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Introduction

It is often claimed that Islam and democracy are incompatible, that there is no foundation in Islamic doctrine that approximates the principles upon which Western civil society is founded. It appears that this misconception has arisen out of the historical "Orientalist" approach to the study of Islam. According to the scholars of this approach, the nature of Islamic law is what prevents Muslims from establishing democratic systems of government across the Middle East. Judeo-Christian ethical principles—for example, the Ten Commandments—have played a part in shaping the legal systems of the West, but this fact has not prevented democracy from flourishing in that part of the world. If these people can achieve democracy, why do Muslims societies struggle to do the same? Does the Bible include a solid foundation for a representative political system that Islamic doctrine lacks? It is surely a worthwhile effort to explore whether there lay some basis in Islam for a liberal political society, especially at a time when the West is striving to promote democracy in the Islamic Middle East. There are essentially two leading views on the issue of whether Islam and democracy can coexist: the liberal view and the Islamist view. The liberal view holds that the essential tenets of Islam are fully compatible with modern democratic values and institutions. The Islamist view, which places a priority on a religious foundation for the state, seeks to establish a just social order based on Islamic tenets, and is less concerned with whether the form of government is democratic or not.

Despite the fact that some political thinkers believe Islam is hostile to democracy, there are in fact numerous references in Islamic jurisprudence that pertain to representative government, respect for the rule of law, and individual freedom. Furthermore, many Western scholars fail to take into account the social, economic, cultural, and political realities rather than the nature of Islamic law itself, that have contributed to the dearth of liberalism and pluralism in Muslim society.

Part I of this paper discusses the early history of Islam. Part II defines general principles of democratic government and compares them with Islamic principles of government. Part III describes the Shari'a, which is the foundation for Islamic law. Part IV focuses on the difficulties of interpreting Islamic law in an ever-changing world. Part V discusses the relationship between religion and politics in democratic governments and Islamic governments. Part VI demonstrates how Islamic law addresses ideas typically associated with democracies:

pluralism, participatory politics, and representative government. Part VII describes how both the United States Constitution and Islamic law promote justice, equality, freedom of expression, and the rule of law. Part VIII provides a comparative analysis of Islamic governments in the Middle East. This paper concludes with a discussion on the prospects for establishing an Islamic democracy in the Middle East.

I. The Foundation of Classical Islamic Law

Islam's founder, Muhammad, was born in the year 570 C.E. in the city of Mecca, located in present-day Saudi Arabia.[1] While meditating outside Mecca, Muhammad received a revelation from God,[2] explaining he was the last prophet. As such, Muhammad was to deliver God's message of monotheism and justice to all humanity: "Over the coming decades, these revelations, once compiled, would constitute the Qur'an."[3] Like other prophets before him, Muhammad's message was both feared and shunned by the powerful and entrenched elite, whose interests represented the social and economic inequities of society that the Prophet denounced.[4]

A. Primary Sources of Islamic Law

The primary sources of Islamic law are the Qur'an and the Sunnah. The Qur'an, which has roughly 500 verses pertaining to legal issues, is the origin of all Islamic law. It fulfills the role in Islamic law that a constitution fulfills for man-made laws. It has served as the model by which Muslims have lived ever since the days of the Prophet. The Sunnah, which includes the words (*hadiths*) and traditions of the Prophet as inspired by God, is a secondary or complementary source of Islamic law. It clarifies and qualifies what the Qur'an leaves ambiguous. As a subsidiary text, the Sunnah sheds light on how to interpret the Qur'anic

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[1] Hamid M. Khan, Note, *Nothing is Written: Fundamentalism, Revivalism, Reformism and the Fate of Islamic Law*, 24 MICH. J. INT'L L. 273, 279 (2002) (citing CYRIL GLASÉ, THE CONCISE ENCYCLOPEDIA OF ISLAM 279 (1989)).

[2] Islamic texts usually refer to "Allah", which is Arabic for the word "God." The author uses the word "God" in place of "Allah" because the two words are synonymous. The word "Allah" does not belong exclusively to Muslims and has always been used by Arabic-speaking Jews and Christians when they speak about God. Muslims believe in the same God as the other two monotheistic faiths of Judaism and Christianity.

[3] Khan, *supra* note 1, at 280.

[4] *Id.*

verses and never departs from the principles outlined in the Qur'an. Together, these sources are wholly authoritative indications of the divine will. Islamic law is also derived from the consensus (*ijma'*) of the Islamic jurists on legal matters and analogical deduction (*qiyas*) from the primary sources of Islamic law. *Ijma'* and *qiyas* are only presumptively authoritative.[5]

B. The Shari'a

The Constitution is the foundation of American jurisprudence, and it is the supreme law of the United States. As a man-made instrument, it was intended to adapt to and develop with society. "Shari'a" is the term used to refer to Islamic law. It is the body of rules that God revealed to humankind in the sacred texts of the Qur'an. Unlike man-made law, the Shari'a is eternal and is not supposed to be altered by man. One prominent Islamic jurist, Ibn al-Jawzi,[6] asserted that any leader who tries to alter God's laws for reasons of political expedience implicitly holds the Shari'a to be imperfect.[7] The Shari'a covers every aspect of law (that is, public and private, criminal and civil, national and international) together with what would not formally be regarded as law in contemporary Western thought (for example, religious and social duties as well as rules of conduct).[8] The orthodox position is that the Shari'a provides the divine blueprint which society and all its members—ruler and subject alike—are always bound to follow as closely as possible. As such, the scope of human legislation is restricted to behavior left legally ambiguous by God.[9] Ultimately, it is God and his laws that are sovereign, not the state or its people, which is why it is argued that Islam is incompatible with democracy.

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[5] *See* NORMAN ANDERSON, LAW REFORM IN THE MUSLIM WORLD 6 (1976).

[6] Ibn al-Jawzi (1126-1200) was an Iraqi jurist who became a leading spokesman of traditionalist Islam. *See* http://www.britannica.com/eb/article?eu=42848 (last visited Jan. 4, 2005).

[7] Khaled Abou El Fadl, *Constitutionalism and the Islamic Sunni Legacy*, 1 UCLA J. ISLAMIC & NEAR E.L. 67, 72 (2002).

[8] ANDERSON, *supra* note 5, at 3.

[9] *Id.* at 38.

II. Islamic Jurisprudence

A. Interpreting Islamic Law

While the Shari'a is divine law and as such is flawless, it becomes imperfect once interpreted by human beings—that is, the application of any human law cannot represent the perfection of Shari'a given the imperfect nature of all human efforts.[10] Even if the state tries to apply and enforce God's law, what is in fact applied and enforced is not God's law, but rather the state's law, which reflects the contradictory nature of religious state law.[11]

The use of religious law as a basis for secular jurisprudence raises additional complexities when one considers the fact that the Qur'an was not revealed all at once but rather over time. Conflicts appear to arise when newer Qur'anic verses contradict older ones. How are Muslim jurists supposed to know which verses should be relied upon when determining whether man-made laws comport with Islamic doctrine? For Muslims, the answer is found in the theory of "abrogation:" certain earlier verses of the Qur'an are replaced by verses revealed later. This does not mean that previous verses in the Qur'an are to be forgotten; instead, God has substituted them with newer verses intended to deal more effectively with new realities and circumstances. In this regard, the theory of abrogation is like the common law rule of "last in time." Under the theory of abrogation, no law can contravene the requirements of Islam, as set out by the Qur'an and Sunnah; all existing laws must be brought into conformity therewith.[12] Furthermore, the abrogation of one verse in the Qur'an by another is not permitted unless it serves the interests of the *ummah*.[13]

The intellectual effort of legal reasoning is required to interpret the law—whether Western or Islamic. *Ijtihad*, which literally means "personal effort," is a term of Islamic jurisprudence that refers to the use of legal reasoning to interpret the rules of the Shari'a, address issues not specifically dealt with in the Qur'an and Sunnah, and reach legal decisions on matters affecting the welfare of the *ummah*.[14] Performed by

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[10] *See* El Fadl, *supra* note 7, at 100.

