Like Maududi, Asad emphasizes that the divine law is the basis of the Islamic State, and the Islamic sources provide adequate guidance for the basic constitutional structure of a modern state. Institutionalizing *sharia* is essential to the legitimacy of the state. While arguing that the Qur'an and reliable Hadith provide clear principles and mandates for the constitutional structure of an Islamic State, Asad (1961/1980, 12) emphasizes that such clear injunctions are quite limited: "The true [*sharia*] is far more concise and very much smaller in volume than the legal structure evolved through the *fiqh* of various schools of thought." Asad (1961/1980, 16) thus emphasizes the role of *ijtihad*: "The Law-Giver meant us Muslims to provide for the necessary, additional legislation through the exercise of our ijtihad (independent reasoning) in consonance with the spirit of Islam." Beyond merely serving as an advisory body for the head of state, Asad puts the principle of *shura* (consultation), drawn from Qur'an 42:38, in the category of *nass* or a fixed injunction that cannot be altered. As in Rahman's vision, the entire community, via elected representatives for pragmatic purposes, participates in determining legislation for "the many problems of administration not touched upon by the [*sharia*] at all, as well as the problems with regard to which the [*sharia*] has provided general principles but no detailed laws" (Asad 1961/1980: 43). In the legislative assembly, the "*majlis ash-shūrā*"

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conflict with *Shari'ah*—and not the *Shari'ah*—that should be declared *ultra vires* of the constitution and set aside" (Maududi 1960, 265).

as he calls it, he argues for the majority principle once again because no better solution is available (Asad 1961/1980, 45).

While he treats *ijtihad* and *ijma'* as related to the whole community of Muslims and not just to the scholars, Asad envisions an important role for the scholars at the outset: codifying *sharia*. Like Maududi, he sees the problem at least partly as related to the need to codify the divine law, currently available only as embedded in the Qur'an and the Sunnah via reliable Hadith. For Asad, the scholars will play an important role in this process, which will provide the basic framework for those laws that are unalterable components of *sharia*.

The ulama

For their part, mainstream *ulama* tended to agree with Maududi's claim that the Qur'an and Sunnah provide extensive guidance, but they also agreed with the notion that additional legislation was needed to conduct affairs in the republic. They argued for a "Committee of Experts on *Shariat*" to play an advisory and veto role with regard to such legislation, to ensure all legislation would be compatible with the letter and spirit of *sharia* (Zaman 2018).

Rahman and the Ayub Khan Administration

In his history of Islam in Pakistan, Zaman (2018) foregrounds the modernist project and its influence, particularly during the formative stages of Pakistan's attempt to establish an Islamic State. Prior to 1973, when the current constitution was adopted, the modernists held the upper hand in terms of influence. Zaman (2018) argues that the Objectives Resolution and the initial 1956 constitution that followed a long period of

negotiation was highly ambiguous, but ultimately favored the modernists' view of Islam. Zaman (2014; 2018) also argues that the modernist project, and Rahman's expression of it in particular, was in some respects inherently authoritarian and statist.

The short-lived 1956 constitution had been a compromise. While the Objectives Resolution enshrined the concept of divine sovereignty, Zaman (2018) pointed out that it was largely a win for the modernists. Ayub Khan's proposed constitution further rolled back the Islamic provisions, though he faced pushback and later re-inserted them. Ahmed and Shaerif (1963) raise some of the debates, including the key issue of how legislation would be determined. The *ulama* did not oppose the idea of a legislature, but insisted on veto power.[30] Instead, the 1962 constitution established the Central Institute and the Council on Islamic Ideology, which would ostensibly serve the function of ensuring legislative conformity with Islam.

Rahman was involved in Pakistan's constitutional politics from 1961 to 1968, during the military regime of Ayub Khan. After consolidating power following Iskander Mirza's abrogation of the 1956 Constitution and subsequent resignation as president, Ayub Khan initiated major constitutional changes, including the promulgation of Pakistan's second constitution in 1962. Ayub Khan was expressly committed to a liberal version of Islamic constitutionalism. He appointed Rahman to direct the Central Institute of Islamic Research, tasked with developing a "liberal and rational" interpretation of Islam to support these efforts (Official notification from the Federal Ministry of

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[30] We can contrast this approach both with Maududi's, which would allow for limited legislative activity only in areas not directly covered by revelation, and with Ayatollah Khomeini's argument for direct rule by the ulama, understood to be implementing divine law.

Education, quoted in Mas'ud & Haque 1976, 37). During this period, Rahman was also involved in the Council of Islamic Ideology, a constitutionally mandated body tasked with making recommendations to legislative and executive bodies and determining whether legislation was consonant with Islam. The Ayub Khan administration, even as it Islamized the country, did so in a manner geared toward modernization, promoting modernist ideas (Qasmi 2010). In a speech at a Deobandi madrasa in May 1959, Ayub Khan directly urged the *ulama* to recapture the progressive spirit of Islam and abandon the dogmatic, outdated approach he argued had stifled the true spirit of Islam (Zaman 2018).

Underpinnings of the Ethicist Approach

Scholars have widely discussed Rahman's support for allowing certain forms of interest in commerce, family planning, the 1961 Muslim Family Law Ordinance, and his progressive stances on a number of controversies (Qasmi 2010; Abbas 2017; Zaman 2018). Rahman's ethicist approach to the Islamic sources and deployment of it in service to development-related goals tied all these controversies and stances together. In the early 1960s, Rahman laid out the key planks of his ethicist framework in a series of highly technical essays in the Islamic Research Institute's journal *Islamic Studies* that eventually formed a book entitled *Islamic Methodology in History* (1965). These essays together mount a direct challenge to the orthodox Sunni understanding of the role of Hadith in determining normative rules for the community's life—and of the *ulama* themselves. In Rahman's view, reliance on Hadith, interpreted as literal examples and injunctions, infelicitously replaced what he calls the "living Sunnah," or example of the

prophet, which the community had continuously, rather than once-for-all, determined through the processes of *ijtihad* and *ijma* in response to changing circumstances (Rahman 1965, 30). *Ijtihad* refers to independent reasoning or effort to determine appropriate legal rules, and *ijma* refers to consensus ("Ijtihad" n.d.; "Ijma" n.d.). As discussed below, each plays a specified, limited role in the traditional understanding of Islamic jurisprudence, where clear guidance is not available in the Qur'an or the Hadith. Rahman's (1965, 23) view is that an organic "Sunnah-Ijtihad-Ijma" process historically determined community norms, not a rigid set of procedures or specific injunctions.

Rahman (1965, 1, 3) described the Sunnah as a "behavioral concept" denoting "exemplary conduct." This code of exemplary conduct consisted of practices derived from the Prophetic Sunnah, or the general sense of ethical behavior the Prophet modeled. These practices and others derived from them gained normative status in the Muslim community by being accepted over a period of time. Rahman emphasizes that living Sunnah was not a restrictive, limiting restraint on norms, but a dynamic and progressive attempt to respond to changing circumstances. Critically, the whole Muslim community participated in the process of determining and accepting behavioral norms that were appropriate for the times but also held onto the core moral teachings of the Prophet.

In Rahman's view, the Sunni tradition emerged out of an impulse toward uniformity that, in contrast to the early jurists and practice of the community, rigidified the process of determining norms for the Muslim community. The jurist Muhammad ibn Idris al-Shafi'i's (767-820), who founded one of the four Sunni *madhabs*, or schools of law, in the ninth century CE, established the hierarchy of sources for jurisprudence that

is still dominant in the orthodox Sunni legal tradition: Qur'an, Sunnah, *qiyas*, and *ijtihad*. This is the hierarchy Maududi insists on. According to Rahman, al-Shafi'i inappropriately underplayed the "democratic" process of the living Sunnah's emergence (Rahman 1965, 21). For al-Shafi'i, the only legitimate vehicle of the Sunnah was Hadith, or stories and sayings of the Prophet. The imperative was to establish uniform practice throughout the Muslim domains. While al-Shafi'i's efforts did generate uniformity, they also extinguished the dynamic processes of *ijtihad* and *ijma*'. The rigid interpretation of Islamic norms and behavioral rules came to dominate the Islamic legal tradition, undermining its true character as a progressive force for liberating humanity.

Rahman did not deny the importance of the Sunnah, but he argued that the orthodox legal tradition was based on contextually bound judgments about Islamic norms that emerged in response to particular needs, not necessarily reflecting norms valid for all times. The living Sunnah, in contrast, is based on core ethical principles the prophet had imparted, relevant for all times but applied differently depending on the circumstances. The Prophet himself was not a "pan-legist" and often made decisions based on community input (Rahman 1965, 10). Further, some elements of the Qur'anic revelation were also given in response to needs of the time. To serve as the basis for cohesion and development in the context of a newly independent country, Islam must recapture the living Sunnah of the Prophet.

The underpinnings of Rahman's constitutional and political theory were thus rooted in a distinctive interpretation of the manner in which norms for an Islamic community can be extracted from the Islamic sources. Necessarily, his idiosyncratic

approach would diminish the epistemic and social authority of the *ulama*, which is derived from the special knowledge of the legal tradition in its various forms—a tradition he denounced as fundamentally misguided in its understanding of the early history of Islam and the process by which community norms were determined. According to Rahman, the early history and true history of Islam was that it was in important ways democratic. He argued that Ayub Khan's Basic Democracies plan was the most important constitutional innovation of the era.

An Islamic Ideology for the Islamic Republic

In 1967, the Ayub Khan administration convened a secret "Meeting of the Committee on the Fundamental Conflict," in which Rahman participated as the Director of the Islamic Research Institute (Qasmi 2010; Zaman 2018; Haq 2019). Cabinet records of this remarkable event provide important context for Rahman's work and its role in the Ayub Khan administration's efforts to co-opt religious leaders in the 1960s.[31]

The committee addresses the "conflict between the Mullah and the intelligentsia." After lamenting that the people of Pakistan have no real understanding of the true teachings of Islam as found the Qur'an, the chairman of the meeting, the Minister of Information and Broadcasting, lambasts the "The Mullah" as propagating a rigid, traditionalist interpretation of Islam that is false and self-serving, and obstructive to the government and to Islam. As a result, the influence of religious leaders has to be

[31] All quotations in the following two paragraphs are from a file housed in the National Documentation Center in Islamabad containing minutes and associated documents from this meeting (NDC File No. 95/CF/67). I am grateful to Dr. Farhat Haq for graciously sharing a photocopy of the file, which she obtained during a visit to the NDC.

reduced. In the course of discussion that follows, the modernist viewpoint is dominant. The religious leaders are described as a priesthood that ignores the "spirit of the message" conveyed by the Prophet Muhammad. Interestingly, another point is raised that the government has inadvertently enhanced the position of the religious leaders by promoting the idea of Pakistan as an Islamic Republic. They have used their influence to propagate a rigid and outdated form of Islam, trying quixotically to turn back time to the early days of Islam. There is a need for the emergence of a "new class of enlightened and learned people" to replace the current class of mullahs. The process of obviating the need for the mullahs will be long-term; in the meantime, those who are not fundamentally anti-government should be co-opted. Finally, an interpretation of Islamic history is advanced, entirely consistent with the modernist viewpoint:

> When Kingship was first established in the muslim world the Kings announced their intention to run their Governments in accordance with Islam and so appointed ulemas to advise them in the matter and to interpret Islam in all types of situations. Thus the monopoly to interpret Islam passed to a group of people. The mulla derives its powers from this historical position. Islam was at its zenith at the time of renaissance in Europe and as such the leaders of the Islamic thoughts in those days ignored the development in Europe. That was the beginning of our failure. We did not look forward anymore and remained static in our ideas.

As Haq (2019) notes, there was some disagreement within the committee on how fundamentally opposed the mullahs and the intelligentsia are, or whether conflict is the

appropriate term to describe the situation. Nevertheless, one of the outcomes of the meeting was to task Rahman with a paper that would "deal with

(a) definition of the ideology of Islam;

(b) ways and means to make the Mullah useful in the process of nation building;

(c) organization of mosques and integration of mullah in the social life."

Haq (2019) notes that no such paper or report is included in the file, and Qasmi (2010) indicates the project was scrapped due to internal division. Nevertheless, Rahman's articles for *Islamic Studies* in 1967 address the topics described in this meeting and could be seen as carrying out his assignment.

