March 1, 2010

Essay: The Quran and the Constitution

Ali Khan, Washburn University
ESSAY

The Quran and the Constitution

“And this Quran is not such as could ever be devised by anyone save God; it is a confirmation of what was (revealed) before and an exposition of Divine Text -- Therein is no doubt -- from the Sustainer of the Worlds.”

“Many have noted the sacredness surrounding the U.S. Constitution, and comparisons with the Bible are often made.”

L. Ali Khan

* Qur'an, sura Yunus 10:37. It is my view that the Quran cannot be translated; it can only be understood. Normally, after conducting my own research on the verses I use in writings, I adopt a translation that best captures the meaning of the verses. I consult English translations by Abdullah Yusuf Ali, Marmaduke Pickthall, and Muhammad Asad. Unless otherwise specified, all translations of the Quran in this article are mine.


*** Professor of Law, Washburn University. The author is grateful to many colleagues for their comments on the ideas contained in this article, first presented in November 2009 at the Seton Hall Law School Conference on Religious Legal Theory. The author is specifically grateful to Professors Carl Monk, Bill Merkel, Jeff Jackson, and Bill Rich for their comments on the draft. Kevin Keatley of class 2012 provided superb editorial suggestions.
Contents

I. Introduction ................................................................................................. 3
   § 1.1. Objective of This Essay ................................................................. 3
   § 1.2. The Basic Code ............................................................................ 5

II. Conscience of the Constitution .............................................................. 7
   § 2.1. Conscience of the Nation ............................................................ 7
   § 2.2. Political Pluralism ....................................................................... 10
   § 2.3. Constitutional Supremacy of the Quran .................................... 11
   § 2.4. Fusion States ............................................................................. 13
   § 2.5. Non-Islamic Constitutions ......................................................... 16
   § 2.6. Vulnerable Constitutions ......................................................... 18
   § 2.7. Constitutional Revolutions ....................................................... 19

III. Evolution of the Quran ......................................................................... 22
   § 3.1. Normative Reversals: ............................................................... 22
   § 3.2. Interpretive Approaches ............................................................ 25
   § 3.3. Text beyond Language ............................................................. 27
   § 3.4. Cross-Cultural Applications .................................................... 29
   § 3.5. Deduction and Compatibility Doctrines ................................... 30
   § 3.6. Reservations to International Treaties ..................................... 34
   § 3.7. The Common Law of Islam ....................................................... 37

IV. Conclusion .............................................................................................. 40
   § 4.1. Points of Parity and Difference: ............................................... 40
I. **INTRODUCTION**

§ 1.1. **Objective of This Essay**: The Quran is a holy book whereas the United States Constitution is a political compact.\(^1\) For some believers, any comparison between the two texts is ungainly, and for some any equivalency between the Word of God \(^2\) and the word of man is sacrilegious. Even for some secularists, including the ones who personally subscribe to religion, an analogical study of the Quran and the Constitution is intellectually dubious since the two genres are anchored in divergent epistemologies and sociologies.\(^3\) Without dismissing these reservations, I conduct this study to highlight a few critical points of parity and points of difference between the Quran and the Constitution.\(^4\) This study is instructive for Muslim jurists in understating the role of the constitution in furthering the evolution of Islamic law. This study is also informative for secular jurists who, while insisting upon the separation of church and state, might have

---

1. **Edward McNall Burns, James Madison, Philosopher of the Constitution** 170 (1938).
3. Secularism itself is a Christian principle, derived from the New Testament, which divides human obligations between God and Caesar, thus separating the two realms. *Matthew 22:17-21*. However, the claim that there ought to be a wall between the realms of God and Caesar is a political assertion that many Christians may not accept.
4. **See Yousef M. Alkadi, Striking Similarities Join the Holy Quran and the USA Constitution** 18 (2009). The author highlights notions of justice, saying truth, peace, security, equality, and owning property are common values that both the Quran and the U.S. Constitution protect.
overlooked the vibrant nexus that exists between the Quran and the Constitution. Since Muslim nations are increasingly inclined to adopt the Quran as the supreme source of law, this study clarifies that the supremacy of the Quran must not be confused with political theocracy, religious fundamentalism, intolerance, or international frictions. Nor is the supremacy of the Quran incompatible with the concept of the constitution, a democratic form of government, or the rule of law.

Note that the constitution (printed in lower case in this article) is the generic constitution found in most modern states. By contrast, the specific constitution (printed in upper case), written or unwritten, is the actual constitution of a state, such as the U.S. Constitution or the Pakistan Constitution. The constitution, in the generic sense, refers to a set of fundamental political and legal principles, critical for the establishment and continuity of a politico-legal system. These fundamental principles provide rules for the succession of government, powers of the branches and layers of

---


6 Consider the 1776 Treaty of Peace and Friendship with Tripoli made under the administration of President George Washington. Article 11 of the Treaty is a remarkable piece of conceptual harmony between the secular United States and the Muslim world: “As the government of the United States of America is not in any sense founded on the Christian Religion,-as it has in itself no character of enmity against the laws, religion or tranquility of Musselmen,-and as the said States never have entered into any war or act of hostility against any Mehomitan nation, it is declared by the parties that no pretext arising from religious opinions shall ever produce an interruption of the harmony existing between the two countries.”
government, and rights and liberties of individuals.\textsuperscript{7} Systemically, the constitution is the antithesis of anarchy, arbitrariness, limitlessness, and absence of the rule of law. Despite references to the constitution in the generic sense, discussion points in this essay draw on specific constitutions of several nations, Muslim and non-Muslim, and much of the comparison offered here relies specifically on the U.S. Constitution.