[11] *See id.*

[12] *See* ANDERSON, *supra* note 5, at 85.

[13] *See* WAEL B. HALLAQ, A HISTORY OF ISLAMIC LEGAL THEORIES: AN INTRODUCTION TO SUNNI *USUL AL FIQH* 233 (1997).

[14] *See, e.g.*, MICHAEL MUMISA, ISLAMIC LAW: THEORY AND INTERPRETATION 93 (2002).

mujtahids (i.e. those qualified to perform *ijtihad*), it is a method of extending the primary sources of Islamic law to deal with issues and realities never faced before in society.[15] Such issues range from personal questions of faith to public matters of government and law. Because *ijtihad* pertains to local matters, the authority of the decision must be considered equally local.[16] In other words, time and place limit decisions reached through this process. Given the relatively limited specificity of primary Islamic texts, *ijtihad* allows for the development of the law in a manner that considers the ever-changing socio-economic conditions under which Muslim societies evolve.

B. Islamic Law and the Interests of the Muslim Community

The Shari'a is regarded as a set of rules that advance the *ummah*'s interests. While the Shari'a is not inherently undemocratic, the way in which it has been interpreted and applied by particular governments in the Muslim world is one factor that has hindered the emergence of democracy in the Middle East. For example, an authoritarian government would be acceptable in theory so long as it correctly applies the Shari'a.

Even though the Prophet did not sanction a particular form of government, as a political leader, he interpreted the Shari'a in a manner that embodied certain values—most importantly, justice and tolerance. An Islamic state is required to help every Muslim lead a proper life by commanding the good (*halal*) and prohibiting the bad (*haram*). Yet, while all Muslims consider obedience to the Shari'a a religious duty, historically there has been no unanimity on how the Shari'a is to be interpreted and applied—even within a single Islamic country.[17] Thus, unless a government is based upon a definitive set of normative values implied by the Shari'a with a process that limits the ability to flout these values, the idea of a government bound by Shari'a will remain vague—something which unscrupulous leaders could manipulate to serve their own narrow interests at the expense of the community. This problem is not unique to Islamic jurisprudence.

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[15] *Id.* at 94.

[16] *Id.*

[17] *See* Clark Benner Lombardi, *Islamic Law as a Source of Constitutional Law in Egypt: The Constitutionalization of the Sharia in a Modern Arab State*, 37 COLUM. J. TRANSNAT'L L. 81.

In the United States, "[t]he Constitution is many things to many people."[18] It is a relatively short document that lays the framework for government and it cannot be expected to address every particular political issue. When a new situation, or even a new variation of an old situation arises, the Constitution is the source for guidance. It is at that point that various interpretations of the Constitution develop. There is no "correct" way to interpret the Constitution and people do not always stick to one interpretation. As a result, a continuous political debate exists in the United States over how to interpret the Constitution.

Some judges think the best way to interpret the Constitution is to determine how the Framers intended it to be interpreted.[19] They look to a number of sources to identify this intent, including the writings and speeches of the Framers, contemporaneous newspaper articles and books, and notes from the Constitutional Convention itself.[20] There are other judges who look for guidance only in the words of the Constitution itself and not in any secondary sources.[21] Then there are those judges who do not believe the Constitution should be rigidly interpreted.[22] These judges see the Constitution as a flexible, living document that should be interpreted with normative ideals and public policy issues in mind. Although the debate over constitutional interpretation is often characterized as being between those who want to follow the letter of the law and those who want to follow the spirit of the law, in practice the debate is really about how to properly balance between these two competing views.

Islamic reformers look to the early period of Islam, the days of the Prophet and his Companions, as embodying the normative ideal of Shari'a.[23] The approach taken by these jurists is similar to that taken by those American judges who look to the Framers' intent, legislative history, and public policy when interpreting law. During the time of the Prophet, there was no room for differences of opinion in interpreting the law to be followed by the *ummah* since he was able to clear any differences himself by acting in accordance with divine revelation in

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[18] The U.S. Constitution Online, *Constitutional Topic: Constitutional Interpretation*, *at* http://www.usconstitution.net/consttop_intr.html (last visited Jan. 4, 2005).

[19] *Id.*

[20] *Id.*

[21] *Id.*

[22] *Id.*

[23] *See* JOHN L. ESPOSITO, ISLAM AND POLITICS 317 (4th ed. 1998).

interpreting the will of God. However, to implement these commands, the Prophet would consult people within the community to find out how they viewed the issue. This is similar to legislation through referendum that takes place in Western countries. In some cases, different options were available and were debated, with people freely offering their views and arguments. Once the Prophet had a sufficient understanding of the effects of each possible decision, he would make his decision as the leader of the community. The Prophet, in making his final decision on a matter, would usually, in democratic fashion, follow the will of the majority. After the Prophet died, Islamic leaders failed to cooperate and reach a consensus on a uniform interpretation of Islamic law; subsequently, followers broke into various sects. A series of political successors known as the Rightly Guided Caliphs (*Al-Khulafa' al-Rashidun*) came to power attempting to maintain order by adhering to the rules laid down during the Prophet's life.[24] By the end of this "Golden Era," Islam had come to dominate a vast and expanding empire.[25]

III. Difficulties Interpreting Islamic Law in Changing Times

Just as American courts have recognized that the Framers of the Constitution could not imagine or predict every situation that might arise in the future (especially given the advent of modern technology), Islamic religious leaders have recognized that the examples from the days of the Prophet cannot serve as concrete prescriptions for issues of governance facing the *ummah* in the twenty-first century. In Muslim countries, the social, political, and economic stresses of modern life are exerting ever-increasing pressures on today's religious leaders to interpret and apply an archaic version Shari'a.[26] Also, because Muslims have been barred from interpreting the Shari'a to deal with new circumstances, they have had to follow the rulings and interpretations of the religious scholars and jurists (*ulama*) on a body of law that has not changed in nearly a millennium.[27] The continued refusal of the *ulama* to reevaluate the Shari'a has led to an Islamic political system based on the conditions of an authoritarian, patriarchal, and traditional society in which individual freedoms are restricted and the development of the community is limited.[28]

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[24] *See* Khan, *supra* note 1, at 282.
[25] *Id.*
[26] *See* ANDERSON, *supra* note 5, at 32.
[27] *See* DANIEL E. PRICE, ISLAMIC POLITICAL CULTURE, DEMOCRACY, AND HUMAN RIGHTS: A COMPARATIVE STUDY 161 (1999).
[28] *Id.* at 160-61.

A. Paralysis in the Interpretation of Islamic Law

In response to the end of the revelation of God's word to the Prophet, and in an effort to maintain consistency of religious rules and practices as Islam spread around the globe, pious religious scholars came together to form schools of Islamic law.[29] While the schools agreed on most legal matters pertaining to the Islamic community, there was endless disagreement among the jurists about the appropriate way to interpret the primary sources of Islamic law.[30] Jurists' positions differed significantly from one country to another, and the nature of Islamic law was affected as governments established codes of law, applied by secular courts, to deal with new realities in the world. Furthermore, the *ulama* that represented the governments interpreted Islam according to their rulers' own political objectives and ideologies.[31] This reality led many people to become disillusioned with their rulers who claimed to be ruling in the name of Islam.