Rahman produced a series of articles and writings in 1967 on the nature of the Islamic State and its application in Pakistan. Moving from the Qur'anic view of God and man to key principles including social justice, democracy, and human rights, along with practical issues related to the functioning of an Islamic government, these articles all express concern with the needs of a developing country. He continually challenges the visions put forward by *ulama* and Maududi of the role of religious leaders and state organization, and advocates a role for the religious leaders that supports national cooperation and cohesion.

In these writings Rahman makes frequent reference to Ayub Khan's system of Basic Democracies. Basic Democracies was a tiered system of governance that attempted to integrate representative local institutions into a national bureaucracy. In a review of Ayub Khan's political memoir *Friends Not Masters* (1967), Rahman (1967a) described the system as the leader's most salutary reform and a key plank of the leader's

applied "political philosophy" for the Third World and the Muslim world. Rahman (1967a: 198) praised the system for implementing development from the "grassroots" and creating cohesion in a country with a growing divide between the rural areas and urban centers. Such praise peppers his writings in this year, and is intimately connected to his outline of an Islamic State.

Rahman's (1967b) vision of Islam and its primary sources is essentially practical, as expressed in "The Qur'anic Concept of God, the Universe, and Man." Even in this more theological piece, his concern is with human responsibility for creative moral effort to construct a divinely ordained social order. His practical concerns come to the fore in the subsequent article, "Some Reflections on the Reconstruction of Muslim Society," the first of two that together constitute the clearest presentation of his vision of the Islamic society and Islamic State: "In a nutshell, inconsequential Islam is no Islam at all" (Rahman 1967c, 107).

He described a society characterized by social justice, human equality, and social cooperation as the essential goal of Islam (Rahman 1967c). Islam is a "social reform movement" geared toward both moral and material progress (Rahman 1967c, 106). The basic principles of Islam carry several implications related to self-government and human rights. Rahman here mentioned political equality and active involvement as central to the Qur'anic social and political vision, which is neither autocratic, nor characterized by party politics. He hinted at the importance of the equal involvement of religious minorities, the limits of religious leaders' authority, the equality of women, the dignity of labor, the centrality of social welfare provisions, and other issues. But he

especially emphasized the role of government and the importance of social obligation: "Islam is a charter for interference in society and this charter gives to the collective institution of the society, i.e. the Government, the right and duty to constantly watch, give direction to, and actually mould the social fabric" (Rahman 1967c, 107). The executive power plays a major role, responsible for "overall administrative control of the entire collective life of the community" (Rahman 1967c, 115). Rahman praised the Basic Democracies system and advocated further incorporation of local religious and civic leaders into the system: "The Mosque should develop into a Community Centre, with a Primary School or a Maktab attached to it. In the evening, this Centre should provide constructive lectures, documentary films, etc., for the instruction and healthy entertainment of the young" (Rahman 1967c, 118). The leaders of mosques should be employees of the central or local government, and the central government should support and supervise all activities related to defense, development, and welfare.

In a subsequent article, Rahman fleshes out the institutional structure he introduces in "Some Reflections." In "Implementation of the Islamic Concept of State in the Pakistani Milieu," Rahman argues that the Basic Democracies system was the only "direct method of giving participation to the people in the running of their own affairs" because the uneducated masses were vulnerable to an educated minority (Rahman 1967, 205). In this article, Rahman makes the case directly that an Islamic State is based on democratic institutions involving self-government. Yet again, he is emphatic about development as a primary aim of the Islamic State and includes a thinly veiled

endorsement of a strong central government and executive power, i.e., the Ayub Khan administration:

> The all-important objectives of an Islamic State are to safeguard the safety and integrity of the State, to maintain law and order and to develop the country so that every individual in it may be able to realise his full potentialities and contribute to the well-being of the whole. This requires a strong central authority… It is requisite that at the helm of affairs there be a strong leader with vision, capability and power of decision, as the executive head. He is to be elected by the people and must command their general confidence. (Rahman 1967, 205-6)

Rahman's concern with cohesion, law, and purposive leadership is clear.[32]

Rahman turns to *shura* as the manner in which "the affairs of the Muslims" are to be conducted. While distinguishing the legislative assembly, which he describes as an aid to the head of state, from Western multi-party democracy, he is emphatic that "legislation in Islam is the business of the Community *as a whole*" (Rahman 1967, 206). Rahman (1967, 205) describes a Muslim community, an *ummah*—an interesting move since it suggests the possibility of more than one *ummah*—as a community of people who have committed themselves "to implement the will of God as revealed in the Qur'an and whose model in history was created by the Prophet." The Islamic State is "the organization to which this *Ummah* entrusts the task of executing its will." The

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[32] In a later article, he suggests the need in the developing world for an "'authoritarian democracy,' a regime through which one hopes real democracy will develop" (Rahman 1970, 321).

Islamic State "obtains its warrant from the people" (Rahman 1967, 205). In two footnotes, he argues, "In the Medina City State all the Muslims participated in the affairs of government." In the second footnote, he refers again to the Basic Democracies system, arguing it allows for the restoration of a principle present in Medina and meant for the broader Islamic community, but that was lost amidst the expansion of the empire.[33]

In another appeal to early Muslim history, Rahman argues that the administrators, not the *fuqaha*, or scholars of jurisprudence, determined the law.[34] In Rahman's vision of how law is determined in an Islamic community, the religious leaders propose ideas and formulations for norms and laws (*Ijtihad*), then the community discusses and debates these proposals and ideas and forms a consensus in public opinion (*Ijma'*), and the representative body codifies the results of this consensus into law. According to Rahman (1967, 206-7), "Such law will be perfectly Islamic law." He goes further to describe the legislative body as the "supreme law-maker" and to argue that "the only force which conditions it and which contains it absolutely, is the will of the Community which is the only sovereign power so far as the legislation is concerned" (Rahman 1967, 217-18). Here is Rahman's argument for Islamic popular sovereignty.

[33] "The Medina City State worked on the principle of direct democracy and there was no question of representation as the whole community participated in the government… Now the modern ballot system has given us the required and much desired machinery, and through such measures as are envisaged in the fundamental philosophy of the Basic Democracies system, the idea of direct democracy at the grass-roots level may be achieved" (Rahman 1967, 222, n. 22).

[34] We will return to this point in a later chapter, as it is subject to dispute in literature on Islamic law and relates to the core issue of the relationship between divine law and liberal constitutionalism.

Rahman dismisses the argument that the *ulama* have a direct role to play in legislating for the community, leaning again on the early history of the Muslim community (Rahman 1967, 206). In Rahman's view, there is no special religious knowledge. Anyone can perform *ijtihad*. There is a need for an "enlightened class of religious leadership," but contemporary *ulama* are wholly unsuited to the task because of stale and outdated curricula and ways of thinking (Rahman 1967, 217). In a later article, Rahman (1967d) argues for radical revision of the madrasa system.

In "Implementation," Rahman discusses institutional features that differentiate his version of the Islamic State from Maududi's. He repeats the claim that the executive plays a powerful administrative role, both in civil and religious affairs. He disagrees with Maududi with regard to the issue of public campaigning for office, arguing that campaigning is not an un-Islamic activity. Also in contrast to Maududi, except for national emergencies—which he does not precisely define—Rahman argues that the head of state must abide by the results of the consultative, democratic lawmaking process. The results of the legislative process, as the will of the *ummah*, are considered binding law.

Just as Rahman challenged claims that the *ulama* should play a significant role in legislation, he challenged Maududi's view of the implications of divine sovereignty, which he described as "comic" (Rahman 1970a, 277). According to Rahman, Maududi's approach treated God as the only legitimate legislator for the community, treating divine sovereignty as a limit on legislation and a key distinguishing mark between Western democracy and the Islamic State. In Rahman's (1967) alternative view, which

distinguishes between ultimate sovereignty and political sovereignty, only the people can actually be sovereign in the sense of legitimately exercising coercive force. The true, practical meaning of divine sovereignty is that certain principles derived from the Qur'an and *Sunnah* guide the Islamic community in matters of legislation and state building: "The principles enunciated in the Qur'an are justice and fair play. This is precisely the meaning of accepting the 'Sovereignty of God', since the standards of justice are objective and do not depend on or even necessarily conform to, the subjective wishes of a people" (Rahman 1967, 209). Rahman argued these Qur'anic principles are liberating and progressive. This notion is the core of the ethicist approach Rahman crafted in the context of nation building in a newly independent and developing country, in which an Islamic ideology would serve as the source of cohesion and a guiding set of norms. The process of determining Islamic law itself is essentially dynamic, democratic, and progressive.

While Rahman acknowledges individual rights, his emphasis is much more on social cohesion and development. His arguments against a strict interpretation of *riba* (usury) and thus allowing transactions that involve interest, for the reformist legislation in family law, and for democratic participation of the whole community are all based not primarily on individual rights but on the need for national cohesion and cooperation.

Islam

Rahman reiterated his challenge to the intellectual, legal, and political trends in traditional Sunni Islam in *Islam* (1966). *Islamic Studies* published portions of this work, which most directly precipitated his resignation. In *Islam*, he attacked the intellectual

and political teachings of the *ulama* as outdated and insufficiently dynamic. Indeed, he told a story of stagnation and decline based on these intellectual and political weaknesses (Abbas 2017). While his argument that the Prophet Muhammad played an active role in the reception of Qur'anic revelation provoked charges that Rahman was a Qur'an-denier, the protests that the work sparked and that led to his resignation also relate to his more general attack on the *ulama*'s authority and his connection to the Ayub Khan regime's designs (Abbas 2017; Zaman 2018).

Discussion and Conclusion

The distinguishing mark of Rahman's vision is not that it would include a strong executive, a legislative assembly, or a role for legislation in an Islamic State. Indeed, even Maududi and groups like the self-proclaimed caliphate of the Islamic State of Iraq and Syria (ISIS) recognize that certain issues not covered in the Qur'an, the Sunnah, or the works of prior jurists require legislation (Revkin 2016). The distinction is that, for Rahman, even the Qur'an does not contain any fixed legislative injunctions. Rather, the Qur'an, the Sunnah, and the early practice of the Muslims convey general ethical principles that constitute the essence of divine law. The Muslim community as a whole discovers these principles, and so all law, in any sphere, passed by an assembly that is representative of the community is legitimate. The *sharia* itself is democratically determined, not a limit on democracy.

Scholars of history have noted the statist element of Rahman's work and of other modernists, and its role in President Mohammed Ayub Khan's (d. 1974) plan to harness and reshape Islam to serve the purposes of state building (Qasmi 2010; Zaman 2018).

Even though his theory is democratic in nature, Rahman argues that an Islamic *ummah* would be guided by supraconstitutional norms, an Islamic Ideology. Rahman attacks both Maududi's and the *ulama*'s visions of the Islamic State and champions his own, unabashedly democratic version. However, his own vision of the Islamic State still requires an authoritative interpretation of the ethical teaching of the Qur'an and of the Sunnah. He thus runs into the same problems facing Maududi's theory of divine sovereignty. Indeed, the problem is arguably worse for Rahman. Maududi and Asad can appeal to a plain reading of the Qur'an, where it gives clear guidance, as a reference point for limits on legislation. In contrast, Rahman would abrogate portions of the Qur'an in favor of the true spirit or ethical norms the Qur'an teaches.