§ 1.2. The Basic Code: Historically, the constitution has not been critical to the development of Islamic law, which traces its legitimacy and evolutionary dynamism from two primary sources: the Quran and the Prophet’s Sunnah, which, put together, may be called the Basic Code.\textsuperscript{8} The Prophet Muhammad was the transmitter of the Word of God, that is, the Quran. He, as a human being, was also considered a wise man, respected as a judge, and accepted as the leader of an emerging Muslim nation. The Prophet’s Sunnah refers to Muhammad’s deeds and opinions when he was acting as the wise man, the judge, and the leader, but not transmitting the Word of God.

\textsuperscript{7} See PHILIP ALLOT, EUOMIA: NEW ORDER FOR THE NEW WORLD 168(2001). Allot describes the following principles as generic to most constitutions: law is integral to social process; legal power is delegated and limited; social power is employed for social interest and ought to be accountable. Id.

\textsuperscript{8} In this essay, the Basic Code is synonymous with the Shariah. However, since the word Shariah has been muddled in legal literature, mixing the revealed law with human law (fiqh), the term Basic Code is used to include exclusively the two primary sources of Islamic law: the Quran and the Sunnah. See Ali Khan, The Reopening of the Islamic Code: The Second Era of Ijtihad, I ST. THOMAS L. J. 341, 344 (2003) (hereinafter, Second Era).
These deeds and opinions are known as *ahadith* (traditions). The Prophet did not blur the two sources. The Prophet dictated only the Word of God, the Quran, to scribes. He prohibited the scribes from recording any *ahadith*. Due to this prohibition, no scribes were designated to reduce to writing the *ahadith* while the Prophet was resolving cases brought before him, when he was advising followers what to do, or when he was recommending manners, etiquettes, and norms of good behavior. The Prophet’s deeds and opinions were memorized at the time and handed down in the form of sacred stories to succeeding generations. While the Quran was meticulously recorded as it was being revealed, the Sunnah remained oral knowledge until it was authenticated and compiled dozens of decades after Muhammad’s death.

The Prophet’s Sunnah contains practical applications of the Quran. The Quran was the text and the Sunnah was the case law. Since the Prophet was the receiver and transmitter of the Quran, the Prophet’s private decisions, methods of dispute resolution, substantive and procedural rulings, advice, deeds, and opinions, all are considered to be informed by, and in harmony with, the injunctions of the Quran. Accordingly, the Prophet’s Sunnah is and must be compatible with the injunctions of the Quran. Any *hadith* that cannot be reconciled with the letter and spirit of the Quran is

---

9 The plural of hadith is ahadith.


11 There is some controversy over how early the *ahadith* were allowed to be recorded. See DANIEL W. BROWN, RETHINKING TRADITION IN MODERN ISLAMIC THOUGHT 91(1999).

12 Second Era, supra note 10 at 353.

considered weak and excluded from the Sunnah. Any *hadith*, which is compatible with the Word of God, ought to be part of the Prophet’s Sunnah even if its authenticity is less than perfect.

Islamic law draws from both the Quran and the Sunnah. Since the dawn of Islamic jurisprudence (*fiqh*), these two sources have constituted the Basic Code for deducing new rules to answer new questions. In Islamic jurisprudence, the Quran is interpreted in light of the Sunnah and the Sunnah is examined in light of the text of the Quran. This mirrors how the U.S. Constitution is interpreted in the light of constitutional precedents and constitutional precedents are examined in light of the text of the Constitution. The Basic Code, composed of the Quran and the Prophet’s Sunnah, is the unified supreme text of Islamic legal systems. However, the Quran as the Word of God is the ultimate source of Islamic law.

II. CONSCIENCE OF THE CONSTITUTION

§ 2.1. Conscience of the Nation: The constitution, in the generic sense, is a flexible device, which organizes and shapes diverse political and legal systems. Since the middle of the twentieth century, the universal popularity of the constitution in the generic sense has

---

14 Because the Sunnah was not contemporaneously recorded, thousands of false *ahadith* were attributed to the Prophet after his death. Vested interests, including persons in authority, concocted the Prophet’s *ahadith* to advance self-serving legal and moral viewpoints. In view of falsehood and fraud regarding the transmission of *ahadith*, Muslim jurists developed the science of gathering and verifying authentic *ahadith*. About two hundred and fifty years after the Prophet’s death, certain collections of *ahadith*, particularly Sahih Bukhari and Sahih Muslim, have been broadly accepted as authentic. See Second Era, *supra note* 10, 351-354.
been spectacular. Almost all modern states, including authoritarian and communist states, have established the constitution as the master text to organize political and legal institutions. The constitution does not demand that the form of government be liberal democracy. The constitution in the generic sense is open to all forms of government, including monarchy, democracy, one-party rule, plutocracy, theocracy, etc. Likewise, secularism is no integral part of the constitution in the generic sense even though specific constitutions may embrace the separation of church and state doctrine in order to establish the secular state. Furthermore, the constitution is open to various economic systems: capitalism; socialism; or mixed economy, are all compatible with the constitution.

Each specific constitution, however, when promulgated freely and with the consent of the people, reflects the deepest values that a nation cherishes. The specific constitution provides a set of principles that define the identity and conscience of the nation. The specific constitution may require that the form of government be a federation, or that the economic system protect free markets. It may mandate that church be separated from state and school from church. Each state custom-designs its constitution to reflect its moral, social, political, economic, and juridical values. The conscience of the nation is incorporated in the conscience of its constitution. Almost all

---


16 Though attributed to the will of the people, constitution-making is essentially an elitist, epistemic undertaking since constitutions are frequently drafted by committees and groups that may or may not have any popular roots. See Levant Gonenc, Prospects for Constitutionalism in Post-Communist Countries 110-112 (2002).
Muslim states, with varying political and economic ideologies, have promulgated national constitutions.