By the tenth century, the *ulama* became increasingly suspicious of this method of independent reasoning and were extremely fearful of multiple interpretations of Islam. They considered knowledge beyond the Qur'an and Sunnah as harmful and divisive. This idea was perpetuated by those clerics who wanted to keep common Muslims in blind faith and to keep them from opposing the tyrannical rulers to whom these clerics were usually attached.[32] The symbiotic relationship between cleric and ruler, whereby the ruler appointed jurists who would endorse the ruler's actions, has greatly inhibited reform efforts—especially those that would undermine the rulers' authority or interests. These co-opted clerics declared the gates of *ijtihad* to be closed, thus ending a key instrument of Islamic thought and reinforcing the general belief that the guidelines for Muslim life in both the private and public spheres had already determined. The net result was a system that effectively standardized and sanctified the traditional, normative ideal of the Shari'a at the expense of Islamic law's universality, dynamism, and adaptability.[33]

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[29] *See* Khan, *supra* note 1, at 282.
[30] *Id.* at 285.
[31] *See, e.g.*, Khaled Abou El Fadl, *Islam and the Challenge of Democracy, at* http://bostonreview.mit.edu/BR28.2/abou.html (last visited Jan. 4, 2005).
[32] MUMISA, *supra* note 14, at 115.
[33] *See* ESPOSITO, *supra* note 23, at 314.

B. Using *Ijtihad* to Revitalize Islamic Legal Reasoning

Although the prevailing view among jurists is that the gates of *ijtihad* are closed, it is worth noting that neither the Qur'an, nor the Sunnah, nor the Companions of the Prophet ever closed these gates of interpretation.[34] It is a well-known fact that neither the Companions nor the majority of scholars during the formative period of Islamic law never put restrictions on the use of *ijtihad*, unlike later medieval scholars.[35] In fact, the Prophet approved, and even encouraged, the exercise of *ijtihad*.

The Islamic jurist Iqbal[36] rejected the centuries-long tendency to regard Islamic law as eternal and sacrosanct.[37] He believed that Muslims must reassert their rights to *ijtihad*, to reinterpret and reapply Islam to changing social conditions.[38] He further suggested that the right to *ijtihad* should be transferred from the *ulama* to a national assembly or legislature.[39] This collective *ijtihad* would then constitute the authoritative *ijma'* of the community, the majority of whose members would have a better knowledge of contemporary affairs and modern disciplines, thus allowing the Shari'a to be interpreted in light of new complexities in the world. This would make help Islamic jurists face the issues and challenges of modernity and an ever-changing world.[40]

The rationale behind *ijtihad* is the preservation of the Shari'a, for without it the law may not be able to effectively continue to function. The right to *ijtihad*, which allows for the extension of Shari'a to deal with new circumstances, is similar to the so-called elastic clause of the Constitution,[41] which authorizes Congress to pass laws and regulate society to meet a variety of circumstances. It was included because the Founding Fathers had no way of knowing what needs the nation would have to address in the future.

It is also important to point out that Muslims are not obligated to find one correct legal interpretation of the Shari'a. As a legal framework, the Shari'a is not so strict: an overwhelming majority of

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[34] *See* MUMISA, *supra* note 14, at 116.
[35] *See id.*
[36] Muhammad Iqbal (1877-1938) was a Punjabi jurist, politician, and social reformer. *See* http://www.geocities.com/junaid_hassan25/iqbal.htm (last visited Jan. 4, 2005).
[37] JOHN ESPOSITO, ISLAM: THE STRAIGHT PATH 138 (1991).
[38] *Id.*
[39] *Id.*
[40] *Id.*
[41] *See* U.S. CONST. art. I, § 8, cl. 14.

Muslim jurists agree that good faith diligence in searching for the Divine Will is sufficient to protect the *mujtahid*, regardless of the result.[42] God, it is argued, never required that *mujtahids* reach one "correct" rule and the Prophet is reported to have said that a jurist who exercises *ijtihad* and reaches the correct result is rewarded twice; if he is wrong, then only once.[43] This proves that it is not sinful for a *mujtahid* to reach a wrong decision and that the possibility of error is to be regarded as an inherent part of this process of legal reasoning. Whether or not the *mujtahid* arrives at the correct decision is not as important as the process by which he does so.[44]

IV. A Comparative Analysis of the United States Constitution and the Constitution of Medina

The Western notion of democracy is one "in which the supreme power is vested in the people and exercised by them directly or indirectly through a system of representation usually involving periodically held free elections."[45] In constitutional democracies, limits are placed on power within the government. All democracies require an adherence to the rule of law. Islamic law also addresses the purpose of government, the role that individuals play in running affairs of state, and limits on governmental power.

A. Separation of Powers

James Madison, who is commonly referred to as the "Father of the Constitution,"[46] stressed the importance of having a constitutional scheme that would prevent a situation in which the majority governs at the expense of the minority.[47] He claimed that the best way to protect the general welfare of the community was to pass ideas "through the medium of a chosen body of citizens, whose wisdom may best discern the true interest of their country, and whose patriotism and love of justice, will be least likely to sacrifice it to temporary or partial

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[42] *See* El Fadl, *supra* note 7, at 97.
[43] *See id.* at 96.
[44] *See id.* at 97.
[45] Merriam-Webster OnLine, *at* http://www.merriam-webster.com (last visited Jan. 4, 2005) (defining democracy).
[46] David Reiss, *Jefferson and Madison as Icons in Judicial History: A Study of Religion Clause Jurisprudence*, 61 MD. L. REV. 94, 154 (2002).
[47] *See* THE FEDERALIST NO. 10, AT 44 (James Madison) (Terence Ball ed., 2003).

considerations."[48] He also argued that the legislative, executive, and judiciary branches ought to be separate and distinct because the accumulation of these powers in the same hands would lead to tyranny.[49]

Liberal-minded Islamic jurists such as al-Mawardi[50] were similarly inclined to adopt separation of power principles to ensure that the executive (the ruler or president) and the legislature (the *shura* council or parliament) effectively kept each other in check.[51] Muhammad, after his migration (*hijra*) to Medina, established himself as the leader, ruler, and judge of the Muslim community (*ummah*). He was able to achieve this by introducing the first constitutional document in Islam, the so-called "Constitution of Medina," which established the first multi-religious, pluralistic political entity for the Muslims in Medina.[52]

While Madison would have been fearful of such a concentration of power in one man, Muhammad was widely regarded as the ideal ruler—both just and wise. The Constitution of Medina required the exercise of judicial authority, political rule, and religious interpretation to be subject to a consensus of the Muslim jurists. It was ratified through a process of mutual consultation (*shura*) to ensure that the interests of the community would be taken into consideration before legislation was enacted.[53] This is similar to our principle of judicial review, which refers to the power of American courts to determine whether the acts of government comply with the Constitution.

B. Citizenship in a Constitutional System

Thomas Jefferson, one of the most influential proponents of American liberal political thought, vociferously argued that society should be tolerant of the beliefs and religious practices of others insofar

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[48] *Id.*

[49] THE FEDERALIST NO. 47, at 234 (James Madison) (Terence Ball ed., 2003).

[50] Al-Mawardi (972-1058) was an Islamic jurist with expertise in the field of political science. *See* http://members.tripod.com/~wzzz/MAWARDI.html (last visited Jan. 4, 2005).