Modernist interpretation of the Qur'an and Hadith was a focus of criticism against Rahman and those working in the same vein. For example, the prominent scholar of the Deobandi *masklak* Mufti Muhammad Taqi Usmani (b. 1943) contends that Rahman and the modernists approach the Islamic sources with predetermined concepts or principles, then interpret the sources in a manner fitting those concepts, ignoring established rules of jurisprudence (Usmani 1995).[35] This is a direct challenge to the ethicist approach, a challenge echoing Maududi's earlier claims.[36]

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[35] "The system of modernists is that they first fix some ideas themselves, label them as the exigencies of time and then impose the Qur'an and Hadith through their 'new Interpretation' on them… they frequently defy the established rules of interpretation of the Qur'an and Sunnah. For example, the established rule of Islamic Jurisprudence is that proverbial or allegoric meaning of any word or phrase of the Qur'an or Hadith would be adopted only when literal meaning is either impossible or have become obsolete in common use. This is perfectly a reasonable rule which can not be challenged through any intellectual argument, without it no definite conclusion can ever be derived from anything said by anybody. But this rule is profusely ignored by the modernists in their writings. Wherever they find a word in the Qur'an and

More consequentially in terms of politics, Rahman's interpretation of Islam and correlative constitutional theory would also absorb the religious leaders into the state. Rahman's vision runs directly against an alternative vision of Islamic nomocracy, one in which the traditional role of the *ulama* as those responsible for determining the law in an Islamic polity is restored. As we saw, *ulama* called for a greater role in ensuring that legislation did not contravene the *sharia* did not demand a return to the pre-state form of legislation; however, Kennedy (1992) suggests this vision gained increasing traction in subsequent decades:

> To many Islamic activists the most unambiguous path to achieve such an agenda is perceived to involve a revision of Pakistan's constitutional structure so that the *Shariah* (the corpus of Islamic law) is made superordinate to the constitution, thereby transferring "law-making" authority from the National Assembly to the courts or *ulema* in their role as interpreters of the *Sharia*. (Kennedy 1992, 771)

It may be that the early modernist successes led to increased demands on the part of Islamists and traditionalists. Certainly, as we will see in our discussion of Ghamidi's work in the following chapter, debates about how to institutionalize nomocracy and the rule of *sharia*, continue to be relevant in twenty-first century politics. Influential *ulama* continue to play an important role (Saif 2014).

Hadith, clashing with their concepts, they unhesitatingly give it an allegoric and sometimes purely imaginative interpretation" (Usmani 1995, 44-45).

[36] "The modernist approach… has been still more shallow, unrealistic and unsuited to our conditions. This approach of the so-called liberals is, in fact, not a reform movement but a cloaked departure from Islam. They lack an understanding of Islam and try to import all their ideas from the West. But as they are not bold enough to speak their mind openly and frankly, they try to maintain the Islamic terminology and twist its meaning to suit their ideas" (Maududi 1960, 19-20).

It is not hard to see why some *ulama* would resist this teaching and instead side with Maududi and the Islamists against Ayub Khan's attempt to harness the spiritual and moral energy of Islam to serve an agenda of economic growth and state building. But this absorption also raises a problem for the principle of the supremacy of the law, which would seem essential for a nomocracy, even one based on progressive, liberal principles. If a higher law is to establish the role of government and set limits on its behavior, then there must be a means of discerning and interpreting the higher law. Critically, the principle of supremacy of the law requires that the state also be under the law. How can the state be under the law if it is also the final arbiter of the law?

Some scholars argue that the codification of Islamic law by imperial powers like the British, and the subsequent legal reforms of modernist elites in places like Pakistan fundamentally transformed Islamic law from a jurists' law to a state-based law. The independence of the jurists was, arguably, a constitutional arrangement for establishing the supremacy of the law. Rahman's constitutional theory would remove this arrangement, but not install a new one that secures the supremacy of the law. What were the consequences of modernist reform for the project of Islamic nomocracy? We will return to this question in Chapter 4.

Finally, Rahman's idiosyncratic approach to the Islamic sources introduces the concept of a hierarchy of values within these sources, including the Qur'an. This creates obvious problems because it leads to divergent interpretations, even among different reformist thinkers. For example, reformist intellectual an-Na'im (2008), who takes the ethicist approach, uses the principle of *nask* or abrogation of certain Qur'anic verses, to

place the Meccan *surahs* in a higher normative position than the Medinan verses. Yet, as we have seen, Rahman uses the experience of the Muslim community in Medina to argue that the Islamic community was essentially and distinctively democratic. Treating different components of the source material as differently weighted opens the door for a great degree of interpretive license, leading to indeterminate outcomes, which may be detrimental to a nomocratic government. As we will see, Ghamidi takes a more direct approach to arguing for liberal institutions: the scripturalist approach.

CHAPTER V

JAVED AHMAD GHAMIDI’S MUSLIM DEMOCRACY: PARLIAMENT AS ADJUDICATORY SOVEREIGN

“Islam does not totally exclude human legislation. It only limits its scope and guides it on right lines. Human legislation, according to Islam, is and should be subject to the Supremacy of Divine Law and within the limits prescribed by it.”

– Maulana Abu’l Maududi, *Islamic Law and Constitution*

“Muslims cannot enact any law in their country which is contrary to the Qur’ān and Sunnah or without taking into consideration the guidance these sources provide.”

– Javed Ahmad Ghamidi, *Islam: A Comprehensive Introduction*

Pakistan’s Constitution contains a preamble originally known the Objectives Resolution. The Preamble invokes the sovereignty of God and associated limits on state power:

> Whereas sovereignty over the entire universe belongs to Allah Almighty alone and the authority which He has delegated to the State of Pakistan, through its people for being exercised within the limits prescribed by Him is a sacred trust; This Constituent Assembly representing the people of Pakistan resolves to frame a Constitution for the sovereign independent State of Pakistan. (Constitution of Pakistan 1973)

The Preamble proceeds to extol the “principles of democracy, freedom, equality, tolerance and social justice as enunciated by Islam,” and states, “Muslims shall be enabled to order their lives in the individual and collective spheres in accordance with the teachings and requirements of Islam as set out in the Holy Quran and the Sunnah.” Part XI includes a provision known as a repugnancy clause: “All existing laws shall be

brought in conformity with the Injunctions of Islam as laid down in the Holy Quran and Sunnah… no law shall be enacted which is repugnant to such Injunctions." Chapter 3A of Part VII constitutes a Federal Shariat Court with power to "examine and decide the question whether or not any law or provision of law is repugnant to the injunctions of Islam, as laid down in the Holy Quran and Sunnah of the Holy Prophet." A 2010 amendment specifies that, of the "not more than eight Muslim [Judges]," on the court, "not more than four shall be persons each one of whom is, or has been, or is qualified to be, a Judge of a High Court and not more than three shall be ulema [having at least fifteen years experience in Islamic law, research or instruction]."

These constitutional provisions together provide a prime example of what has emerged as a theory of "Islamic democracy" (March 2019a, 4). The theory recognizes divine sovereignty and the existence of a divine law but also the role of human beings, delegated authority to interpret and apply divine law. The theory involves a democratic component based on the Qur'anic principle of consultation (Qur'an 42:38), but limits the role of participatory self-government, requiring that human legislation must not contravene the divine law, the *sharia*. This theory of Islamic democracy is attested widely in political and legal literature of Muslim-majority countries and reflected in a number of state constitutions.

Ghamidi expressly denies the need for the Objectives Resolution and the repugnancy clause. Ghamidi's interpretive approach differs from Rahman's, but he likewise has developed arguments against Maududi and proponents of the *sharia* state (Iftikhar 2004; Amin 2012). He argues that, though an Islamic State is desirable,

Muslims are under no obligation to establish such a regime; rather, Muslims should work to establish a state he describes simply as democratic (Iftikhar 2004; Ghamidi 2014). Yet, the basic principle of what he calls "The Political Sharī'ah" is that "Muslims cannot enact any law in their country which is contrary to the Qur'ān and Sunnah or without taking into consideration the guidance these sources provide" (Ghamidi Undated, 451-52). Even as he rejects the need for the state to have an official religious identity, the inclusion of the Objectives Resolution in the constitution, and the repugnancy clause, Ghamidi's constitutional theory is based on the political *sharia*, guidance God has given for human beings in collective affairs. His advocacy of democratic legislative processes for Muslim majority polities thus necessitates a theory of parliamentary sovereignty based on the Qur'an and Sunnah.

Ghamidi's work has presented scholars with a challenge in terms of categorization, and there is debate about how to situate him vis-à-vis Islamic modernism (Iqtidar 2016; 2020). Scholars have described Javed Ahmad Ghamidi's political theory as modernist because of his favorable view of liberal democracy, as critical-traditionalist because it is based on the Qur'an and Sunnah and yields a minimalist interpretation of the state's role in implementing Islamic law, and as promoting a form of secularism. While Zaman (2011, 215) discusses Ghamidi and Rahman in his analysis of Islamic modernism in Pakistan, he describes Ghamidi as at most an "uncertain member" of the "fragmented" modernist camp. Styling Ghamidi as a "critical traditionalist," Masud (2007) argues he is not a modernist because, while "he comes to conclusions which are similar to those of Islamic modernists… he never goes out of the traditional framework."

Amin (2012) counters that he can be considered a modernist because of his positive attitude toward Western, liberal democracy. Ghamidi himself seems uninterested in labels like "conservative," "liberal," "Islamic," or "secular," (Ghamidi, quoted in Mufti 2007; Ghamidi, quoted in Walsh 2011), describing himself simply as a "Muslim and a democrat" (Ghamidi, quoted in Walsh 2011) and positioning himself as an independent thinker in a tradition of Muslim intellectuals who sought to capture the true essence of Islam in its entirety (Ghamidi 2020).

Describing the character and form of the state in a situation of a Muslim majority that Ghamidi envisions has also presented scholars with a challenge, and conflicting interpretations have emerged. Ihktidar (2020) describes Ghamidi's vision as that of a non-liberal, yet tolerant and minimalist conception of the state similar to that expressed in classical Islamic political thought. On the other hand, Aziz (2011) characterizes his involvement with the Enlightened Moderation program of President Pervaz Musharraf and his rejection of classical *fiqh* as buttressing a statist model of Islamic law. Indeed, his protest resignation from the Council of Islamic Ideology was on the grounds that extra-state religious leaders were encroaching on that body's unique authority to make recommendations regarding the *sharia* compatibility of national legislation. Yasmeen (2013, 93), distinguishing between "assertive secularism" in which religious rights are threatened and "passive secularism," argues that Ghamidi "supports notions of a passive secular democracy for Muslim states." Ghamidi also opposes theocratic rule, offering an alternative to the Islamism of Khomeini and Maududi. Yet, as Zaman (2014) discusses, Ghamidi clearly envisions a state role in promoting prayers and zakat, along with

prohibition of financial transactions involving interest. As Yasmeen (2013, 93) points out, Ghamidi, "views democracy as paving the way for gradually establishing the true Islamic state."

Focusing on how Ghamidi's constitutional theory resolves the tension between his claim for democracy and his claim for nomocracy, this chapter argues that Ghamidi's political theory proposed form of Islamic democracy delegates "adjudicative" sovereignty to the parliament (March 2019a, 22). Since Ghamidi accepts the nomocratic principle that divine law as expressed in the Qur'an and Sunnah should constrain the legislative activity, he faces the institutional problem of how to ensure the compatibility of legislation with the divine law, and thus of how the content of divine law shall be determined authoritatively. Drawing on personal interviews, along with lectures, writings, and secondary scholarship Ghamidi himself identified as particularly revelatory of his mature thought, this chapter helps situate his work in relation to other theories of Islamic democracy. The chapter also connects Ghamidi's constitutional theory with the broader theme of liberal constitutionalism and religious nomocracy.

The Idea of Islamic Democracy

In debates of the First Constituent Assembly on the Objectives Resolution, which the assembly approved in 1949 prior to the first constitution, Dr. Omar Hayat Malik, a representative of West Punjab, gave the idea of Islamic democracy expression:

> I shall discuss very briefly as to what type of State we are envisaging. It has been asked whether it will be democracy or a limited democracy. Well, the answer is very plain: it will be a limited democracy. The people will have some power but

> they will not have all the power… The principles of Islam and the laws of Islam as laid down in the Quran are binding on the State. The people or the State cannot change these principles or these laws. The State shall have to enforce these principles and these laws as they stand, but there is a vast field besides these principles and laws in which the people will have free play… the State we are envisaging will be a democracy of a limited form: it might be called by the name of "theo-democracy", that is democracy limited by the word of God, but as the word "theo" is not in vogue so we call it by the name of Islamic democracy. (Constituent Assembly Debates 1949, V.4.78)

Malik proposes the idea of a democratic or representative government operating within the limits of clear Qur'anic injunctions. Interestingly, Malik was arguing in favor of the Objectives Resolution. We have seen that Maududi's version of "theo-democracy" incorporated democratic elections and a consultative assembly, but also a direct approach to ensuring *sharia* compliance. The more typical approach is reflected in the Pakistan constitution and espoused by Rashid Ghannoushi (b. 1941), the Tunisian theorist-politician of the Ennahda Movement. As March (2019a) describes, even as Ghannoushi is a proponent of popular sovereignty, he supports the establishment of a body of experts composed of respected traditional jurists to assess legislation's *sharia* compatibility. While Ghamidi's emphasis on the consultative principle as permeating the entire system is distinctive, his argument for a Muslim-majority political system administered on the basis of consultation is not unique to him. What is distinctive is that

he rejects the notion of an external institutional constraint on the parliament to prevent legislation from transgressing on clear Qur'anic or *sharia* limits.