True, the Quran constitutes the conscience of many Muslim communities. Yet, the belief that Muslim states need no unifying document besides the Quran misunderstands the function of the constitution in establishing a modern state. The constitution by no means adversative to the Quran. The Basic Code provides many principles of good government, but it leaves open the possibility of various forms of government that Muslim communities may establish over the course of centuries. It is the province of the constitution to lay out the structure of the government. Each Muslim state, therefore, needs a constitution to formalize its political choices in matters of government. The constitution may also reaffirm the rights and obligations that the Basic Code provides. It may establish new rights and obligations consistent with the Basic Code. Because the Quran is open to cultural diversity, each Muslim state may inscribe its fundamental cultural preferences in the national constitution. After resisting for years the idea of the constitution as a super-normative instrument, Saudi Arabia has finally promulgated a national constitution that nonetheless declares that “God's Book and the Sunnah of His Prophet, God's prayers and peace be upon him, are its constitution.” The establishment of national constitutions in Islamic states, such as Saudi Arabia, simply means that the Basic Code is the conscience of both the community and the constitution.

---

17 For example, the consultation principle lies at the heart of Islamic government. The Quran recommends that decisions must be made after due deliberation and consultation. *Quran*, ash shura 42:38. *See also Iran Const. art. 7.* (incorporating the consultation principle).

§ 2.2. Political Pluralism: Just like the constitution in the generic sense, the Quran does not prescribe any specific form of government. However, specific national constitutions cannot function unless a form of government is established. Muslim jurists have relied on the Quran to defend monarchies as well as democracies. Over the centuries, the Quran has been open to various forms of government, including caliphate, kingship, democracy, rule of the clergy, etc. The democracy in Iran, designed under the Quran, is not the same as democracy in Pakistan. Yet both Pakistan and Iran submit to the Quran as the supreme law of the land. The Saudi monarchy perpetuates the “rule of the sons of the founding King . . . and [of] their children’s children.”19 Yet the Saudi Arabia Constitution submits to God’s Book (the Quran).20

One must not assume that the Quran establishes theocracy, that is, the rule of the clergy. The Pakistan Constitution embraces the supremacy of the Quran but does not establish theocracy. Most state institutions in Pakistan are non-clerical. The Saudi Arabian Constitution establishes the supremacy of the Quran, but the state is a kingdom ruled by the Saud family, not clerics. Even in Iran, although the Shia clergy wield tremendous powers, the Iranian Constitution allows non-clerical institutions to run numerous affairs of the state. However, the Quran does establish a spiritual normative order under which all systemic norms are subjected to God’s authority embodied in the Quran. One could therefore argue that a legal system in which the Quran is the supreme law of the land is by definition God-oriented, and hence theocratic, even though the government may or may not be vested in a clerical establishment or religious party. The

19 Saudi Arabia Const. art. 5.
20 Saudi Arabia Const. art. 1.
learned in the science of the Quran play a central role in administration of the Islamic state, but they need not command political power.

Whether a Muslim nation would prefer democracy over another form of government is a political and cultural decision. It is far-fetched to argue that the Quran mandates the rule of the sons of a specific family or that it requires a government of clerics. The Quran is open to various forms of government that submit to the rule of law and to normative injunctions of the Quran. Some Muslims carry nostalgic memories of the caliphate, a form of government that survived several centuries after the dawn of Islam.\textsuperscript{21} Some even argue that the caliphate is a preferred political system under the Quran.\textsuperscript{22} Such theses confuse historical and cultural preferences of Muslim populations with injunctions of the Quran.\textsuperscript{23} Since the Quran is revealed to diverse nations and for evolving periods of history, it does not mandate any one form of government that might suit one nation but not another, or that might work at one stage of human evolution but not at another.

\section*{2.3. Constitutional Supremacy of the Quran}

In most states, the constitution, placed at top of the legal pyramid, is the master text and

\begin{itemize}
\item \textsuperscript{21} Dan Bilefsky, \textit{Frustrated with West, Turks Revel in Empire Lost}, N.Y. TIMES, Dec. 4, 2009.
\item \textsuperscript{22} John O. Voll, \textit{Revivalism, Shi’a Style}, NATIONAL INTEREST ONLINE (Jan. 3, 2007) (describing sentiments for caliphate).
\item \textsuperscript{23} The Quran does indicate that God has appointed Adam as the \textit{khaleefa} (vicegerent or caliph) on the earth. sura al Baqara 2:30. At another place, the Quran addresses David as the \textit{khaleefa} of the earth. sura Suad 38:26. But the expression “\textit{khaleefa} of the earth” should not be confused with “\textit{khaleefa} of the empire” or king of the nation-state.
\end{itemize}
the supreme law of the land.\textsuperscript{24} However, a constitution may concede its supremacy to the Quran. In some Muslim states, the national constitution itself declares the Quran to be the supreme text. In such states, including Saudi Arabia, Iran, and Pakistan, all laws must conform to injunctions of the Quran. Muslim nations that subscribe to both the Quran and the constitution require laws be compatible with both supreme texts. For example, in Pakistan a law passed by the Parliament or the Executive must meet the constitutional standards, but the law must also be compatible with the Basic Code.\textsuperscript{25}

Technically, a constitutional provision that declares the Quran to be the supreme law can be modified and repealed, unless it is declared non-amendable.\textsuperscript{26} Article 227 of the Pakistan Constitution, which declares the Quran to be the supreme source of law, can be repealed through amendment procedures listed in the Constitution.\textsuperscript{27} Because Article 227 can be repealed, one might argue that the Pakistan Constitution, and not the Quran, ought to be considered the supreme text. This argument, though technically credible, does not diminish the supremacy of the Quran. It is a sociological question whether or not a Muslim nation, which constitutionally subscribes to supremacy of the Quran, can reverse its normative choices and opt for a secular constitution. Just because a constitutional provision can be amended does not \textit{ipso facto} weaken its normative durability. The First Amendment of the U.S. Constitution can be technically repealed, though such repeal might be declared unconstitutional.\textsuperscript{28}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{24} CONSTITUTION art. V.
\item \textsuperscript{25} PAKISTAN CONSTITUTION art. 227.
\item \textsuperscript{26} IRAN CONSTITUTION art. 177. Islamic provisions are unalterable.
\item \textsuperscript{27} PAKISTAN CONSTITUTION Part XI.
\item \textsuperscript{28} Scholars have argued that amendments can be challenged for their unconstitutionality. In other words, an amendment that does not fit with
\end{itemize}
\end{footnotesize}
potential amendability does not mean, though, that the First Amendment is vulnerable to amendment or that the United States would indeed repeal the amendment and deny the rights to speech, association, and religion.