[51] Gudrun Kramer, *Islamist Notions of Democracy*, *in* POLITICAL ISLAM: ESSAYS FROM MIDDLE EAST REPORT 77 (Joel Beinin ed., 1997).

[52] AHMAD S. MOUSSALLI, THE ISLAMIC QUEST FOR DEMOCRACY, PLURALISM, AND HUMAN RIGHTS 30 (2001).

[53] *See, e.g.*, Ahmad Kassim, *A Short Note on the Medina Charter*, *at* http://www.stormloader.com/qsmjam/politik/ren22s.html (last visited Jan 4, 2005).

as they do not harm the public good.[54] Though the Constitution of Medina was devised long before the era of nation-states and the rise of liberalism, Muhammad succeeded in organizing different tribes into a cohesive community that over subsequent centuries extended its reach to cover a powerful and expansive empire. Under the pact made between Muhammad and the people of Medina, non-Muslim communities were treated with respect and understanding.[55] They were protected and permitted to live in accordance with their own laws and customs; the community chose its own rulers so long as they acted in accordance with the tenets of Islam.[56]

Hence, the Constitution of Medina represents an early seventh century example of federalism. Much like the Federalists in America—among them Madison and Jefferson—who established our federal system of government, the Prophet in Medina created a sovereign nation-state with common citizenship. It consisted of a federal structure, dividing governing power between a centralized authority and each of the various communities, with autonomy in social, cultural, and religious matters reserved to the individual communities so long as their actions comported with the clear teachings of the Qur'an. The Constitution of Medina called on the Islamic state to retain the power to deal with matters of state security and the national defense in the same way the Preamble of the United States Constitution (hereinafter "the Constitution") delegates to the federal government the fundamental power of "insur[ing] domestic [t]ranquility" and "provid[ing] for the common defense."[57] While the Constitution of Medina addresses broad governmental issues, its American counterpart is far wider in scope because it deals with the intricacies of government and how laws are made. In Islam, one must turn to divinely inspired law for guidance on how to govern and legislate.

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[54] Thomas Jefferson, *Notes on Religion*, *in* 16 THE WRITINGS OF THOMAS JEFFERSON 266 (Paul Leicester Ford ed., 1904).

[55] Azizah Y. al Hibri, *Islamic and American Constitutional Law: Borrowing Possibilities or a History of Borrowing?*, 1 U. PA. J. CONST. L. 492, 512 (1999).

[56] ANTHONY SHADID, LEGACY OF THE PROPHET: DESPOTS, DEMOCRATS, AND THE NEW POLITICS OF ISLAM 248 (2001).

[57] *Compare* al Hibri, *supra* note 55 at 512. *with* U.S. CONST. pmbl.

V. Church/Mosque and State: Analyzing the Relationship Between Religious Ideals and Democratic Principles

According to Thomas Jefferson, religion is a matter "which lies solely between man and his God, that he owes account to none other for his faith or his worship, that the legislative powers of government reach actions only, and not opinions . . . thus [democracy requires the] building of a wall of separation between Church and State."[58]

In Islam, democracy poses a challenge since there is the idea among Islamic jurists that law made by a sovereign is inherently illegitimate because it substitutes human authority for God's sovereignty.[59] In other words, it is claimed that there can be no separation between Mosque (church) and State in Islam.

Many Western writers claim the union of religion and politics hinders the emergence of democratic reforms in Muslim countries. They fail to recognize, however, the effect of morality on law—that is, how their ideas of morality often shape legislation in Western societies. Most Muslims believe religion and politics are so intertwined in Islamic doctrine that Islam should play a significant role in the political systems of their countries.[60] Al-Mawardi was one of the first jurists to understand the need to bring into compliance the norms of Shari'a and the existing historical-political situation. The main thrust of his idea focuses on the theoretical justification for the different spheres of authority and power between the Imam (or Caliph) in the area of religious matters and the Emir (or Sultan) in the field of civil management on the basis of mutual agreement.[61] Al-Mawardi's theory limits the functions of the Imam to the religious, judicial, and executive spheres. In accordance with the foundations of the Islamic doctrine on authority, the Imam has no right to issue laws.

The acceptance of the large role of jurists in the Islamic state was expressed in al-Mawardi's statement that if the Imam appears to be unable to execute his responsibilities and functions, the *ummah* through the jurists could vote to replace him with a new Imam. At the same time, he maintained that an Imam should only be displaced in extreme cases

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[58] Letter from Thomas Jefferson to the Danbury Baptists (Jan. 1, 1802), *in* 16 THE WRITINGS OF THOMAS JEFFERSON 281-82 (Andrew Lipscomb & Albert Bergh eds., 1903-04).

[59] El Fadl, *supra* note 31.

[60] *See* PRICE, *supra* note 27, at 34.

[61] *See* ABU AL-HASSAN AL-MAWARDI, AL-AHKAM AS-SULTANIYYAH: THE LAWS OF ISLAMIC GOVERNANCE (Asadullah Yate trans., 1996).

where there exists a public or national security threat. This idea is similar to the idea of impeachment of civil officers in the United States for actions that seriously threaten the interests of the state.[62]

The institution of democracy is protected by the separation of religion and politics. Al-Mawardi's statements demonstrate that religious matters can be distinguished from matters related to the execution of civil affairs by an Islamic state. It is not that religious authorities cannot be involved in state affairs; it is that they must not be lawmakers themselves. Although such ideas regarding the relation between the religious and secular are not liberal in the Jeffersonian sense, they are an attempt to show how the distinctions between these two spheres can be reconciled in an Islamic state.

VI. Democratic Principles in an Islamic State

Muslim jurists generally agree that the Qur'an does not specify a particular form of government. It does, however, identify essential norms to be promoted in an Islamic state: the pursuit of justice through social cooperation and mutual assistance;[63] the establishment of a non-autocratic, consultative method of governance;[64] and the institutionalization of mercy and compassion in social interactions.[65]

While Americans may not equate the typical Muslim scholar with such liberal political thinkers as Madison or Jefferson, the issue of reform strikes a chord with a number of important jurists in the Muslim world. One such jurist, Sheikh Yusuf al-Qaradawi, issued a religious opinion (*fatwa*) in response to those who argue democracy is un-Islamic.[66] He argued that democracy empowers the community by giving people the right to choose their leaders without compulsion, to question them when they err, and to depose them when they fail to uphold their duties to those they govern,[67] ideas that are all consistent with the tenets of Islam.

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[62] *See* U.S. CONST. art. II, § 4 (stating that the "President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.").

[63] *See* QUR'AN 49:3; 11:119 (Abdullah Yusuf Ali trans., 10th ed., Amana Publ'ns, 2001).

[64] *See id.*

[65] *See id.* 6:12; 21:107; 27:77; 29:51; 45:20; *see* Fadl, *supra* note 31.

[66] SHADID, *supra* note 56, at 68.

[67] *Id.*

A. Consensus

The Islamic principle of *ijma'*, which provides that before establishing, modifying, or changing policies, states should obtain from society-at-large majority approval, is consistent with the democratic notion of fair and equal representation.[68] In fact, the founders of the four orthodox (Sunni) legal schools of Islam accept the validity of consensus and pluralism.[69] Al-Shafi'i, who was the first jurist to write extensively on basic jurisprudential principles, considered the highest form of consensus to be that in which there is agreement between the entire community, both scholars and the public alike.[70] It is generally agreed among jurists that a Muslim should not go against his community's collective political will.[71]

B. Mutual Consultation

In the Constitution, Articles I and II deal with the roles played by the legislative and executive branches in the government. While there are no specific provisions in Islamic law corresponding to this separation of power, the concept of *shura*, which translates roughly as mutual consultation, is found in the Qur'an.[72] In this process, the leaders of Islamic governments are to consult with the *ummah* before making political decisions.[73] According to the Qur'an and the Sunnah, *shura* requires participation from all believers, a requirement that has been ignored by those jurists who advocate an elitist approach to Islamic jurisprudence.