Ghamidi's Counter Narrative

Ghamidi (2020) positions his own work in a tradition of thinkers who try to articulate the essence of Islam in a holistic fashion. These thinkers are not scholars of *fiqh* or a particular branch of knowledge within Islam, but of the religion as a whole and the relation of its components to the others. Ghamidi models this approach in his work *Mizan*. He lists four other scholars in this tradition: Abu Hamid al-Ghazali (c. 1056-1111), Ibn Taymiyyah (d. 1328), Shah Walliullah (1703-1762), and Maududi. All agree on the basic relation of Islam to the state: they are indistinguishable. Ghamidi takes these scholars' thought to lie at the roots of the Islamist and Wahhabi movements in the contemporary period, and he argues this narrative is dominant among religious seminaries in Pakistan. The counter-narrative he offers is thus not just an alternative to Maududi and contemporary Islamists' political theory, but of the broader understanding of Islam constituting the intellectual well from which they draw. The stakes are high: Ghamidi argues that the narrative of Islam he aims to counter is the narrative fueling groups like the Taliban, al-Qaeda, and ISIS, and is in fact shared by the traditional jurists, who differ only in terms of strategy from the militants.

The paradigmatic element of the narrative Ghamidi aims to counter is treating apostasy as a capital crime. The logic is that apostasy is equivalent to treason because the Muslim community, the global *ummah*, is also a political community. The idea of *jihad* as primarily an ongoing struggle, including military elements, against unbelief and

a contest between Dar al-Harb and Dar al-Islam, expressed in the writings of classical jurists, also reflects the equation of Islam with a political community.

In Ghamidi's counter-narrative, Islam's primary addressee is the individual. Ghamidi (personal communication, January 4, 2021) emphasizes that most (95 percent) of the content of religion, or Islam, is aimed at the individual, rather than the collectivity, or the state. States and governments arise out of the need for coordination between individuals and containment of the negative consequences of their free will and unbridled pursuit of self-interest, much as in other versions of social contract theory (Ghamidi n.d.). Government action is primarily oriented toward the protection of individuals' rights, wealth, and honor:

> The directives [Islam] has given to the society are also addressed to individuals who are fulfilling their responsibilities as the rulers of Muslims. Hence, it is baseless to think that a state also has a religion and there is no need to Islamize it through an Objectives Resolution and that it must be constitutionally bound to not make any law repugnant to the Qur'an and the Sunnah. (Ghamidi 2015)

The establishment of the caliphate or the universal Muslim *ummah* as a political entity may be desirable, but it is not an obligatory component of *sharia*. Indeed, rebellion against established states is a "heinous crime" (Ghamidi 2015). Islam is not in fact the basis of "nationhood," but of a more general "brotherhood" and solidarity (Ghamidi 2015). Provided they are allowed to worship, Muslims can be citizens of nation-sates, even as they inculcate a sense of transnational brotherhood with fellow Muslims.

Ghamidi also makes a crucial distinction between God's judgment at the end of time and matters that have to do only with temporal existence, implying that the traditional narrative inappropriately brings some issues belonging to divine judgment at the end times into the temporal sphere. Declaring other people who identify as Muslims to be non-Muslims is not allowed in Islam, and is a prerogative of God alone on the Day of Judgment. While pointing out mistakes or false teachings is appropriate, Muslims must consider others who declare themselves to be Muslim as Muslims. God alone can punish polytheism, disbelief, and apostasy, even though these are "grave crimes" (Ghamidi 2015).

Ghamidi's Political Theory

Ghamidi's political theory, based on his scripturalist hermeneutic, can be described as promoting a limited, Muslim democracy. He lays out his understanding of the proper form a Muslim-majority state should take, based on the principle of consultation: "Centuries before the thinkers of the present age, the Quran had declared: 'The affairs of the Muslims are run on the basis of their mutual consultation.' (42:38)" (Ghamidi 2015). While he does not promote the idea that pursuit of an Islamic State is obligatory for every Muslim, neither does he espouse the notion of a secular state and the idea that Pakistan was founded as a secular state. In recent writings reflecting his mature view, he describes his envisioned constitutional order simply as a "democracy" (Ghamidi 2015).

Even in his mature, post- or anti-Islamist thought and writing, Ghamidi envisions the Qur'an and Sunnah as providing the basis of legislation in a Muslim-majority polity, or at least providing a clear limit on legislation. While the state arises out of necessity for

order and protection of rights, Ghamidi (n.d.) argues that human beings require guidance from God to organize the state properly, which he has provided in the Qur'an. In a section of *Mizan*, he identifies five principles of the political *sharia*. The first, "basic principle" is that the message of God and his prophet Muhammad is to be heeded. No law can contravene the Qur'an and the Sunnah:

> Since the authority of Allah and his Prophet (sws) is eternal, therefore in all affairs in which an eternal directive has been given by them, it is now incumbent upon those in authority whether they are rulers or members of the parliament to submit to them forever. The orders and directives of these rulers can only be carried out subsequent to obeying Allah and his Prophet (sws), and only if they do not overrule or exceed the limits adjudicated by Allah and His Prophet (sws). Therefore, Muslims cannot enact any law in their country which is contrary to the Qur'ān and Sunnah or without taking into consideration the guidance these sources provide. (Ghamidi n.d., 452)

This is essentially Ghamidi's version of a repugnancy clause; nevertheless, Ghamidi rejects the need for any extra-parliamentary body to ensure legislation does not contravene *sharia*, the Qur'an, or the Sunnah. How, then, is the basic principle to be institutionalized?

According to Ghamidi, a representative parliament is the forum for determining the interpretation of the Qur'an and Sunnah that will become binding as state law (Ghamidi, personal communication, January 4, 2021; Hassan Forthcoming). If Muslims constitute the majority, they will control the process of legislation, and the basis of

legislation will naturally be the Qur'an and Sunnah. Experts on *sharia* with differing interpretations and views may articulate them and argue for them before the parliament, just as economists and other technocratic experts might argue for a policy approach, but ultimately a parliamentary majority provides the sanction for law to be binding on the polity. Those who disagree have the freedom to express their dissenting views and interpretations, and they may attempt to gain majority support for changes to the law.

Ghamidi explicitly rejects the idea that the *ulama* should play a formal role in legislation, as in Maududi's theory (Hassan Forthcoming). The argument is based on a fundamental notion of human freedom, granted by God. God has provided guidance for individuals and for the collective system, but he has left people free to follow it or not. The *ulama* properly offer advice and counsel to the people regarding God's law, but their claims to a formal role in the legislative process constitute an oligarchic breach of the "basic human-right of self-determination," as Hassan (Forthcoming, 83) clarifies: "Even in a matter as important as religion, God has given people the right to choose. This implies that, contrary to what such oligarchists claim, all humans are endowed with a capacity to understand even something as complex as theology and discern truth from falsehood. It is, in fact, an insult to human intellect to think otherwise." As Akyol (2011) and Saeed (2011) have argued, the Qur'an provides a fundamental anthropology of human choice and freedom.

More generally, Ghamidi argues that the role of the state, including the sphere of the legislature, is limited in two ways. The first is that the scope and purpose of government is limited to protecting the rights, wealth, and honor of individuals (Ghamidi

2015a). Second, the legislature only makes rulings when there is a dispute among citizens, a point brought out when considering Ghamidi's distinction between Muslim and non-Muslim citizens. In Ghamidi's framework, any laws based on Islamic principles apply only to Muslim citizens, raising the question of how non-Muslim citizens are to be governed in those areas, such as family law. His answer is that the parliament intervenes only if there is a dispute among citizens regarding their affairs. In that case, the parliament rules on the majority principle. Religious personal or family law can operate independently of the state, through scholars' delivery of *fatawa* to citizens with questions about *sharia*, but it becomes binding on the whole political community only in case of a dispute between litigants and when a majority of parliamentary representatives issue a ruling.

We should distinguish between Ghamidi's constitutional theory and his own views on the substantive provisions of the Qur'an and Sunnah that should not be contravened. For example, consider the matter of apostasy. Ghamidi's own view is that neither the Qur'an nor the Sunnah requires the death penalty for apostasy, and that the enactment of this penalty in early Islamic history is not normative for the contemporary period. However, according to his constitutional theory, a parliamentary majority could legitimately enact this penalty as state law (Ghamidi, personal communication, February 1, 2021). While Ghamidi's theory is minimalist in that the only positive injunctions Muslims may be required to follow without consent are the prayers and the zakat, other provisions commonly associated with traditional *fiqh* may be enacted by the parliament.

We can understand Ghamidi's theory in terms of the different elements of sovereignty, as reflected in classical Islamic political thought, that March (2019a: 22-23) has explicated. March identifies a number of questions arising from a system based on divine law, each of which relates to a different component of sovereignty. One component is "the scope of constituent authority" to create governing institutions. Another is the "legislative authority" to interpret, express, and enact divine and temporal law. A third is the right to enact "divine violence." Finally, the question of "adjudicative authority," relates to who is authorized to determine the boundary between divine and temporal legislation and the implications of that determination. In Ghamidi's theory, the parliament possesses partial legislative authority and full adjudicative authority. In a number of matters having to do with personal law, religious scholars and courts may interpret and express the divine law. The parliament acts as an arbiter of last resort when there is a dispute, exercising adjudicative authority. The parliament also enacts temporal legislation and possesses the adjudicative authority to determine the purview of such legislation. The authority to express views on the content of divine law is not solely that of the parliament; all citizens, including the scholars, retain the prerogative to express their views.

We can compare Ghamidi's theory of Muslim democracy, with the parliament assuming adjudicatory sovereignty, to analogues in Western constitutional thought and practice. McIlwain (1911/1979) gives an account of the English parliament functioning as the high court of the land, not necessarily abolishing the common law as construed and implemented by judges, but serving as the final authority for disputes. George

(1996; 2001), while arguing for natural law as an objective, transcendent standard of justice, nevertheless argues that the proper locus of authority to determine and enforce the content and application of the higher law is not determined by natural law itself. In a liberal democracy, the legislative and not the judicial branch, is constitutionally delegated the responsibility for determining the proper application of natural law. For a judge to claim that authority in a situation where positive, constitutional law has not granted it would, in fact, violate the natural law principle of the rule of law. A comparable idea is at work in Ghamidi's vision of a limited Muslim democracy. The difference is that, in Ghamidi's view, the higher law is explicit that the parliament, or at least whatever institutions enable processes of extensive consultation for the conduct of public affairs, are the proper locus of authority for determining whether laws contravene the Qur'an and the Sunnah. According to George, the higher law allows for a representative legislature to play this role; according to Ghamidi, the higher law requires it to do so.

Usmani's Critique

Usmani (2020) critiques Ghamidi's counter-narrative, charging him with advocating secularism, despite his stated intent to the contrary, and with internal inconsistency. The fundamental contradiction, Usmani argues, concerns Ghamidi's Qur'an-based argument for parliamentary supremacy. According to Usmani, Ghamidi's theory means that "parliament shall be established according to the Qur'anic principle of consultation but once it is established it cannot be bound to abide by Quran and Sunnah, yet all the individuals and institutions can be bound to submit to the decisions of parliament." Why,

Usmani asks, is the state bound to follow the consultative principle, when the state is not to be based on religion? What if the parliament passes a law (for example, allowing same-sex marriage) conflicting with the Qur'an and the Sunnah? How can the Qur'an bind believers to follow a law that conflicts with the Qur'an?

Usmani points to several elements in Ghamidi's (2015) narrative that apparently conflict with his dictum that "it is baseless to think that a state… has a religion and there is a need to Islamize it through an Objectives Resolution and that it must be constitutionally bound to not make any law repugnant to the Qur'an and Sunnah." For example, Usmani reads Ghamidi to imply that the state may enact the *zakat* even without the consent of a parliamentary majority, when he says "without [Muslims'] consent, the state shall not impose any tax on them other than zakah." Usmani (2020) asks,

> If this was the intended meaning, how will a tax be imposed without the legislative sanction of the parliament (given that the state has no religion)? What will be the sanction for it? If the sanction for it is the Qur'an then it will practically mean Qur'an is superior to parliament. What then will become of the 'the state shall have no religion' principle? Ghamidi likewise argues that the Qur'anic punishments will be applied for murder, theft, fornication, or false accusations of fornication; Usmani asks whether this is binding on the parliament. If so, then the Qur'an is in fact binding on the parliament.