§ 2.4. Fusion States: In examining the modern constitutions of Muslim states, I have presented the concept of the fusion state in other works.29 Here, a brief description of the fusion state is helpful in understanding the comparative dynamics of the Quran and the secular constitution. A secular constitution, such as the U.S. Constitution, separates the legal order from the religious order. The secular state is prohibited from the establishment of religion, even though it allows the free exercise of religion. Accordingly, the secular state refrains from aiding any religion or preferring one religion over another.30 The U.S. Constitution guarantees equal religious freedom to Christians as well as to “the infidel, the atheist, or the adherent of a non-Christian faith such as Islam or Judaism.”31

In contrast to the secular state, which promises state neutrality toward belief systems, the fusion state aligns itself with a designated religion or denomination. The Constitutions of Iran, Pakistan, Saudi Arabia, Algeria, Egypt, and Malaysia, among others, establish fusion states in that each Constitution designates Islam as

footnotes:
the official state religion.\footnote{ALGERIA CONST. art. 2; EGYPT CONST. art. 2; MALAYSIA CONST. art. 3(1).} This fusion would mandate that the state enforce the laws and morality of Islam and refrain from enacting laws that violate the Basic Code. However, the fusion state must not be confused with theocracy, under which political power is vested in the clergy.\footnote{L. ALI KHAN, A THEORY OF UNIVERSAL DEMOCRACY 227 (2003).} The fusion state is compatible with various forms of government, including democracy.

A fusion state may allow or express intolerance toward other religions, but religious intolerance is not a defining characteristic of the fusion state.\footnote{Pakistan Constitution assures freedom of religion for minority groups. Yet, intolerant Muslims attack Christian churches. See Sabrina Tavernise, \textit{Hate Engulfs Christians in Pakistan}, N.Y. TIMES, Aug. 2, 2009.} In fact, any such intolerance would violate the Basic Code under which there is no compulsion in matters of religion.\footnote{QURAN, sura al-Baqara 2:254.} Many fusion constitutions in Muslim states make an explicit commitment to religious tolerance.\footnote{MALAYSIA CONST. art. 3(1); PAKISTAN CONST. art. 227(3).} In addition to constitutional commitments to freedom of religion, the fusion state must be proactively engaged in protecting the rights of religious minorities. Protecting the rights of religious minorities is not an act of charity but a prescription of the Quran.

There is no guarantee that the secular state would be more tolerant of minority religions than the fusion state. The claim that the secular state offers the freedom of religion to all, though an elegant doctrine, fails to protect numerically or politically weak religious groups. For example, the religious beliefs and sacred sites of Native Americans have received rough treatment under the First
Amendment. In one case, the U.S. Supreme Court refused to extend constitutional protection to the Native American Church’s sacrament of ingesting peyote cactus, punishing the religious practice under the state criminal statute. In another case, the Supreme Court allowed the government to build a highway through the sacred sites of Indian tribes, though the construction “could have devastating effects on traditional Indian religious practices.” Armed with the Patriot Act, the FBI has been accused of engaging in electronic surveillance of mosques, violating American Muslims’ constitutional rights of free speech, free association, and free exercise of religion.

While religious freedom has emerged as a universal value, a nation or community, whether its constitution adopts secularism or fusion, cannot escape the social and cultural impact of the dominant religion. In Kansas, for example, because most of its inhabitants are Christians, one sees many more Christian churches than mosques, Jewish synagogues, or Hindu temples. Radio stations in Kansas


40 The Kansas constitution pays homage to Almighty God in the preamble. But it also contains the separation of church and state clause, though worded differently than the First Amendment. KAN. CONST. art. 8.
relay extended sermons on the Bible. Furthermore, Kansas lawmakers, judges, and government officials are overwhelmingly Christian. To say that Kansas practices secularism is a constitutional truism. In reality, however, though tolerant of other religions, including Islam, Kansas is culturally, socially, and politically anchored in Christianity.41 Likewise, in Turkey, a predominantly Muslim state, though its Constitution adopts secularism, cities and the countryside are filled with the images, rituals, and practices of Islam. These dichotomies demonstrate that even when the constitution formally embraces secularism, social reality might interstitially nurture fusion rather than separation of church and state.

§ 2.5. Non-Islamic Constitutions: The Quran and non-Islamic constitutions are not mutually exclusive. In fact, for the most part, they can be mutually supportive. A non-Islamic constitution is not necessarily an anti-Islamic constitution. An anti-Islamic constitution that forcibly bans the study or practice of Islam is a rarity, particularly in nations where there is a substantial Muslim population determined to practice Islam. The Soviet constitution that ideologically opposed religion and showed little respect for holy books, including the Quran, failed to survive. In the United States, the Constitution and not the Quran is the supreme law of the land. Yet the U.S. Constitution, though non-Islamic, is not anti-Islamic. Even though the 9/11 attacks have produced phobias about Islam and Muslims, the U.S. Constitution continues to allow freedom of religion under which Muslims may conduct their private life in accordance with injunctions

41 THOMAS FRANK, WHAT’S THE MATTER WITH KANSAS 67-71 (2005). The political leaders of Kansas, mostly Republicans, talk about “the crisis of soul” as the source of ill in the United States. Id. at 69.
of the Quran. The U.S. Constitution continues to respect the five pillars of Islam so that American Muslims are free to believe in One God, participate in mandatory daily prayers, fast during the month of Ramadhan, give charity, and make a pilgrimage.