Although Islam does not specifically prescribe democracy as the system of governance to be employed, a number of prominent jurists have argued that a democratic system of government best promotes the values an Islamic state. According to Al-Qaradawi argues that Islamic law protects against abuses of power and prevents arbitrary rule by effectively institutionalizing the process of consultation.[74] Islamic *shura*,

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[68] *See* LEONARD BINDER, ISLAMIC LIBERALISM: A CRITIQUE OF DEVELOPMENT IDEOLOGIES 27 (1988).
[69] MOUSSALLI, *supra* note 52, at 94.
[70] *Id.*
[71] *Id.* at 32.
[72] *See* QUR'AN 42:38 (stating that one of the characteristics of the Muslim community is that its affairs are decided through a process of mutual consultation).
[73] *See* PRICE, *supra* note 27, at 27.
[74] SHADID, *supra* note 56, at 68-69.

according to Al-Qaradawi, "approaches the spirit of democracy, or if you will, the spirit of democracy approaches the spirit of Islamic *shura*."[75] In the opinion of the Islamic jurist al-Ghazali,[76] consensus is necessary for the passage and enactment of new legislation. New legislation, agreed upon by the majority of society, in turn, permits an Islamic state to adapt and respond to changes in the modern world in absence of specific Qu'ranic injunctions.[77] Al-Ghazali also stated that "[d]espotic, non-consultative, decision-making, even if from a wise and learned person, is objectionable and unacceptable."[78]

The Prophet, who regularly consulted with his Companions regarding affairs of the state, died without naming a successor to lead the Muslim community. He intentionally left the choice of leadership to the *ummah* as a whole. The Rightly Guided Caliph Abu Bakr, successor to the Prophet, stated: "[God] has left people to manage their own affairs so that they will choose a leader who will serve their interests."[79] *Shura* came to represent "participatory politics and legitimacy," [80] but the civil polity based on this concept lasted only about two decades after the Prophet's death.[81] As Muslims spread into distant lands, they failed to actively participate in the political sphere and take part in governing their own affairs.[82]

Arguably, a modern representative government is an attempt to apply the principle of *shura* in state affairs. But, even if *shura* is to be transformed into an instrument of participatory representation, it must be limited by a scheme of private rights that serves an overriding moral goal, such as justice, in order to prevent what Alexis de Tocqueville feared most about democratic governance: a tyranny of the majority.[83]

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[75] *Id.* at 69.

[76] Abu Hamid al-Ghazali (1058-1111) is considered one of the greatest scholars of Islam. *See* http://www.fordham.edu/halsall/source/alghazali.html (last visited Jan. 4, 2005).

[77] MOUSSALLI, *supra* note 52, at 32.

[78] El Fadl, *supra* note 7, at 86.

[79] *Id.* at 79-80.

[80] *Id.* at 85

[81] MUMISA, *supra* note 14, at 89.

[82] *Id.* at 89-90.

[83] *See* 1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA chs. 15-16 (Henry Reeve trans., 1st ed., Vintage Books 1954) (1840).

C. Representative Government

Prominent Western political philosophers such as Thomas Hobbes, John Locke, and Jean-Jacques Rousseau understood that it serves the interest of all individuals to join and covenant their collective wills to a sovereign—whether in the form of an autocrat, monarch, or legislative body—that would secure peace and order in society. Under this social contract, the people swear their obedience to the sovereign in return for having the sovereign protect their interests. If the government fails in its duties, the people have the right to revolt.

Numerous Muslim jurists have similarly commented on the role of government. According to the Islamic jurist al-Juwayni, whose view on the role of government is "representative of . . . [most] Sunni jurists" (and in some senses similar to the Western liberal thought), governments are necessary to resolve conflict, protect Islam, and uphold justice.[84] Al-Ghazali takes a Hobbesian view on the purpose of government, arguing that "human beings are by nature fractious, contentious, not inclined towards cooperation, and thus prone to misunderstanding and conflict."[85] "Government, in a paternalistic fashion, must [therefore] force people to act contrary to their . . . nature"[86] in order to promote justice and the welfare of the community.[87] Ibn Taymiyya's[88] view of the relationship between the ruler and the ruled is more egalitarian. He believed they must work together for the welfare of all the people. Al-Baqillani[89] comes even "closer to the idea of a representative government . . . with limited powers."[90] He stated that a political leader is "the people's duly delegated agent, charged with the obligation of implementing God's

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[84] El Fadl, *supra* note 7, at 76-77.
[85] *Id.* at 77.
[86] *Id.*
[87] *Id.*
[88] Taqi al-Din Ibn Taymiyya (1263-1328) was an Islamic jurist who advocated a doctrine of conservative reformism, stressing the need for the solidarity of the *ummah*. He remains one of the lasting influences on contemporary political Islam. *See* http://www.encyclopedia.com/html/I/IbnT1aymi.asp (last visited Jan. 4, 2005).
[89] Al-Baqillani (950-1013) was an Islamic jurist who was known for his leadership and arguing abilities among his fellow jurists. *See* http://ourworld.compuserve.com/homepages/ABewley/mad6.html (last visited Jan 4, 2005).
[90] El Fadl, *supra* note 7, at 81.

law."[91] An agent may be removed if he does not fulfill that duty, however.[92]

Muhammad was the first political leader of the Muslims, a position he acquired through *bay'a,* a social contract with the citizens of his nation that he concluded through *shura.*[93] In Islam, through *bay'a,* people give an oath of allegiance to the ruler who governs over them in a manner consistent with the Shari'a. Additionally, "Obedience to the ruler is not absolute . . . . It is conditioned on obedience to [Islamic law and legitimate] opposition is linked to observance of the same law."[94] According to the Prophet, if a man authorized by God to rule people abuses that power by ruling unjustly, he "will never feel even the smell of Paradise."[95] Moreover, the Prophet recognized that in certain circumstances the oppressed have a duty to rebel against their oppressors: "If people see an oppressor and they do not hinder him, then [God] will punish all of them."[96] In accordance with these commands, the majority of Muslim jurists have refused to condemn the behavior of those individuals who revolt against an oppressive, tyrannical government.