Ghamidi has available to him an argument following George's (2000) logic regarding the role of natural law in a democratic political system. The legislature is indeed bound to follow the natural law, but the legislature itself—consistent with the

natural law—is the constitutional body tasked with interpreting the natural law. There must be a final human authority to determine the content of the natural law, whether a court, a legislature, a monarch, or some other office. Any such authority might misinterpret the true content of the natural law. Other principles of natural law suggest the legislature should be that final authority. Hence, the legislature is theoretically bound by the natural law, but the legislature itself is constitutionally tasked with determining the content of the natural law, or legislation consistent with the natural law.

In the same way, Ghamidi might argue, based on the Qur'anic principle of consultation, that the parliament should have adjudicative authority within the political system on the content of *sharia*, including the proper interpretation of the Qur'an and the Sunnah. Even though, as Usmani argues, there is the possibility of the parliament passing laws contravening the Qur'an, the Sunnah, or *sharia*, that is a possibility for any constitutional body, including a *sharia* court, the Council of Islamic Ideology, or any other body charged with authoritatively determining the content of *sharia*. On the other hand, Usmani might retort that ultimate authority to determine *sharia* repugnancy ought to rest with those most qualified to do so, minimizing the possibility of such an occurrence.

Ghamidi's (n.d., 462) theory thus rests on a very robust understanding of the consultative principle expressed in Qur'an 42:38 and its implications:

> The pattern of the words [their system is based on their consultation] demands that even the head of a state be appointed through consultation; the system itself be based on consultation; everyone should have an equal right in consultation;

> whatever is done through consultation should only be undone through consultation; everyone that is part of the system should have a say in its affairs, and in the absence of a consensus, the majority opinion should decide the matter.

This principle, in combination with the suggestion that Islam's primary addressee is the individual, makes each person in authority accountable directly to God for his or her efforts to understand and implement the divine law.

Conclusion

Ghamidi's theory of Islamic democracy, which delegates adjudicate sovereignty to parliament, departs from other influential conceptions of Islamic democracy, but it retains the vision of a religious nomocracy. Even as Ghamidi expressly denies the need for the Objectives Resolution and the repugnancy clause, Ghamidi accepts the logic that, in a Muslim-majority polity, laws can and will be based on God's guidance as revealed in the Qur'an and Sunnah, along with the repugnancy principle. Based on a robust understanding of the Qur'anic mandate of consultation, Ghamidi argues that parliament should retain adjudicatory sovereignty or responsibility for ensuring that state laws do not contravene the Qur'an or the Sunnah.

There is a subtle difference between Ghamidi's theory of Muslim democracy and Rahman's approach. The true message of the Qur'an is progressive and dynamic in nature, partly revealed and discovered through common action and legislation. For Ghamidi, the Qu'ran, the Sunnah, and the political *sharia* they reveal retain independent content against which legislation can be evaluated. For Rahman, the *sharia* itself is democratically determined. While Ghamidi rejects a formal role for the *ulama*, he allows

for informal input on their part in the deliberative and legislative process. He thus allows for independent representation of the divine law as a constraint on law and policy, and a role for the *ulama* as experts on the law. Nevertheless, like Rahman's, his argument is outside of the mainstream in terms of how the nomocratic principle is to be realized.

CHAPTER VI

"REFORM THROUGH TRADITION": THE PARADOX OF DIVINE LAW AND LIBERAL CONSTITUTIONALISM

Can divine law and liberal constitutionalism coexist? Could divine law support elements of liberal constitutionalism? The notions of divine sovereignty and divine law present conceptual and institutional challenges for proponents of liberal constitutionalism. Given the centrality of *sharia*, the divine law of Islam, to Muslim identity and popular support for both *sharia* and democracy, Muslim theorists of liberal institutions have been obliged to address the challenge of divine law (Esposito & Mogahed 2007; Kurzman 2011). Islamist constitutional theory, which entails an expansive view of divine sovereignty and its legal implications, presents a potent and prominent version of the challenge facing Muslim advocates of liberal constitutionalism. This chapter discusses two theoretical approaches from which Muslim scholars draw to challenge Islamist theory and argue for liberal institutions. What I have called the ethicist approach, or "normative Islam" (Rahman 1984: 124), is focused on reinterpretation and reform of divine law. The other, juristic constitutionalism, is focused on removing divine law from the influence of the state. In some cases, Muslim advocates of liberal constitutionalism draw on both approaches, but they are distinct and suggest different institutional implications.

The ethicist approach is based on an assessment of the Islamic legal tradition as an obstruction to self-government and individual rights. Rahman and subsequent advocates of normative Islam subscribe to the notion that a rationalist, liberal interpretation of the Islamic sources, a sort of "Islamic Enlightenment," is a prerequisite

for political liberalism (de Bellaigue 2017; Akyol 2017). On the other hand, juristic constitutionalism treats the classical legal tradition, as safeguarded by jurists independent of the state, as a barrier against executive and legislative tyranny. Some Muslim proponents of liberal constitutionalism charge that Islamist theory innovatively and inappropriately positions state agents as the promulgators of divine law, undermining the traditional separation of function between legal scholars (*fuqaha*) and agents of the state. Juristic constitutionalism, in stark contrast to normative Islam, rests on the integrity of the search for divine law as an enterprise.

Each approach supports liberal constitutionalism on key dimensions but detracts from it on others. Normative Islam supports the notion of self-government through representative lawmaking institutions and individual rights, but is in important respects statist. Both conceptually and as manifest in historical examples of family law reform, normative Islam is open to the charge that it positions state agents as authoritative interpreters of the divine law, a charge critics also raise against Islamist theory. Juristic constitutionalism supports constraints on state power but does not guarantee the suite of individual rights that might be considered essential to the civic equality component of liberal constitutionalism. "Reform through tradition," an approach Rahman (1970: 324) viewed with suspicion, may be a means of relieving this tension in contexts where citizens consider the search divine law for divine law a serious enterprise.

Liberal Constitutionalism and Divine Law

Recall the desiderata of liberal constitutionalism: self-government, rule of law, and individual rights. There are a few important features of divine law that pose a potential

challenge to liberal constitutionalism. Divine law has been conceptualized in many ways, but refers here to the conception in the Abrahamic faiths as an obligatory code or way of living that God issues to human beings (Brague 2007). First, for the believer, divine law trumps human law. Second, traditional interpretations of divine law are often inegalitarian and hierarchical. Third, even when enshrined or rooted in sacred texts, divine law requires agents to interpret and apply its definitive content (Abou El Fadl 2001). An institutional question inevitably confronts advocates of divine sovereignty and divine law: who 'owns' authoritative interpretation of the divine will? A society ruled by divine law can easily become a spiritual or intellectual oligarchy or "religious despotism" (Fadel 2015, 32), at odds with the notion of self-government. Further, divine law carries a distinct potential for totalitarianism if a single agent associated with the state is the authoritative interpreter of the divine law. Critics of Islamist thought and activism frequently note their totalitarian ambitions to merge the civil and the spiritual (Whine 2001; Tibi 2007; Bale 2009).

Some scholars posit a fundamental clash between divine law and the rule of law essential to liberal constitutionalism, along with other core components (Hirschl & Shachar 2018; Lilla 2007; 2014). Scruton (2002) argued that the abandonment of divine law for humanly devised law on the model of a social contract is the centerpiece of the political systems of the modern West, a development which represents a key contrast with Islam. Complementarily, several scholars have argued that the Christian tradition adopted the notion of natural law and thus better accommodated the emergence of human law, in contrast with Islam and its fideistic understanding of divine law, allowing

even for potential arbitrariness on the part of God (Reilly 2010; Wick 2012; Gregg 2019).

On the other hand, the notion of an immutable, higher law could support the idea of constraints on state power, which many theorists consider an essential component of the rule of law and constitutionalism (Vile 1967; Fellman 1973; McIlwain 1940/2005). In both Christian and Muslim traditions of political thought, arguments for the right of legitimate resistance to unlawful power have emerged in light of the priority of divine law over human laws, and this right of resistance is at the core of liberal constitutionalism (Ginsburg, Lansberg-Rodriguez, & Versteeg 2012). Brown (1997, 2002) describes the development of an Islamic constitutional theory of *sharia* as an ethical system and generates boundaries limiting states' legislative power. Feldman (2008: 4) develops an interpretation of sharia as a "constitutional ground rule" or "higher law" (2008a). Likewise, Bahlul (2007, 522) proposes that even the dominant Ash'ari theological doctrine, with its "theistic positivism" and voluntarist conception of the divine law, could support a form of constitutionalism emphasizing limitations on government power.[37]

Sharia, the divine law of Islam, is central to Muslim identity and social structure (Weiss 1998/2006). As Abou El Fadl (2012, 55) writes, "Any constitutionalist practice must come to terms with the centrality of [*sharia*] to the conception of government in

[37] "Whatever the philosophical difficulties faced by Ash'arism, this does not mean that it is impossible to make a case for constitutionalism on Ash'arite grounds. What it means is that the constitutionalism in question is likely to be literal (out of respect for the letter of the scripture, which is, after all, God's word), rigid (so as not to risk legislating against God's commands) and non-rationalistic" (Bahlul 2007: 523).

Islam. In many ways, in an Islamic system, sovereignty belongs to the [*sharia*], and not to the people." Qur'anic provisions that undergird *sharia* and *fiqh*, or legal rulings derived from sharia, thus present Muslim advocates of self-government and individual rights a challenge. The realm of family law, in particular, engaged traditional jurists' attention more than other civil matters, and is an especially important area of *sharia* (Mayer 1995; Lev 1972; Weiss 1998/2006). Critics of traditional *fiqh* rightly charge that it is essentially patriarchal (Mir-Hosseini 2013).[38] In the context of many Muslim-majority countries, the family law regime is an important symbol of Islamic identity and preserve of religious authorities. A number of colonial and post-independence regimes strategically left family law in the purview of traditional religious elites, even as they introduced codes of law based on European codes in other legal areas (Abu-Odeh 2004).

Feminist advocates of egalitarian legal reform have developed arguments for an interpretation of the Qur'an and its ethical message that supports such reform drawing on Rahman's ethicist approach (Jawad 2003; Zainah 2009; Mir-Hosseini 2013). Recall that the ethicist approach focuses on challenging the claim that divine sovereignty requires all state legislation to issue from *sharia* as directly interpreted from Islamic sources or determined by *ulama*.[39] The central idea of ethicist Islam is that the Qur'an and the Sunnah, or traditions of the Prophet Muhammad, have to be interpreted in light of the

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[38] As Htun and Weldon (2018) document in a helpful appendix to their book *The Logics of Gender Justice*, this could be said for other traditions of religious family law.
[39] Saeed (2006, 3) describes thinkers who adopt normative Islam as "contextualists": "Those I refer to as Contextualists emphasize the socio-historical context of the ethico-legal content of the Qur'ān and of its subsequent interpretations. They argue for understanding the ethico-legal content in the light of the political, social, historical, cultural and economic contexts in which this content was revealed, interpreted and applied. Thus they argue for a high degree of freedom for the modern Muslim scholar in determining what is mutable (changeable) and immutable (unchangeable) in the area of ethico-legal content."

context in which they were produced, not applied directly to differing circumstances. Properly interpreted and applied, these sources communicate a general ethical message of social justice and egalitarianism, and they provide the intellectual underpinning for institutions of self-government and individual rights. As we have discussed, some scholarship has noted the statist institutional implications and potential authoritarianism of the ethicist approach to Islamic modernism (Binder 1988; Abou El Fadl 2001; Haykel 2014; Zaman 2014; 2018). While Islamist theory and practice involves institutionalizing and politicizing Islam, Islamists have not been the only political actors to do so. Rather, as Haykel (2014), Zaman (2018), Ichwan (2006) and others have shown, Muslim modernists and state leaders sympathetic to their views have also attempted to institute reformist interpretations of Islam through the state apparatus, particularly in family law.

An alternative approach, referred to here as juristic constitutionalism, turns to the traditional role of religious scholars as purveyors and guardians of the divine law, independent of the state. Though some scholars draw on elements of both alternatives, the fundamental logic and institutional implications of normative Islam and juristic constitutionalism conflict regarding the critical question of where to locate the authoritative interpretation of divine law.