However, Muslims cannot demand that the U.S. Constitution enforce all prescriptions and permissions of the Quran. It is unlikely, for example, that the U.S. Constitution would allow polygamy. Although the Quran permits polygamy, it does not mandate that Muslim men have multiple wives. Muslims living under non-Islamic constitutions must respect national and local laws. If laws prohibit them for practicing the basics of Islam, Muslims must be politically engaged to assert their right to freedom of religion. If persecution continues and the practice of religion becomes perilous, Muslims may migrate to safer towns and cities, since migration from the domain of evil is a virtue under the Quran. The Prophet himself migrated to Medina to escape persecution in Makka, where he was born and raised.

---

42 Some Islamic charities, however, have been closed for their alleged support of international terrorism. See e.g., Holy Land Found. v. Ashcroft, 333 F.3d 156 (D.C. Cir. 2003).

43 It is ironic though that states may constitutionally prohibit polygamy (Reynolds v. United States 95 U.S. 145 (1878)) but see little harm to civilization while married men and married women are having both short term and long term extra-marital affairs. See PEGGY VAUGHAN, MONOGAMY MYTH 26 (2007) (analyzing high extra-marital affairs statistics).

44 QURAN, sura an-Nisa 4:3.

45 QURAN, sura al-Anfal, 8:72.

46 IRA M. LAPIDUS, A HISTORY OF ISLAMIC SOCIETIES 27 (1988).
§ 2.6. Vulnerable Constitutions: A constitution set against the conscience of the community is inherently unstable, for it defies the nation’s moral gravity. Overly rigid secular constitutions in Muslim states, that specifically separate the Quran and the Constitution, are highly vulnerable to change; such constitutions may be amended or even completely discarded.\(^{47}\) The Turkish constitution stands out as the leading example of a rigidly secular constitution in a predominantly Muslim nation. The Turkish constitution establishes a secular state and declares that secular provisions of the Constitution are non-amendable.\(^{48}\) Because secular provisions cannot be amended, the Quran cannot be declared the supreme text in the Turkish legal system. However, the non-amendability of secular provisions may threaten longevity of the Turkish Constitution itself. Rigid secular provisions may sow the seeds of resentment among religious segments of the population. Even though the Turkish armed forces, the judiciary, and numerous other institutions are firmly secular, political forces have been moving toward the reintroduction of Islam in public life.\(^{49}\) If the Turkish population alters its secular orientation and demands the supremacy of the Quran, the existing constitution will have to be replaced with a new one. Constitutional replacements

---

\(^{47}\) Iraq and Afghanistan both promulgated new constitutions while under American occupation. Both constitutions declare Islam to be the state religion. \textit{See} \textit{IRAQ CONST.} art. 2; \textit{AFGHANISTAN CONST.} arts. 1-3. These constitutions would have been highly unstable if the occupying forces had demanded the separation of church and state.

\(^{48}\) \textit{TURK. CONST.} art. 2. The Senegal Constitution also establishes a secular state under which the state shall not directly supervise any religious institutions and communities. \textit{SENEGAL CONST.} arts. 1 & 24.

\(^{49}\) \textit{See generally} \textit{ANGEL RABASA ET. AL, THE RISE OF POLITICAL ISLAM IN TURKEY} (2008).
are not novel or rare. The U.S. Constitution replaced the Articles of Confederation.\textsuperscript{50} The Russian Federation, which holds Muslim Chechnya, has discarded the atheistic constitution of the Soviet Union\textsuperscript{51} in favor of the present constitution that, though secular,\textsuperscript{52} guarantees a vigorous right to profess and disseminate religious beliefs.\textsuperscript{53} In Pakistan, the idea of a secular constitution that Jinnah, the founder of Pakistan, advocated at the time of national independence from Great Britain was discarded in favor of an Islamic constitution that established the supremacy of the Quran.\textsuperscript{54}

\textbf{§ 2.7. Constitutional Revolutions:} A constitutional revolution means a fundamental change either in the form of government, in fundamental values, or both. The constitutional revolution can be

\textsuperscript{50} Examine the following provision: “And the Articles of this confederation shall be inviolably observed by every state, and the Union shall be perpetual; nor shall any alteration at any time hereafter be made in any of them; unless such alteration be agreed to in a congress of the United States, and be afterwards confirmed by the legislatures of every state. Art. XIII. Contrary to every element of this provision, however, constitutional conventions replaced the perpetual Union with “a more perfect Union” and dropped the unanimity rule, requiring only 9 state ratifications for the establishment of the new Constitution. \textit{See Const.} art. VII. \textit{See also} Bruce Ackerman, \textit{We the People: Transformations} 34-35 (1998).


\textsuperscript{52} Russia Const. art. 14.

\textsuperscript{53} Russia Const. art. 28.

brought about in two distinct ways. First, a constitution can be revolutionized through the amendment procedure. Second, a constitution can be scrapped or overthrown and replaced with a new one.\(^{55}\) Revolution through amendment is more orderly, whereas revolution through replacement may or may not be peaceful.\(^{56}\) Over the decades, the U.S. Constitution has been revolutionized through the amendment procedure. Amendments introduced a set of fundamental rights,\(^{57}\) abolished slavery,\(^{58}\) furnished equal protection of laws without discrimination on the basis of race, color, religion, or national origin,\(^{59}\) extended the right to vote to non-whites,\(^{60}\) women,\(^{61}\) and persons eighteen years of age or older.\(^{62}\) These revolutionary changes transformed the conscience of a nation originally mired in slavery and apartheid, by extending democracy, egalitarianism, and constitutional rights and liberties to a much wider population.