Muhammad's first two successors "sought the people's oath of allegiance as evidence of approval."[97] In fact, Abu Bakr, after being elected, stated: "I was made a ruler though I was not the best among you. If I commit any wrongdoing, correct me. Obey me insofar as I obey the Prophet. If I disobey [God] and His Prophet, do not obey me."[98] Further, neither Abu Bakr nor anyone else represented that they inherited the Prophet's powers in either the religious or political spheres.[99]

Leadership over the Muslim people has raised further questions among Islamic jurists. According to Ahmad Moussalli:

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[91] *Id.*
[92] *Id.*
[93] Al Hibri, *supra* note 55, at 505.
[94] MOUSSALLI, *supra* note 52, at 104.
[95] SAHIH BUKHARI, vol. 9, bk. 89, No. 264 (M. Muhsin Khan trans.), *at* www.usc.edu/dept/MSA/fundamentals/hadithsunnah/bukhari/089.sbt.html (last visited Jan. 4, 2005).
[96] ABDULAZIZ SACHEDINA, THE ISLAMIC ROOTS OF DEMOCRATIC PLURALISM 122 (2001).
[97] MOUSSALLI, *supra* note 52, at 33.
[98] *Id.*
[99] *Id.*

> Because the majority of jurists have agreed that [*bay'a* is essential for legitimizing governments], the rule of any individual who forces himself on the Muslims is theoretically illegitimate and should be ended. Many jurists, however, have been reluctant of oppose such a ruler out of fear of civil strife and bloodshed. In the absence of such fear, it is the duty of Muslims to rid themselves of [such a ruler] and [replace him with] a legitimate one.[100]

Moussalli goes on to state that "[t]he most accepted view among jurists specified no number to nominate a ruler, but required for his election the approval of the majority of the informal communal representatives in every country or region."[101] Traditionally, in the event of a ruler's death, a successor would be elected on the condition that the successor had first obtained an oath of allegiance from the public.[102] The Qur'anic requirement of *bay'a* and *shura* in determining who shall lead the government is inconsistent with a hereditary system of political succession,[103] which raises questions as to the legitimacy of undemocratic monarchies that abound in the Middle East.

VII. A Comparative Analysis of the United States Constitution and Islamic Law

A. Fundamental Aims of Justice

The Preamble of the Constitution broadly enumerates the fundamental purposes and powers of the government.[104] It refers to promoting justice, order, and liberty among other values. In a similar vein, Islamic law promotes these values and protects certain individual rights. Its objective is to prohibit that which is harmful and promote that which is beneficial to the *ummah*. Individual rights in Islam differ from the Lockean conception of rights, which posits that man is born free. From an Islamic perspective, man is not born free but is born to be free from whim and desire through his relationship with humankind.[105]

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[100] *Id.* at 45.
[101] *Id.* at 36.
[102] *Id.*
[103] *Id.* at 126.
[104] *See* U.S. CONST. pmbl.
[105] MOUSSALLI, *supra* note 52, at 126.

American jurisprudence focuses on individual rights. Islamic jurisprudence, on the other hand, focuses on protecting the interests of society. The divinely inspired aim of Islam is the pursuit of justice and the establishment of a just social order. According to the tenets of Islam, justice is a virtue demanded by God: He commands justice and the doing of good, and forbids injustice.[106] Furthermore, justice is seen as being next to piety.[107] Any act should thus be measured according to whether it will promote social justice and the public interest. According to al-Ghazali, a law is deemed to be in the public interest if it is in agreement with the spirit of the law.[108] If there is a choice between two interpretations of the Islamic texts, the preferred choice is that which is less prejudicial to society and its members.[109] The protection of life, private property, and liberty—rights central to liberal democratic theory—are such divinely inspired aims.[110]

The conservative *ulama*, typically hostile to democracy, argue that Islam is itself liberating and therefore precludes the need to engage in any other discourse of liberation.[111] While it is true that Islam in its pure form (i.e., as propagated by the Prophet and his Companions) is liberating, it is not true that the version of Islam propagated by closed-minded clerics can offer any solutions to the problems of tyranny and discrimination in the Islamic world.[112]

While democracy does not ensure justice, it establishes a basis for pursuing justice since the citizens of a nation express their sovereign will by electing representatives. In a democracy, the people are the source of the laws; the laws, in turn, ensure fundamental rights of an individual are protected.[113] Islam and democracy are compatible because democracy expresses the special worth of human beings. It offers the greatest potential for promoting justice and protecting human dignity by enabling humans to fulfill the central responsibility assigned by God—namely, to carry out His message of justice and mutual respect.[114]

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[106] *See* QUR'AN 16:90.
[107] *See id.* 5:8.
[108] HALLAQ, *supra* note 13, at 89.
[109] *Id.*
[110] *See, e.g.*, El Fadl, *supra* note 31.
[111] MUMISA, *supra* note 14, at 44
[112] *Id.*
[113] *See* el Fadl, *supra* note 7, at 81.
[114] *See* QUR'AN 2:30.

B. Equality

An important notion in any democratic government is the equality of its citizens. The Declaration of Independence underscores the equality of all humans under God. The same is true in Islam, which holds that differences among human beings are ordained by God since He made mankind "into nations and tribes, that [they] may know each other (not that [they] may despise each other) . . . the most honored of you in the sight of God is (he who is) the most righteous of you."[115]

The *ahl al-dhimma*, those groups of non-Muslims that lived in the Islamic world under a contract of mutual agreement between themselves and the Muslims, would pay a poll tax (*jizya*) to enable them to become members of the Islamic state and could enjoy equal rights and equal duties.[116] While *jizya* was imposed, certain rights were solidly secured in each community: life, freedom of religion, freedom of expression and movement, equal treatment under the law, and the maintenance of specific customs and its local laws.[117] When one caliph tried to obtain a *fatwa* to prohibit minorities from having wine and pork, Islamic jurist Abu al Hasan al-Basri's response was that so long as the *ahl al-dhimma* paid the *jizya* they were free to have their own beliefs and that the caliph should follow the religious regulations on these matters.[118] Subsequent jurists made it a duty of the Islamic state to defend minorities against harm because of the *dhimma* contract. [119]

Islam also calls for justice along lines of race, class, or ethnicity. In the view of Ibn Taymiyya, it was unjust for a ruler to act according to prejudices along such lines. By doing so, the ruler was a traitor to God and His Prophet.[120]

Islam also played a large role in empowering women. It granted them the right to choose their husbands and the right to own and inherit property. More importantly, Islam accorded women equal religious status before God.[121] Because of this new status and the effects it had on the community, women became pillars of early Muslim society.[122] Several women, notably Fatima (daughter of the Prophet Muhammad and wife of

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[115] *Id.* 49:13.
[116] MOUSSALLI, *supra* note 52, at 130.
[117] *See id.* at 135.
[118] *Id.*
[119] *Id.* at 138.
[120] *Id.* at 129.
[121] Khan, *supra* note 1, at 330-31.
[122] *Id.* at 331.

Ali, the fourth of the Rightly Guided Caliphs) played an important role in propagating the Islamic faith.[123] A'isha, a wife of the Prophet, was noted for her intelligence and was frequently consulted about the teachings of the Prophet after his death.[124]

Despite the tradition of female empowerment, the spirit of gender equality never fully developed under Islamic law, as much of the progressive momentum of Islam died with the Prophet. As a matter of history, male jurists monopolized classical Islamic law and where the Qur'an gave no more, they gave no further—a relationship of inequity that remains to this very day.[125] The fact that female scholars are not represented at high levels in Islamic governments is unfortunate, given that women in the early Islamic period participated in *shura* and *ijma'*.[126] It is also unfortunate that the same Qur'an that liberated oppressed women at the dawn of Islam is now being used to oppress them.

C. Freedom of Expression

Jefferson argued that society should be tolerant of the religious practices of others insofar as they do not harm the public good.[127] The First Amendment of the Constitution protects religious freedom by prohibiting the establishment of a particular state religion.[128] The right to free speech and free press are protected under the Constitution.[129] The First Amendment also covers the right of the people to peacefully assemble and petition the government for a redress of grievances.[130]

Because humans are fallible, Islam recognizes the importance of the diversity of opinion and freedom of conscience, a notion that presages the American commitment to the "marketplace of ideas" principle with regard to the First Amendment.[131] The Qur'an provides a substantial basis for freedom of religion:

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[123] *Id.*
[124] *Id.*
[125] *Id.*
[126] MUMISA, *supra* note 14, at 85.
[127] *See* Jefferson, *supra* note 54, at 266.
[128] U.S. CONST. amend. I.
[129] *See* New York Times Co. v. Sullivan, 376 U.S. 254, 269 (1964).
[130] U.S. CONST. amend. I.
[131] *See* Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

> "If [God] had so willed, He would have made you [mankind] a single people; but [His plan is] to test you in what he hath given you; so strive as in a race in all virtues. The goal of you all is to [God]; it is He that will show you the truth of the matters in which ye dispute."[132]

This shows that even the proponents of false doctrines must be given a voice, if only to help strengthen peoples' belief in the truth as described by God.