According to the ethicist approach, *sharia* and its underlying ethical message justify legislation on the part of the state, even legislation contravening express provisions in the Qur'an and existing *fiqh*. As an example, the Qur'an (4: 3, 129) appears to allow men to marry up to four wives in certain circumstances. The Qur'an also includes, however, what Rahman (1980: 451) calls a "moral rider" to the effect that a

man with more than one wife must treat each wife equally—an impossible injunction. Classical jurists "took the permission clause to be absolute and construed the riders to be a matter for the private judgment of every individual husband" (Rahman 1980, 451). The *fiqh*, or jurisprudence, of all the major schools of Islamic law allowed polygamy. On the other hand, modernists, "wanting to abolish polygamy, gave legal import to the riders and dismissed the permission clause as being without primary import" (Rahman 1980, 452). Rahman (1980, 452) illustrates a core feature of the normative Islam approach to interpreting the Qur'an: "The Qur'an is talking on two levels: a legal level where limited polygamy was allowed, and a moral level toward which the Qur'an had apparently hoped the society would move in the course of time." The Qur'an contains an underlying message normative for all times and contexts. The message is transmitted, though, through a literary vehicle shaped by a particular time and place, components of which are contextually bound. On this view, Islamic jurisprudence in its traditional form is inordinately rigid, patriarchal, and illiberal. Instead, the rationalist tradition of the Mutazilites has to be recovered (Akyol 2011; Mir-Hosseini 2013).

A major implication of normative Islam for constitutional theory is that the authority to determine Islamic law should be removed from the monopoly of the *ulama* and broadened to incorporate a more diverse array of voices. In this view, control over the content of divine law by classically trained scholars and religious elites is an obstruction to modernization, development, and realization of *sharia*'s progressiveness and adaptability to modern conditions. Rahman (1967) explicitly rejects the notion that the *ulama* should own the authoritative interpretation of Islamic law, arguing that in a

Muslim polity the community as a whole possesses sovereign power to legislate, to select or determine Islamic law. Fadel (2015; 2018) advances a model of Islamic public law in which a fiduciary relationship between the people and rulers, rather than adherence to a pre-existing set of norms, is the basis of legitimacy. He argues this theory offers opportunities for bold reform of family law contravening jurisprudential precedent. Feminist scholar and activist Amina Wadud (2013) does not outright reject the idea of scholarly expertise and authority, but she suggests all believers should have some say in what constitutes Islamic law, particularly those previously excluded from informing *fiqh*, such as women.[40]

In Muslim-majority polities in the 1950s and '60s, ruling elites referred to these arguments to promote centralization of legal authority and arrogate power from traditional religious scholars, including in the sensitive and contested arena of family law. Scholars have also observed and advocated a more subtle form of normative Islam's influence through judicial interpretation (Lombardi 2009; Hirschl 2010). Islamists and formally trained *ulama* counter that modernists like Rahman advance legal proposals and reforms, including in the area of family law, unconstrained by the Islamic sources.

Juristic Constitutionalism

Juristic constitutionalism, developed in response to the rise of Islamism and Islamization programs since the late 1970s in countries such as in Iran and Pakistan, builds on an

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[40] Akyol (2011) supports the idea of a secular state in *Islam Without Extremes*, but in a more recent contribution to *The Atlantic*, Akyol (2017) argues that the state plays an important role in establishing a tolerant or moderate interpretation of Islam: "Because there is no central religious authority… one should consider the only definitive authority available, which is the state. … It really matters, therefore, whether the state promotes a tolerant or a bigoted interpretation of Islam."

interpretation of the historical separation between religious scholars and the state (Lapidus 1975; Hallaq 2004; 2015). This approach rests on an interpretation of classical *sharia* as a system in which ruler and ruled alike are constrained by divine law, emphasizing the ideal of the rule of law (Akyol 2011).

Juristic constitutionalism draws from an account of classical *sharia* in which non-state actors served as the authoritative interpreters of divine law, exercising an "ideological" (Mouline 2014, 5) or "text-based legitimacy" and moral authority (Abou El Fadl 2001, 12). Longo (2019, 298) describes the guardianship of the revealed divine law by an independent class of *ulama* as the central feature of the "Islamic material constitution." Emon (2012) also outlines *sharia* as a "rule of law" system, one function of which is to circumscribe the legitimate functions of civil authorities. In this constitutional theory, the *fuqaha*, or jurists, operate independently of the state, institutionalizing the idea that the law originates externally to the civil rulers (Abou El Fadl 2003a; Brague 2007). In particular, the figure of the *mufti*, theoretically distinguished from the state-appointed *qadi*, or judge, and independent of the civil power, is the most authoritative voice on the content of the divine law (Vikør 2005). To be sure, civil rulers' legitimacy is tied to the enforcement and preservation of divine law, but their function is not to create or determine its content. Even the jurists are thought not to create, but to give reasoned opinions, determined by appropriate methodology, about the content of the divine law (Quraishi 2008). Such was the constitutional arrangement of pre-modern Islamic "nomocracy" (Louis Gardet, quoted in Brague 2007, 156). In the constitutional theory of nineteenth century reformist Khayr al-Din al-Tunisi

(1820-1890), the *ulama* play a prominent role to serve as a check on the executive power's legal activity and ensure it accords with *sharia* (Hourani 1983).

The classical system and its division of powers was partly the result of a major conflict between Abbasid caliphs and jurists (Lapidus 1975). One significant episode in this controversy was the *mihna*, or inquisition. During this period in the eighth and ninth centuries of the Common Era, caliphs attempted to impose a Mutalizite doctrine that the Qur'an was created and not coeval with God as the official doctrine of the Abbasid Empire. Some jurists, such as Ahmad ibn Hanbal (780-855), opposed the imposition. The caliph Ma'mun imprisoned him, but his popularity and subsequent opposition to the imposition increased. The outcome of the *minha* and of al-Shafi'i's subsequent systematization of the law was a division of powers in which the religious scholars were considered the legitimate authorities on divine law.

The ideal of *siyasa sharia*, or sharia governance, involved a rough distinction between public law, the province of the civil ruler and based on pragmatic judgment, and private law, the province of the *sharia* courts and based on *fiqh* (Coulson 1964/2011; Quraishi-Landes 2014; 2015). Quraishi-Landes (2015) has explicated this system as involving a notable separation of powers and functions.[41] The key point is that the civil ruler has the prerogative to legislate in a wide domain of affairs, but not to legislate in a manner that contravenes in sharia, as interpreted by the *fiqh* of the religious scholars.

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[41] "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. 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'" (Quraishi-Landes 2015, 557-58).

Some contemporary scholars draw on elements of juristic constitutionalism to counter Islamist theory. One element such scholars emphasize is that of legal pluralism. Schools of Islamic jurisprudence developed different rulings in some areas of law, all considered equally valid. Indeed, the notion that rulings and opinions on Islamic law only probabilistically, fallibly, and provisionally capture the divine will is an important component of juristic constitutionalism (Abou El Fadl 2003b; Weiss 1998/2006). A related argument is that state law cannot be equated with divine law because some human agency, always fallible, will be the purveyor of the law. Abou El Fadl (2003b) and An-Na‘im (2008) each make this argument. Abou El Fadl (2003b) emphasizes that, since fallible human agency is required to interpret the divine will, sharia is best understood as an ongoing search for the divine will. Particular determinations of that divine will are only "potential," not actual realizations of the divine will. On the other hand, to identify a state law as an expression of the divine will is to treat it as actually realized, rather than only potential:

> If a legal opinion is adopted and enforced by the state, it cannot be said to be God's law. By passing through the determinative and enforcement processes of the state, the legal opinion is no longer a potential—it has become an actual law, applied and enforced. But what has been applied and enforced is not God's law—it is the state's law. Effectively, a religious state law is a contradiction in terms. (Abou El Fadl 2003b)

Likewise, An-Na‘im (2008), in building an Islamic case for a secular state, reasons that state law cannot be equated with divine law because that would mean selecting among competing interpretations, competing *fiqh* rulings that are equally legitimate.

Abou El Fadl (2003) identifies four models of the role of Islam in modern constitutions: Strict-Separationist,[42] Accommodationist,[43] Integrationist,[44] and Requisitionist.[45] Abou El Fadl (2003) favors the Integrationist Model, which allows elected or appointed religious scholars to play various roles in crafting and deliberating on legislation short of full veto power, without creating a theocracy:

> The earmark of the integrationist model is that, on principle, it does not seek to exclude Islam from the public manifestations of life… Importantly, the Integrationist [model is] consistent with the historical experience of Islam, and the traditional role of Shari’a. The Qur’an itself asserts that there can be no coercion or duress in religion, and the Integrationist Model attempts to avoid

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[42] “The state represents purely secular interests, and religion is not formally integrated in the political or legal system. Although the country in question might be predominately Muslim, there is no reference to Islam in the constitution or civil code, and personal laws are not based on nor inspired by Shari’a law. In this model, religious scholars and institutions may exist as a part of civil society, and they may even receive limited subsidies from the state, but they do not play an institutional role in the power structure, and they do not formally participate in formulating policy or the production of law.”

[43] “In general, the institutions of the state are separated from religion, and Shari’a is excluded as a formal source of law. The personal and family law codes, however, are based on Islamic law, and are implemented by Shari’a courts.”

[44] “In this model, there is greater formal involvement by the state with religion, but the political institutions continue to maintain their autonomy and separate existence from the religious institutions. Particularly in the decade of the 1970’s, this model became more widespread and influential… The distinctive paradigm of this model is that while the state does not seek to implement all the technical prescriptions of Islamic law, and the state does not pretend to be the enforcer of canonical Islam, Islam and the Shari'ah are recognized as formal sources of moral and ethical inspiration.”

[45] “This model is the closest to a theocratic government, except for the fact that there is no consecrated church in Islam. The state selects the canonical doctrine, which the state believes represents the correct Islamic position, and enforces it both as the will of the state and God.”

transforming religion into the coercive instrument of the state. It also attempts to avoid institutionalizing a particular group of spokesmen as the enforcers of Divine Will. In addition, the Integrationist Model tends to respect the enormous diversity and richness of the Islamic jurisprudential tradition by refusing to enforce one particular view to the exclusion of all others.

On the other hand, in the Requisitionist Model, implemented in states like Saudi Arabia and Iran, "the state selects the canonical doctrine, which the state believes represents the correct Islamic position, and enforces it both as the will of the state and God." He critiques this model because it gives state institutions the "gloss of divinity," and potentially "undermine[s] the richness and diversity of the Islamic tradition."

These thinkers object to implementing sharia through the apparatus of the state. An-Na'im's (2008, 7) characterizes the idea of the Islamic State as

> a postcolonial innovation based on a European model of the state and a totalitarian view of law and public policy as instruments of social engineering by ruling elites… The proponents of a so-called Islamic state in the modern context seek to use the institutions and powers of the state… to regulate individual behavior and social relations in ways selected by the ruling elites.

Their argument is not against the presence of divine law in a constitutional system, but rather that law originating with the state cannot be divine law. When the state enacts law and presents it as divine law, the result is the absorption and corruption, rather than the genuine institutionalization, of divine law.

Muslim thinkers advocating liberal democracy like Akyol (2011) and Abou El Fadl (2003b) appeal to elements of both the ethicist approach and juristic constitutionalism. Each thinker promotes the idea that normative ideals like justice constitute the core aims of Islam, and liberal democracy is the regime most likely to secure these norms in the contemporary world. They also appeal to the classic ideal of Islamic nomocracy and independent jurists as a check on executive power. Illustrating this role, Akyol (2011: 69, quoting Rahman) tells the story of a religious scholar opposing an excessive tax plan of Mogul emperor Ala-ud-din Khilji (d. 1326) and the emperor's reaction: "Whenever I want to consolidate my rule, someone tells me that this is against the [*sharia*]."

The catch is, traditionally trained *ulama* have often opposed liberal reform in the area of family law, in addition to supporting harsh penalties in criminal law and restrictions on transactions with interest. As Zaman (2011; 2014) points out, the basis in scriptural fidelity of Ghamidi's thought also leads him to support implementation of harsh criminal law penalties and a thoroughgoing prohibition on transactions involving interest. Likewise, Umani, the Deobandi scholar and advocate of restoring the jurist' classical role, has challenged both modernists who advance views associated with normative Islam and Islamists' privileging of politics (Usmani 1995; Euben & Zaman 2009; Pemberton 2009). Particularly in the area of family law reform, some of the juristic constitutionalists' critiques of Islamist constitutional theory apply equally to the ethicist approach.