The 1979 Iranian Constitution, which replaced the 1906 Royal Constitution, offers an example of constitutional revolution affected through replacement rather than amendment of a prior

---


\(^{56}\) For a discussion of why constitutional directives may not be established in ways other than the constitutionally ordained amendment procedures, see Michael Perry, *What is “the Constitution” (and Other Fundamental Questions) in CONSTITUTIONALISM: PHILOSOPHICAL FOUNDATIONS* 99 (Larry Alexander ed. 2008).

\(^{57}\) *CONST. amend. I-X."

\(^{58}\) *Id., amend. XIII."

\(^{59}\) *Id., amend. XIV."

\(^{60}\) *Id., amend. XV."

\(^{61}\) *Id. amend. XIX."

\(^{62}\) *Id. amend. XXIV."
The 1979 Constitution not only changed the form of government by dismantling royalty, but also deepened the state’s commitment to Islam and Islamic law.\textsuperscript{63} The 1979 Constitution also established the primacy of Shia clergy in the administration of state affairs.\textsuperscript{64} Even the 1906 Royal Constitution was by no means secular. Its preamble promised to “give effect to the enactments of the Sacred Law of His Holiness the Prophet.” In 1907, the Royal Constitution was amended to establish the orthodox Ja’fari doctrine of the Ithna ‘Ashariyya (Shia Islam) as the official religion of Persia.\textsuperscript{65} The 1979 Constitution, in reinforcing the supremacy of the Quran and the Prophet’s Sunnah, is in some ways the continuation of Islamization of law, which began, though feebly, under the Shah of Iran.\textsuperscript{66}

The Quran is not opposed to constitutional revolutions either through amendment or replacement, provided the new constitution establishes the supremacy of the Quran. The Quran mandates that Muslims obey God, the Prophet, and leaders in charge of their affairs.\textsuperscript{67} Leaders, who themselves defy God and the Prophet, will have little claim anchored in Islamic law to demand loyalty from Muslims. Some leaders, in order to perpetuate their personal rule or the rule of their family, adopt Islamic law as a political strategy. Such

\begin{itemize}
\item \textsuperscript{63} IRAN CONST. art.2
\item \textsuperscript{64} IRAN CONST. art. 12.
\item \textsuperscript{65} See The Supplementary Fundamental Laws of October 7, 1907 available at http://www.fis-iran.org/en/resources/legaldoc/iranconstitution
\item \textsuperscript{66} See generally HOUCHANG CHEHABI, IRANIAN POLITICS AND RELIGIOUS MODERNISM (1990). The doctrine of velayat-al-fiqh (the rule of the religious jurisprudent), though made popular during the 1979 Islamic revolution, was invented in the early nineteenth century. Id. at 18. See also Iran Const. art. 5 & 107 (installation of the religious leader).
\item \textsuperscript{67} QURAN, sura an-Nisa 4: 59 & 4:83.
\end{itemize}
leaders often begin with the enforcement of harsh Islamic penalties for theft, fornication, and blasphemy, ignoring the more urgent needs of solving social and economic problems facing the nation. In 1977, General Zia-ul-Haq toppled a democratically elected government in Pakistan, made constitutional amendments to consolidate his powers, and employed harsh versions of Islamic criminal law to legitimize his authority.  

He used verses of the Quran to legitimize his ill-gotten authority, saying God gives power to whom He pleases. The people of Pakistan are still in the process of restoring the 1973 democratic Constitution that General Zia (and later General Pervez Musharraf) had unlawfully amended to weaken the power of the elected Parliament.

III. EVOLUTION OF THE QURAN

§ 3.1. Normative Reversals: The Quran is a permanent and immutable divine text. No force of emergency or catastrophe can repeal its divine prescriptions. Note the difference between the Quran and the constitution. The constitution can be amended whereas the Quran cannot be amended. The specific constitution itself prescribes procedures for its own textual amendments. The Quran prescribes no procedures for its textual amendments. In fact, the Quran prohibits

68 JOHN WILSON, PAKISTAN: THE STRUGGLE WITHIN 50 (2008). The Taliban in Afghanistan also employed spectacular Islamic punishments, such as public executions, to establish a regime of fear. Such regimes breach social balance that the Quran enforces.


any alteration in the Word of God.\textsuperscript{71} Over the past 1400 years, the Arabic text of the Quran has remained intact. The non-amendability of the Quran assures the permanence of its values. By contrast, the amendability of the constitution can result in normative reversals.

In the United States, the Eighteenth Amendment to the Constitution prohibited the manufacturing, sale, transportation, importation, and exportation of intoxicating liquors. However, this amendment was later repealed by means of yet another constitutional amendment.\textsuperscript{72} Contrast this value reversal with the prohibition of intoxicating liquors under the Quran.\textsuperscript{73} Since the Quran cannot be amended, the prohibition of intoxicating liquors is timeless. Secular Muslim states that do not subscribe to the supremacy of the Quran may ignore the prohibition and allow the sale and consumption of intoxicating liquors. The non-enforcement of the Quran’s injunctions against intoxicating liquors, however, does not amend or repeal the Quran’s prescriptions. Muslim nations that ignore the sumptuary laws of the Quran may reverse their laws and bring them in conformity with the injunctions of the Quran.\textsuperscript{74}

One might argue that what cannot be changed through amendment might be corrected through interpretation; and, therefore, non-amendability of a master text interposes no serious barriers to the deduction of new and even revolutionary rules. In the case of the