The Qur'an allows for freedom of thought by forbidding compulsion in matters of belief.[133] Indeed the Prophet's duty was simply to deliver the divine message without taking it upon him to act as God's religious enforcer.[134] As with the Constitution, there are limits to the tolerance of religious pluralism in Islam – most notably with regard to apostasy. Insofar as apostasy remains a private matter and does not disrupt society, there is no particular punishment prescribed for it in the divine texts. But when abandonment of religious faith causes social discord, impinges on the rights of Muslims to practice their belief, and threatens the unity of the *ummah*, then it is treated as an act of sedition to be dealt with by the severest penalties.[135]

D. Criminal Procedure and the Rule of Law

The Fourth, Fifth, Sixth, and Eighth Amendments of the Constitution are essential provisions that protect the rights of the individual in legal actions and proceedings carried out by the State. These Amendments protect Americans from illegal searches and seizures, infringements upon the privacy of individuals, unfair trials, and excessive punishments. They are some of the benchmarks of the American system of justice.

The Fourth Amendment protects individuals from "unreasonable searches and seizures"[136] and affirms their right to privacy. These rights are protected in Islam. The Qur'an and the Prophet addressed the right of privacy, stating that a person is prohibited from entering any residence

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[132] QUR'AN 5:48.
[133] *See id.* 2:256.
[134] *See id.* 17:54.
[135] SACHEDINA, *supra* note 96, at 101.
[136] U.S. CONST. amend. IV.

without the owner's permission.[137] In fact, most Islamic jurists agree that, just as in America, an individual has the right to use force to protect his privacy without fear of punishment under the law.[138] According to al-Mawardi, who summarized the jurists' views on a number of issues, an individual's privacy cannot legitimately be invaded if there was no apparent misconduct or violation of the law.[139]

The Fourth Amendment also addresses the issue of what to do with improperly obtained evidence.[140] A large number of jurists also opposed the use of coerced confessions in all legal matters[141] and have formulated a doctrine similar to the American exculpatory doctrine, whereby confessions or evidence obtained illegally are rendered inadmissible at trial.[142]

The Fifth Amendment guarantees the right to life, liberty, and property.[143] Similarly, these rights have been endorsed in Islamic law. In his Farewell Pilgrimage, the Prophet declared: "Your lives and your property shall be inviolate until you meet your Lord."[145]

The Sixth Amendment guarantees a defendant the right to be informed of the charges against him, the right to a speedy, fair trial by an impartial jury (or judge), and the right to be presented with the evidence against him, including a list of the prosecution's witnesses.[144] Again, the similarities are striking. Muslim jurists also believe in the presumption of innocence in all civil and criminal proceedings and in the notion that the accuser always carries the burden of proof.[145] Under the Shari'a, as traditionally applied, the primary means of proof was always the testimony of witnesses whose eligibility was determined by their piety and truthfulness, and the absence of some essential factor that would make their testimony unacceptable (such as bias or interest).[146]

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[137] *See* QUR'AN 24:27-28.
[138] MOUSSALLI, *supra* note 52, at 129.
[139] *Id.*
[140] U.S. CONST. amend. IV.
[141] El Fadl, *supra* note 7, at 89-90.
[142] *Id.* at 90.
[143] *See* U.S. CONST. amend. V.
[145] MUHAMMAD HAYKAL, LIFE OF MUHAMMAD 486 (1976) (citing QUR'AN 2:188).
[144] *See* U.S. CONST. amend. VI.
[145] El Fadl, *supra* note 7, at 89.
[146] ANDERSON, *supra* note 5, at 44.

The Eighth Amendment prohibits the infliction of "cruel and unusual punishments" by the state.[147] Islamic criminal law includes a limited number of offenses for which certain severe penalties are divinely prescribed. However, just as in America, there is a high standard of proof required before harsh punishments such as the death penalty or long prison sentences can be imposed.[148]

Similar to democratic penal systems, an underlying principle of the Qur'an is proportionality—that the punishment should fit the crime and the character of the offender.[149] The Qur'an underscores the importance of retributive justice and manifesting God's mercy and compassion for the perpetrator of a violent crime by offering an alternative to violence in order to redress a wrong committed against that person.[150]

E. Respect for the Rule of Law and the Doctrine of *Stare Decisis*

Another common feature between the Western system and the Islamic system is their acceptance of and adherence to the rule of law and the doctrine of *stare decisis*, whereby similarly situated cases are disposed of in similar fashion. Any new case that arises must first be checked against those relevant cases contained in the body of law.[151] If no precedent is found, *ijtihad* must be exercised. If a case proves to be so close to it as to justify treating it in a similar fashion, then the jurist must apply the rule in the precedent to the new case.[152] This process, as it was applied in classical Islam, is essential to maintaining consistency and leads to the notion that an established legal doctrine should not be abandoned unless there is a compelling reason to do so.

VIII. Islamic Governments in the Middle East

In order to understand the issues that reformers face while trying to bring Islam and democracy into the same realm, it is important to examine events in recent history and the nature of particular governments in the Middle East.

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[147] U.S. CONST. amend. VIII.
[148] ANDERSON, *supra* note 5, at 37.
[149] *See* Furman v. Georgia, 408 U.S. 238, 314 (1972) (Marshall J., concurring).
[150] SACHEDINA, *supra* note 96, at 105; *see* QUR'AN 2:178.
[151] HALLAQ, *supra* note 13, at 161.
[152] *Id.*

A. Algeria

In the early 1990s, Algeria held its first ever multi-party elections in its thirty-five year history. The result was that an Islamic political movement, the Islamic Salvation Front (FIS) was elected through the democratic process. Shortly thereafter, the Algerian military in a *de facto* coup seized power in order to prevent the FIS from realizing its democratic victory.[153] Military leaders claimed that the FIS was an antidemocratic, "radical" Islamic group that used the ballot box to "seize" power and, once in power, would hijack democracy and take control of the government.[154] As a result of the Algerian government's repression of the FIS, the country fell into a prolonged and devastating civil war that has ravaged the country for over a decade. This incident, rather than showing that Islam and democracy are incompatible, serves as another example of how the actions of autocratic governments have kept democracy from taking hold in the Islamic Middle East.