Family Law Reform

The tension between normative Islam and juristic constitutionalism is evident in efforts to reform family law in various Muslim-majority countries. Scholars often connect the low status of women in Muslim-majority countries to the authoritarianism of traditional interpretations of Islam and contemporary political authoritarianism (Abou El Fadl 2001; Fish 2002; Guttmann & Voigt 2015), but a complicating point is that authoritarian rulers have advanced legal reform in an egalitarian direction.[46] In a report on family law reform efforts in Sudan, El Nagar and Tønnessen (2017) note that such reforms in the Middle East and North Africa, when they have occurred, have involved two key elements. First, authoritarian rulers, rather than democratic legislative bodies, have tended to successfully spearhead egalitarian reforms. Second, such rulers and reform advocates have described reforms as *sharia*-consistent to justify them. Many of these reform efforts can be said to have advanced the civic equality and individual rights components of liberal constitutionalism, while also centralizing state power in a way manner that diverges from the limits on government, also central to liberal constitutionalism. When state agents select particular interpretations of *sharia* and enact them as law, they run afoul of the same critiques juristic constitutionalists lodge against Islamist constitutional theory.

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[46] "The evidence shows that Muslim countries are markedly more authoritarian than non-Muslim societies, even when one controls for other potentially influential factors; and the status of women, more than other factors that predominate in Western thinking about religious systems and politics, links Islam and the democratic deficit" (Fish 2002, 37).

Leaders of several newly independent Muslim-majority countries in the Arab countries and South Asia codified family law in the 1950s and 1960s. In Tunisia, Pakistan, Iraq, and Iran, leaders relied on modernist arguments to support comparatively egalitarian reforms, in some cases abolishing *sharia* courts. Religious elites and Islamists have often contested attempts to reform family law. The Code of Personal Status that Tunisian president Habib Bourguiba (1903-2000) promulgated in 1956 was the most dramatic, outright abolishing polygamy. Charrad (2007, 1518-19) writes of the reform:

> The CPS was not a victory of feminism. It was the victory of a government strong enough to place a claim on Islam and enforce a reformist interpretation of the Islamic tradition. Like other world religions, Islam offers many possible interpretations and systems of meaning. In Islamic texts, arguments exist both for and against legal innovation. Members of the 1956 government introduced the CPS as a new phase in Islamic innovation, similar to earlier phases in the history of Islamic thought. Rejecting dogmatism, they emphasized, instead, the vitality of Islam and its adaptability to the modern world.

Here, we see an example of ethicist Islam operating according to the Requisitionist Model, with the state selecting and enacting a particular, reformist interpretation of divine law.

The Pakistan government did not abolish polygamy as in Tunisia, but the Ayub Khan (1907-1974 CE) administration codified family law in the Muslim Family Law Ordinance (1961), in a manner departing from traditional *fiqh*. The legislation survived intense opposition at the time, and the Zia al-Huq regime and Pakistani judges protected

these reforms amidst the Islamization of the country's constitutional and legal architecture since the late 1970s (Haider 2000; Zaman 2018). A 1955 report of a Commission on Marriage and Family Laws that largely provided the basis for the 1961 Pakistan ordinance expresses the normative Islam interpretation of Islamic law, identifying necessary changes in the code of personal status the British rulers had established based on traditional *fiqh*. The only *madrasa*-educated scholar on the commission, Ihtisham al-Haqq Thanawi, and other *ulama* opposed its recommendations, but the other Commission members and eventually the Ayub Khan regime ignored these protests.

A document entitled *Marriage Commission Report X-Rayed*, edited by Kurshid Ahmad (b. 1932), an economist and activist associated with the Jamaat-e-Islami, includes the Commission's report and recommendations, along with several responses by Islamist thinkers, all members of the Jamaat, critiquing the report. The Commission offers a justification for its inquiry into modifying and revising the existing family law code, expressing several key components of normative Islam. The Islamic sources communicate general principles, bundled in with injunctions related to particular historical circumstances. *Ijtihad* has to be continually exercised to determine applications of the law that fit changing circumstances. Finally, the Commission argues that a wide range of legislative activity is available and necessary to bring the stultified and rigidified personal status law of sharia into conformity with the "fundamentals of Islam" (Ahmad 1959, 44). In addition to *Ijtihad*, the members emphasize *Istihsan* or "Common weal," as a critical element in the determination of Islamic law (Ahmad 1959,

45). The committee likewise emphasizes the distinction between sharia and *fiqh*, the latter being humanly devised and changeable, while the former is the essence of the divine will and unchangeable. Finally, it acknowledges the binding nature of specific Qur'anic injunctions, while arguing they can be interpreted "liberally and rationally" (Ahmad 1959, 49).

Amin Ahsan Islahi (1904-1997), sometime member of the Jamaat-e-Islami, and Ahmad raise myriad objections to the configuration and content of the Commission. The proposed reforms, they argue, fly in the face of explicit Qur'anic injunctions and disregard the *fiqh* of past jurists, including the founders of the primary schools of jurisprudence. While giving lip service to eternal principles communicated in the Qur'an and Sunnah, they do not identify those eternal principles but subvert the explicit content of the Islamic sources, claiming to exercise *ijtihad* without the requisite qualifications. They equate state legislation with *ijtihad* and Islamic law. Some of their arguments channel juristic constitutionalism.

Islahi articulates an argument that the modernist versions of Islam, *sharia*, and *ijtihad*, are impositions on an existing body of *fiqh*, unanchored by any limiting principle. While there is a distinction between *sharia* and *fiqh*, *fiqh* is to be considered valid Islamic law unless altered by a *mujtahid*, a jurist qualified to exercise *ijtihad* and derive legal opinions based on the core sources. Islahi also observes that the Soviet Union's egalitarian family policy, justified by the pursuit of social justice, absorbed

power over traditional family arrangements and authorities (Islahi 1959).[47] In the same way, the Commission's proposed reforms are unconstrained by *sharia* and therefore despotic and totalitarian. Proponents of normative Islam emphasize the prerogative for human leaders and democratic bodies to make laws and order policy in the public interest.

Normative Islam suggests the state must reform traditional Islamic jurisprudence, while in juristic constitutionalism the jurists play a key role in checking the state, through their authoritative interpretations of divine law. In other words, rather than the Accommodationist or Integrationist models, strong versions of normative Islam adopt the Requisitionist Model, albeit selecting more egalitarian and liberal interpretations of *sharia* than Saudi Arabian and Iranian leaders or Islamists.

Juristic Constitutionalism, Hayekian Liberalism, and Anti-Totalitarianism

There is a case grounded in liberal constitutional theory for giving some weight to juristic constitutionalism, even though it may protect inegalitarian interpretations of divine law. Indeed, as Akyol (2011) points out, the United Kingdom ruled in 2008 that *sharia* courts may adjudicate disputes related to family law. This ruling could be construed on liberal terms as supporting pluralism and limiting state power in the realm of family law, particularly if participation is voluntary. There are also regimes in countries with large Muslim populations such as India and Indonesia, but in which Islam is not the state religion, that adopt Accomodationist or Integrationist approaches to

[47] Htun and Weldon (2015, 2018) have documented that Communist and post-Communist states tend to exhibit a greater degree of egalitarianism in family law than other states.

family law for Muslim citizens, basing it on jurist-informed *fiqh* and adjudicated in *sharia* courts.

There is clearly an illiberal component of divine law, as traditionally interpreted in the Abrahamic faiths. Traditional *fiqh* and the canon law of the Catholic Church, as well as the English common law, all involve some version of coverture. Nevertheless, important strands of liberal constitutionalism develop the idea that law, understood as originating externally from rulers and institutionally separated from rulers' ordinances in the public interest, serves as a fundamental constraint on government power. Liberal theorists of the rule of law have argued that jurists' law, as opposed to law-making by legislatures, allows for greater liberty by enhancing the certainty of the law (Leoni 1961/1991; Hayek 1973).

Hayekian Liberalism

While the Austrian economist and philosopher Friedrich Hayek's (1899-1992 CE) defense of the common law does not refer explicitly to divine law, elements of the argument apply. In *The Constitution of Liberty* and Volume 1 of *Law, Legislation, and Liberty: Rules and Order*, Hayek (1973: 88) offers a liberal defense of custom and tradition, sources of "grown law," as opposed to made law. He argues for a view in which law, understood as a set of binding, generally applicable, equally applied rules of just conduct develops independently of any human being's reason or will.[48] These rules

[48] "We must not believe that, because we have learned to make laws deliberately, all laws must be deliberately made by some human agency. Rather, a group of men can form a society capable of making laws because they already share common beliefs which make discussion and persuasion possible and to which the articulated rules must conform in order to be accepted as legitimate" (Hayek 1960, 181).

of just conduct derive from an "order," a set of expectations that allow people to navigate the social world with a degree of certainty about how others will respond (Hayek 1973, 36).[49] These rules and the order from which they derive also proffer limits beyond which rulers, whether singular figures or collective bodies, may not transgress. In this view, the rule of law depends on preexisting rules of just conduct, transmitted in the form of custom or tradition, in which policymaking or legislation is nested.

In *The Constitution of Liberty*, Hayek defends the principle of individual liberty and attempts to identify the conditions and institutions that support it, along with contemporary trends that threaten it. Limits on government's coercive power and protection of individual rights are central to Hayek's understanding of liberal constitutionalism.[50] The chief limit on such power is a sense of a preexisting law, the rules of which government may not transgress. He argues that the Western tradition of rule of law is rooted in the practice of case law like the English common law.[51] The idea of law as originating externally from the will of legislators, indeed existing externally to any human will, involves a more fundamental separation of powers than Montesquieu's tripartite division of the legislative, judicial, and executive functions of government and serves as an important contributor to the development of institutions of liberty, especially independent courts. The "jurisconsults" who crafted Roman law developed

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[49] "By 'order' we shall throughout describe *a state of affairs in which a multiplicity of elements of various kinds are so related to each other that we may learn from our acquaintance with some spatial or temporal part of the whole to form correct expectations concerning the rest, or at least expectations which have a good chance of proving correc*t" (Hayek 1973, 36, emphasis in original).
[50] "Constitutionalism means that all power rests on the understanding that it will be exercised according to commonly accepted principles… It rests, in the last resort, on the understanding that power is ultimately not a physical fact but a state of opinion which makes people obey" (Hayek 1960, 181).
[51] Hayek (1973, 1) writes, "Constitutionalism means limited government."

this understanding, the medieval notion of the supremacy of the law heightened the notion, and its preservation in the English common law prevented the rise of centralized absolutism in England (Hayek 1973, 83).[52] The common law preserved the medieval idea of the "supremacy of the law," indeed of divine law in a modified form identified with custom.[53]

While acknowledging an important role for legislation and public law, much as in Quraishi-Landes's explication of the *siyasa sharia* system, Hayek critiques the idea that the law itself, the underlying set of rules of just conduct, is to be determined by legislation. He argues that modern legislatures went beyond the purview of directing policy to specifying just rules of conduct—the very rules by which a government agency might claim the authority to legislate, leading to a "a gradual transformation of the spontaneous order of a free society into a totalitarian system conducted in the service of some coalition of organized interests" (Hayek 1973, 2). Hayek's argument parallel's An-Na'im's case against state enactment of divine law, since enacted legislation simply reflects the preferences and interests of ruling elites.

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[52] "The freedom of the British… was thus not… originally a product of the separation between legislature and executive, but rather a result of the common law, a law existing independently of anyone's will and at the same time binding upon and developed by the independent courts… One might even say that a sort of separation of powers had grown up in England, not because the 'legislature' alone made law but because it did not: because the law was determined by courts independent of the power which organized and directed government, the power namely of what was misleadingly called the 'legislature'" (Hayek 1973, 85).

[53] "It was because England retained more of the common medieval ideal of the supremacy of law, which was destroyed elsewhere by the rise of absolutism, that she was able to initiate the modern growth of liberty" (Hayek 1960, 163). Makdisi (1998) actually argues that the English common law has origins in classical sharia. The historical claim aside, this is interesting conceptually for our purposes. Makdisi points out that the sharia was thought to originate externally to the civil power, with jurists. The common law operated in a similar manner.