\textsuperscript{71} Quran, sura Yunus 10:64.
\textsuperscript{72} Const. amend. XXI.
\textsuperscript{73} Quran, sura al Maidah 5:90.
\textsuperscript{74} Pakistan allowed the sale and consumption of intoxicating liquors for many years after its independence. In the 1970s, however, laws were enacted to prohibit such sale and consumption for Muslims. Christians, however, are allowed to buy and consume liquors to this day.
constitution, legislatures and judges can be empowered to read the constitutional text to serve the evolving social utility. The U.S. Supreme Court has read the same Constitution to both prohibit and allow death penalty for juveniles under the Eighth Amendment.\footnote{Stanford v. Kentucky, 492 U.S. 361 (1989) (allowing such executions); Roper v. Simmons, 543 U.S. 551 (2005) (outlawing such executions).} In 5-4 split decisions, the Supreme Court Justices frequently read the same provisions, of the Constitution, in diametrically opposite ways.\footnote{Robert E. Riggs, \textit{When Every Vote Counts: 5-4 Decisions in the United States Supreme Court, 1900-90}, 21 \textit{Hofstra L. Rev.} 667 (1993) (arguing that ideology rather than law drives decision making).} Likewise, one might argue that the Quran can be interpreted to allow traditionally proscribed behaviors such as the consumption of intoxicating liquors.\footnote{However, the question of punishment for consuming intoxicating liquors is amenable to conflicting interpretations.}

The sweeping argument that supreme texts are inherently vulnerable to any and all interpretations must fail both with respect to the constitution and the Quran. The argument effectively renders the supreme texts irrelevant. The argument either asserts that interpreters ignore the meaning of the text, or presumes that texts are inherently porous and devoid of meaning. If the text has meaning, the legal system can find ways to remove interpreters who refuse to enforce the text. The argument that texts are without meaning does not comport with reality. Parts of a constitutional text may be vague and vagueness may at times yield mutually incompatible interpretations. Ambiguity is part of human communication, but one can hardly rely on the notion of ambiguity to conclude that texts are inherently meaningless. Human systems, including law, would simply fail, and
do fail, generating accidents and catastrophes if, or when, texts, oral
or written, fail to communicate shared meaning.\footnote{Planes would crash if the argument of textual meaninglessness is applied
to communications between pilots and controllers (though sometimes
 crashes occur because of failure in communication). Under this argument,
manuals that provide instruction on the assembly of products will be useless
texts (though sometimes they indeed are).}

Even though the Quran is a permanent text, it is nonetheless
 evolutionary. The evolution of the Quran is directly related to the
evolution of believers. Because the Quran is timeless and universal, it
must respond to all times and to the evolving human condition. Social
conditions of the believers in the seventh century, when the Quran
was revealed, have little in common with social conditions of
believers in the twenty-first century. A text that cannot respond to
evolving human conditions is not universal, but historically rooted. A
timeless text is good for times foregone, times here, and for times to
come. The Quran is revealed for all worlds and for all times. As such,
the believers are constantly in search for meaning in the Quran that
answers their questions. Past interpretations are helpful but they

\S 3.2. \textit{Interpretive Approaches}: While the constitution evolves
through both amendment and interpretation, the Quran evolves
through interpretation only. Both the constitution and the Quran must
be interpreted to resolve cases and controversies that cannot be
resolved under the plain text of the respective documents alone.
However, a remarkable difference separates exegetical attitudes and
interpretive traditions bearing on these supreme texts. In interpreting a specific constitution, judges, jurists, and lawmakers, themselves human beings, are interpreting a text made by other human beings. Even though admiration and ritual reverence is showered on the “founding fathers,” the interpreters could be highly sophisticated, knowledgeable, and wiser men and women. The interpreters, such as the U.S. Supreme Court Justices with decades of juristic and interpretational experience, could possibly know much more about the historical evolution of the national constitution than did the founders who could only speculate how the text might later be amended or interpreted in the context of cases and controversies.

Confident and willful interpreters of the constitution, who have mastered analytical skills and the art of textual manipulation, admit fewer constraints in bending the constitution to serve their own ideological viewpoints. For them, the interpretation of human texts is an intellectual sport, a power play, creative merriment. Smart and linguistically suave judges, vested with life tenure on the bench, can act as demigods in offering personal preferences as constitutionally mandated interpretations. U.S. Supreme Court Justices frequently accuse each other of reaching decisions not on the basis of “the text or history” of the Constitution but on “personal views.”

---


81 David Barnhizer, “On the Make:” Campaign Funding and the Corruption of American Judiciary, 50 CATH. U.L. REV. 361, 394 (2001) (arguing that judges are human and may be seeking power, not truth).

The mental orientation is quite different when believers interpret the Word of God. Willful manipulation of the text of the Quran to promote personal agendas cannot be the goal of believers. The Quran, itself, instructs readers not to touch the Book of God if their hearts or intentions are impure. The Quran also cautions interpreters from speculative undertakings. Abusively critical interpretations of the Quran, and other holy books, have been routinely made by persons who reject the idea of divine texts and do not believe in God. The Quran does not chill reflection but invites readers to use reason and knowledge in understanding the Word of God.

While few believers would blatantly distort the Word of God, the cultural conditioning of interpreters affects the readings of the Quran. In early Muslim empires, Islamic deductive jurisprudence (fiqh) remained under the influence of Arabophone interpreters, even though Egyptian, Mesopotamian, Iranian, and Central Asian jurists, who contributed to the formation of early jurisprudence, were not culturally Arabs. More recently, interpretations of the Basic Code have become more linguistically diverse.

§ 3.3. Text beyond Language: The specific constitution rarely requires translation for its application, but the Quran does. The Quran and the constitution are texts, each an organized assemblage of finite words.