B. Saudi Arabia and Morocco

A comparative look at the Islamic monarchies in Saudi Arabia and Morocco raises the question of how an Islamic government is supposed to look. When one sees that two conservative Arab monarchies simultaneously publish documents defining the elements of Islamic government in fundamentally dissimilar ways, it becomes more evident that the Islamic principles of government are reformulated according to historical circumstances and local political exigencies.[155] The examples of Saudi Arabia and Morocco prove that versions of Islamic constitutionalism do not emerge from a common theory of Islamic government, but are the result of individual regimes' power struggles and the tactics or strategies used to further their goals.[156]

The Saudi royal family, seeking to establish Islamic legitimacy, sponsored the puritanical Wahabbi sect of Islam. Because of their deference to the Wahabbi jurists, Saudi rulers have been committed to preserving traditional Islamic jurisprudence. They follow the tenet that in an Islamic system there is no room for man-made legislation; only laws derived by jurists from the Qur'an and Sunnah would be

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[153] ESPOSITO, *supra* note 23, at 303.
[154] *Id.* at 304.
[155] Ann Elizabeth Mayer, *Conundrums in Constitutionalism: Islamic Monarchies in an Era of Transition*, 1 UCLA J. ISLAMIC & NEAR E. L. 183, 184.
[156] *Id.*

acceptable.[157] The Saudi royal family, as a result, ceased using legislation as a tool of modernization.[158] In contrast, Moroccan clerics defer to the king's views about what Islam requires.[159] Using his dynasty's claim that it inherited the authority of the Prophet, the king is seen as the preeminent authority on Islam in Morocco, and his decisions are not subject to legal analysis.[160]

The Saudi and Moroccan examples of governance—both carried out in the name of Islam—exemplify the assertion that the Shari'a does not sanction a particular form of government. Beyond the loose concept of *shura*, the Prophet, as we have seen, left his successors no particular code by which to administer a government or procedure by which the community would choose its rulers and hold them publicly accountable.[161] This lack of concrete guidance leaves political reformers with a reasonably wide vacuum in which to interpret the divine will and adapt it to modern times in the interest of society as a whole. This fact could serve to bring legitimacy to the claims of those reformers clamoring for democracy in the Middle East.

C. Recent Government Reform Efforts in Saudi Arabia

Saudi Arabia is facing a number of unprecedented problems. While its population has doubled in the last twenty years, oil revenues have remained flat with no prospects for sustained growth.[162] In the past ten years, per capita spending on infrastructure has been halved, leading to strains on basic services that are likely to grow.[163] Many Saudis are expressing a deepening dismay at the opaque and often arbitrary judicial and legislative systems.[164] Making matters worse, America's has declared that it intends to promote democracy as a means to counter religious extremism. This policy may signal the end of America's close economic and political relationship with the Gulf oil monarchies.[165]

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[157] *Id.* at 186.
[158] *Id.*
[159] *Id.* at 188.
[160] *Id.*
[161] SHADID, *supra* note 56, at 236.
[162] *Saudi Arabian Reform: Praying to Make Their Kingdom Nicer*, ECONOMIST, Jan. 11-14, 2003, at 37.
[163] *Id.*
[164] *Id.*
[165] *Id.*

To relieve internal and external pressures on its autocratic system of government, in 1992 the Kingdom of Saudi Arabia issued a significant piece of new legislation: the Basic Law of Government (Basic Law). The Basic Law represents the first extensively written constitutional system in the Kingdom's history.[166] Despite these steps toward modernization, these laws remain subordinate to the official constitution of Saudi Arabia, the Shari'a.[167] The Basic Law supplements the Shari'a and covers areas of modern life not specifically foreseen by the preceding Qur'an or Sunnah.[168] It institutionalizes the governmental framework of the Kingdom, authorizes the establishment of the *Shura* Council (an appointed body that acts as a sounding board for policy), and guarantees fundamental rights to affected persons.[169] These changes represent Saudi Arabia's attempt to integrate Islamic law and culture with the ideals of participatory government.[170] There has been some progress.

Saudi Arabia's fiercely independent jurists are now, at least in theory, bound to respect systematized procedure.[171] Lawyers have the right to defend clients.[172] Furthermore, there are alleged plans to broaden the mandate of the *Shura* Council, which is seen by some as a future parliament,[173] and limited local elections have recently taken place. Some enlightened princes even talk about moving the country toward a constitutional monarchy.[174]

The reforming trend is clear, but many Saudis complain that such changes are largely cosmetic.[175] Freedom of the press, and thus public debate of important matters, is still highly restricted.[176] The new laws ignore an issue that has been the focus of much debate: promoting equality between the sexes.[177] To the disappointment of many Saudis

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[166] A. Michael Tarazi, *Saudi Arabia's New Basic Laws: The Struggle for Participatory Islamic Government*, 34 HARV. INT'L L. J. 258 (1993).
[167] *Id.*
[168] *Id.*
[169] *Id.*
[170] *Id.*
[171] *Saudi Arabian Reform: Praying to Make Their Kingdom Nicer*, *supra* note 162, at 37.
[172] *Id.*
[173] *Id.* at 38.
[174] *Id.*
[175] *Id.*
[176] *Id.*
[177] Tarazi, *supra* note 166, at 270.

who hoped for reforms that would impose real limits on monarchical absolutism, the Basic Law turned out to offer no constitutional mechanism by which their rulers would be held accountable.[178] Arguably, the Basic Law does little more than ratify the status quo in Saudi Arabia and merely places a façade of constitutionalism before the autocratic rulers of the country. Although the Basic Law affirms the Shari'a as the fundamental law of the Kingdom, the King has the final word as to its implementation.[179]

Conclusion: Prospects for Establishing Islamic Democracy

The relationship between Islam and democracy is paradoxical: the very conditions that have blocked the growth of democracy in the Islamic Middle East—political instability, economic weakness and the resulting dependence on the West, lack of education, high unemployment, the inability of these societies to cope with modernization, and the ineffectiveness of governments to bring political rights and prosperity to their people—have led to increasing demands for a more influential role for Islam in politics in the past few decades. In addition, liberal-minded Muslims have remained on the margins in the development of Islamic law, unable to advance their reformist ideas. This stems in large part from their being isolated from the centers of political power, a link essential for the practical implementation of any idea.[180]

Islamists claim that turning back to Islam is the only way Muslim society can reach a level of prosperity such as it enjoyed over 1000 years ago during Islam's "Golden Era." Furthermore, they argue that the morally corrupt secular regimes in the Islamic world have been totally inept in providing for their nations' citizens. Although reformers worry that such a turn to the past will only exacerbate the host of troubles that plague the Middle East, perhaps Islam *is* in a way the cure to what ails Muslim society today. Given that the Qur'an is the highest authority and the final court of appeal in theological, political, and legal disputes, any attempt to justify democracy in the Muslim world must be based on the divine commands prescribed therein. Therefore, the proponents of political liberalism in Islam must portray democratic governance as the modern-day version of the process of *shura* described in the Qur'an. They must also show that Islam's fundamental objective of pursuing a

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[178]Mayer, *supra* note 155, at 194.
[179] Tarazi, *supra* note 166, at 264.
[180]HALLAQ, *supra* note 13, at 262.

just social order is furthered when the will of the *ummah*'s serves as the mandate for government.

Without resorting to or restoring the Qur'anic principles of *shura* or *ijma'* (justice, equality and coexistence), Muslims are hard-pressed to recapture the spirit of society that existed in the early days of Islam and achieve the ideals that the Prophet envisioned for his community of believers. Islam started as a religion that liberated people from political oppression and social inequality. Unfortunately, this universal message of tolerance and empowerment has been lost on conservative Muslim clerics, Middle Eastern autocrats, and Islamic extremists, each of whom chose to select passages of Islamic law to justify their grip on power, prevent public participation, and dominate political debate. Their actions have led both Western democrats and Middle Eastern reformers to demand that Islamic law no longer be used as the basis for government in the Islamic world. The problem with this proposal is that it denies the fact that most Muslims believe Islam should be a source of law and that the main thrust of Islamic law is to promote justice, equality, and tolerance. The solution, then, is to use Islam as a tool for reform. By realizing that Islam embraces many of the tenets of democracy, those seeking political changes in the Middle East can use Islamic principles to counter those who impede reform in the name of Islam in the great debate over the future of Muslim society.