Anti-Totalitarianism

The broader anti-totalitarian strand of liberal and republican political thought also suggests giving weight to juristic constitutionalism. Prior to, during, and after World War II, a number of religious thinkers sought to ground the intellectual foundations of liberal democracy in respect for natural and divine law (Hallowell 1945; Brunner 1945; Maritain 1951/1998; Simon 1951). These thinkers emphasized institutions like federalism and other mechanisms for decentralization of power over democratic procedures. Like critics of the codification of Islamic law, Brunner (1945) suggested the nineteenth century codification movements in Europe contributed to the development of legal positivism and undermined the idea of an order of justice independent of the state, by which its laws are evaluated as just or unjust. In the same period, but operating in the context of newly independent states like Pakistan, Muslim thinkers including Asad (1961/1980) likewise emphasized the idea of a higher, divine law constraining government power.

Lippmann (1955) describes a totalitarian system as one completely fusing the civil and spiritual realms. Watkins (1948: x) likewise argues the development of distinct institutions of church and state contributed to the rule of law in the West, associating totalitarianism with an "emphasis on self-determining and uncontrolled political authority." Arendt (1951/1968; 1994), too, connects totalitarianism with an appeal to constant motion or progress and a rejection of permanent laws of nature or revelation. The core idea of totalitarianism in this strand of theory is that the state exercises unconstrained and total control over public and private life, absorbing or extinguishing

all sources of authority external to itself. Along with Hayek, these theorists describe totalitarian states as unconstrained by higher law, custom, or tradition.

The idea of the family and regulating family relations as a divinely ordained institution antecedent to the state is an important element of the anti-totalitarian case for constraining the state to act in accordance with divine law that, for example, Brunner (1945) outlines. Herein lies the paradox of the relationship between divine law and liberal constitutionalism: divine law can furnish constraints on civil power, but those constraints might precisely relate to inegalitarian distinctions and social hierarchies.

Reform Through Tradition

Hayek's account of law and liberty does allow for legal change, even legislation-led reform of the rules of just conduct. The need for such change might arise when powerful actors, under cover of preserving the existing order, have used the accepted rules of just conduct to suppress a particular group, as might be reasonably claimed vis-à-vis the status of women under traditional *fiqh*. However, Hayek's argument suggests that such reform should be pursued in a manner preserving the essence of the existing order and its rules of just conduct. In terms of the reform of *fiqh*, this might suggest a reform from within that engages the *fiqh* itself, as opposed to codifying reforms as state law. We might conceptualize the backlashes to family law reform in Pakistan and Iran as indicative of failure on Hayekian terms, failure to change the law in a manner perceived consistent with the going order.

Reform through tradition offers an alternative approach, recognizing the legitimate role of *ulama* as authoritative interpreters of the law, in dialogue with other

actors and groups in society. To the extent jurists independent of the state adopt or compromise with ethicist reinterpretations of *sharia*, legal reform could proceed in a manner preserving the institutionalization of *sharia* as higher law and a constraint on the state. Rahman (1970) expresses ambivalence toward this approach. While it ensures “the all-important purpose of continuity-in-change,” appealing to tradition runs the risk of “strengthening traditionalism itself and doing fundamental harm to modernism” (Rahman 1970, 325).

King Mohammed VI of Morocco initiated egalitarian reforms in family law, ultimately winning the support even of the Islamist contingent of the parliament and successfully passing reforms in 2004 (Clark & Young 2008). Unlike in Pakistan, the King included religious scholars in the commission in a serious way, and they helped craft the legislation, in a move toward Abou El Fadl’s Integrationist Model, though the outcome was still for the state to determine the law of the land regarding the family (Rabb 2007). Rabb argues that the inclusion of the scholars contributed to the success of the reform, and religious scholars should play similar roles in the legislative process of Muslim polities.

Conclusion: The Paradox of Divine Law and Liberal Constitutionalism

The paradox of the relationship between divine law and liberal constitutionalism lies in the fact that divine law can furnish constraints on civil power, but those constraints often relate to inegalitarian distinctions and social hierarchies, potentially inimical to individual rights. Ideas and institutional practices associated with a divine law can support constraints on state power, particularly when embodied in texts, interpreted by

independent courts, and developed in social forums external to the state. Yet such ideas and practices often do not support the modern notion of equal rights under the law. This is particularly true of the Abrahamic faiths, as the divine law of all three in its traditional form is patriarchal. Illiberal institutions based on divine law and civic egalitarianism might both be considered contributors to liberal constitutionalism, but they are in tension. In the Islamic and Christian traditions, the institutionalization of divine law contributes to establishing the supremacy of law, but may obstruct civic equality.

Normative Islam's appeal is that it may provide a culturally resonant avenue in Muslim-majority nations for development towards liberal constitutionalism. As opposed to secularism, a liberal interpretation of Islam ostensibly offers a path to liberal constitutionalism that Muslim believers can wholeheartedly accept. A problem with the approach of normative Islam is that it strongly suggests an arrangement in which the state dictates the content of divine law. According to the logic of juristic constitutionalism, this leads to the same absorption of divine law as Islamist constitutional theory. In terms suggested by explications of classical Muslim theory and Hayekian constitutionalism, the very law that might serve as a check on the state is determined by the state.

To the extent that a view of law as originating externally from the state and requiring legislation to be seen as substantially in accord with a pre-existing order is a key condition for liberal constitutionalism, Islamic advocates of liberal reform face a challenge regarding the best avenues for reform. Not only the content, but also the institutional context, must be of concern to the advocate of liberal constitutionalism in

Muslim-majority societies and any society in which a belief in divine law is prevalent. Reform through tradition offers a paradigm for constructive engagement incorporating insights from both normative Islam and juristic constitutionalism.

CHAPTER VII

CONCLUSION

Al-Azhar, a prestigious site of learning in the Sunni Islamic world, hosted an international conference on Renovation in Islamic Thought in January of 2020 (Emam 2020). President Sisi of Egypt had been pushing for reform since 2015 as a strategic move to undercut the appeal of extremism, and he a speech of his was read at the conference. But the event that drew more media attention was a dispute arising on the second day of the conference. Mohamed al-Khosht, the president of Cairo University, argued for a complete renewal of Islamic thought and a rejection of the heritage of past ages. Grand Imam of Ahmed al-Tayeb Al-Azher rebutted him, arguing for a renewal grounded in tradition. This internal debate reflects an important element of the ongoing academic and public conversation about Islamic reform: the issue of authority on the content of Islamic law and its relationship to state power. The issue concerns not only the interpretation of Islamic teaching but the question of whose interpretation is considered authoritative in what social and political spheres.

This study makes three contributions to academic and public debate on developments in Islamic political thought and on the relationship between divine law and liberal constitutionalism. It explicates the theories of two prominent exponents of Islamic modernist thought. Secondly, in doing so, it explains how the institutional implications of a strand of liberal Islamic thought championed among Western thinkers is problematic from the perspective both of Islamic political thought and liberal constitutionalism. Finally, it shows how intra-Islamic debates relate to a question of

broader applicability: how to institutionalize the nomocratic principle that laws of a polity ought to adhere to a higher law. While Muslim advocates of liberal institutions face the challenge of reconciling the idea of divine law with institutions of self-government and individual rights in an acute way, the question of the relationship between divine law and liberal constitutionalism and the challenge of institutionalizing of the nomocratic principle is not unique to Islam. Any system of higher law, including but not limited to those of the Abrahamic faiths, faces similar challenges in developing arguments for such institutions. Especially where members of a faith tradition wield majority power in a polity, the question of whether, to what extent, and according to whose interpretation the mandates of the divine law relate should be instantiated in state law remains a perennially relevant question of significance.

Discussions of Islamic reform sometimes leave the impression of reformist intellectuals as isolated voices in the wilderness, struggling to gain a hearing in the broader Muslim world with little support. Shireen T. Hunter (2013), a scholar of Islamic reformism, made this explicit:

> Thus far, reformist Islam has made the strongest inroads in Iran, where it has done so both within the clerical establishment, where there are many reformist clerics, especially among the younger clerics, and has affected national politics. Reformist ideas are also present in some Arab countries, such as Egypt, Tunisia, and, in an underground fashion, even Saudi Arabia. They are not very influential, however, largely because these ideas are often limited to lay intellectuals or former Islamists and do not enjoy large popular support. This lack of support

> provides evidence for many of the reasons asserted for why the current prospects for Reformist Islam are not very bright, including: the opposition of established governments, which see it as a serious political challenge; opposition from the traditional clergy and conservative populace that see it as disguised secularism; mistrust of secular Muslims who see it as far too Islamic; and the complicated nature of reformist discourse which tries to reconcile faith and reason.

To be sure, there are examples of scholars and activists who have undertaken reform at great personal risk in Iran, the Sudan, Egypt, and Pakistan. But the idea of the lone wolf reformer does not tell the full story of Islamic reform or Islamic modernism. Islamic modernism is connected with the establishment of "official Islam" aimed at encouraging peace, acquiescence to the state, and economic development (Brown 2017). In notable examples, particularly in Pakistan and Indonesia, established governments have in fact bankrolled and advanced efforts to promote a state-supportive version of Islam and to counter extremism.

The top-down, statist approach and the co-optation of traditional religious elites that characterized Islamic modernism's entry into the political scene has major implications for its workability in Muslim-majority nations. Rahman's association with General Ayub Khan's attempt to co-opt religious institutions and craft an Islamic ideology to serve a vision of national development and progress in Pakistan is an example of the statist element of Islamic reform. The institutional problem of building constitutional nomocracies in societies where jurists were once the authoritative guardians of the law may be greater than the philosophical challenge of providing

intellectual grounding for liberal constitutionalism. In particular, there has been great resistance to the very hermeneutical and intellectual approaches Western advocates of Islamic reform advance. Reform-minded Muslims and friendly non-Muslims ought to bear in mind the statist element of Islamic reform and the historical reactions it has provoked.

Muslim scholars arguing for institutions associated with liberal constitutionalism—self-government and individual rights in particular—openly acknowledge the challenge of reconciling these institutions with the idea of a divine law. The importance of *sharia* to Islamic identity and the historic role of the *ulama* in predominantly Muslim societies make this challenge particularly acute. The thinkers we have examined, Fazlur Rahman and Javed Ahmad Ghamidi, but also other theorists of Islamic political thought in contemporary Pakistan, take different approaches to reconciling representative self-government and individual rights with the nomocratic principle.

There is a prominent line of thinking that theological liberalism, if not secularism, is a prerequisite for a genuine theory and practice of liberal constitutionalism. One strand of modernist Islamic political thought, the ethicist strand, reflects this tendency. On important dimensions, however, this approach suggests illiberal, statist constitutional theory. I have argued that Rahman's ethicist approach, favored by many in the West, fails to uphold the nomocratic principle because it equates state law with divine law. Since, according to Rahman, the divine law is itself democratically determined, it collapses into state law rather than limiting state law.

Ghamidi's scripturalist defense of a Muslim democracy, where a representative legislature determines the authoritative content of divine law as a matter of pragmatism, but where jurists maintain an independent voice regarding the content of the divine law, takes it more seriously as possessing definitive content independent of the state's interpretation. Even though Ghamidi rejects the typical approach Islamic democrats of various stripes employ to institutionalize nomocracy, incorporating such provisions as *sharia* repugnancy clauses and giving jurists a formal, if limited, role in the legislative process or judicial process, he preserves the conceptual distinction by allowing for independent jurists to serve as advisers to the parliament. Nevertheless, Maududi's Muslim democracy, with parliamentary sovereignty, is by no means straightforward or mainstream.

Juristic constitutionalism reflects a third strand of reformist thought, sometimes combined with the other two, rooted directly in the Islamic legal tradition that is liberal on the important dimension of rule of law and limited government. The catch is that traditional *fiqh*, like jurisprudence in other religious traditions, does not support an understanding of equal individual rights also essential to liberal constitutionalism.

The statist approach to reform suggested by Rahman's theory and that a number of contemporary reformist thinkers espouse has in fact been tried and provoked negative responses. It is vulnerable to some of the same criticisms that reformists levy against Islamist advocates of the sharia state. Even though Rahman found problematic the notion of "reform through tradition," (1970: 324) working for reform through engagement with

ulama as authoritative expounders Islamic law and the tradition of jurisprudence, is an approach that merits serious consideration.

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