---

83 QURAN, sura al Waqia 56:79. Here impurity means lack of faith or a pre-determined inclination or mindset to find faults in the Quran.

84 QURAN, sura aal-Imran 3:7. For a detailed explanation of this verse, see Divine Texts, supra note 69, at 838.


86 QURAN, sura Ibrahim 14:25. God coins parables for human beings so that they can reflect. Id.
While the constitution is most often written in the national language, the Quran is revealed in Arabic spoken in the seventh century Makka and Medina. Despite the passage of more than 200 years since its promulgation, the U.S. Constitution, written in simple English, remains almost fully accessible to Anglophone legal professionals. Although the need for translation has not yet arisen, questions of constitutional interpretation can ignite heated debates over the meaning of words found in the U.S. Constitution. The text of the Quran, revealed more than 1400 years ago, must also be interpreted and applied in diverse cultures and periods of civilization. Various Arabic dialects are spoken as native tongues in Middle Eastern countries. However, the Quran’s diction, syntax, vocabulary, and verbal structures are unique. The Quran, as the Word of God, is not easily translatable, further complicating the hermeneutic enterprise of understanding. For the most part, even educated Arabic speaking persons need to devote considerable amount of special effort to understand the meaning of the Quran. When the Quran is employed as the supreme text in non-Arabic speaking countries, such as Iran and Pakistan, legal professionals must rely on both Arabic and national languages to understand and apply the meaning of the Quran to various cases and situations.

The Quran, therefore, is a text not tied to its original language. Overly linguistic analyses derived from classical Arabic contravene the purpose of the Quran, which is to constantly guide humanity speaking diverse languages. Constitutional theories of originalism, which demand that words be interpreted in the social

---

87 The problems of untranslatability are universal and apply to all texts and languages. See James Nolan, Interpretation: Techniques and Exercises 57 (2005).
contexts of times when the Constitution was made, do not apply to the Quran or the Basic Code. Each generation of Muslims and each linguistic community is free to understand the meaning Quran that best suits its social and cultural realities. Of course, new understandings of the Quran cannot be separated from its prior understandings. But to dictate prior understandings made within the context of a particular culture is incompatible with the timelessness and universality of the Basic code. In this sense, the Quran’s text cannot be confined to any single language, including classical Arabic.

§ 3.4. Cross-Cultural Applications: The specific constitution is a cultural instrument that must be interpreted within the cultural context. Applications of the constitution cannot defy cultural forces of the community. Even though understandings of the specific constitution may be expanded or narrowed in light of inputs from foreign cultures, the constitution must always reflect broad cultural forces. Legal professionals, particularly judges, are often reluctant to apply the national constitution in the context of foreign cultures.

By contrast, the Quran cannot be confined to any single culture. Even though verses of the Quran were revealed in response to concrete issues facing the Prophet, the Quran transcends its socio-temporal placement in seventh century Arabia. Since the inception of Islam, the Quran has been the source of legal guidance for numerous diverse cultures, communities, and civilizations. Mesopotamians, Egyptians, Persians, Turks, Central Asians, Indians, and Indonesians, all Muslim communities, physically and culturally removed from Makka and Medina, understood and applied the Quran in their diverse cultural and linguistic contexts. Since significant Muslim communities have been established in Europe and North America, applications of the Quran within Western civilization have brought
even more diversity of applications. Just like in previous centuries, jurists and scholars of diverse nations and languages in present and future times would contribute to understandings of the Quran.

There has rarely been a suggestion that Muslim communities all over the world are obligated to accept applications of the Quran permitted in Saudi Arabia or in another Arab nation. Though revealed in Arabic, the Quran is not confined to any specific culture. Hundreds of millions of Muslims do not speak Arabic and live in communities markedly different from Middle Eastern nations. Even in the Middle East, cultural mores vary from nation to nation. Despite monumental diversity among Muslims of the world, the Quran’s central message and its fundamental principles have remained intact. The Quran influences each culture in more or less the same way. The Quran is not so porous that conflicting cultural norms can be read into it. It is not so rigid that it repudiates cultural variety. Cross-cultural applications of the Quran have been unable to dilute its core legal and moral principles. The Quran itself states that cultural and linguistic diversity is part of God’s creation.  

§ 3.5. Deduction and Compatibility Doctrines: The constitution serves in two distinct ways to expand and systematize norms of the legal system. The first method is that of deduction. The courts may use deductive methods, such as the use of analogy, to extract new rules from the text of a constitution. New rules may also be extracted from the structure or design of the constitution. The U.S. Supreme Court used the deductive method to construct the right to privacy, a

---

88 QURAN, sura ar-Rum 30:22.; see also Ali Khan, Protection of Languages and Self-Expressions under Islamic Law, 19 J. TRANS. L & POL’CY ---- (2010).
right nowhere mentioned in the text of the constitution, “emanating from the totality of the constitutional scheme.” Deductive methodologies employ the internal resources of a constitution and rarely consult external sources. The second method, which may be called the compatibility doctrine, has assumed more importance in the ever-expanding era of legislation and regulations. Under the compatibility doctrine, courts assess the constitutionality of statutes and regulations to determine whether these laws are compatible with fundamental principles and policies of the constitution. Deduction allows courts to make new rules whereas the compatibility doctrine empowers courts to engage in judicial review of laws that other authorized bodies have made.

In the first few centuries of Islam, Islamic law was deduced from the primary divine sources, that is, the Quran and the Prophet’s Sunnah. Eminent jurists employed legal methodologies, such as analogy and consensus, to deduce rules from the primary sources. The deductive Islamic law is known as fiqh. The early jurists, particularly Abu Hanifa, Malik bin Anas, Abu Abdullah Muhammad bin Idris (Shafi), and Ahmed bin Muhammad Hanbal, with hundreds of followers, established what is known as the major Sunni schools of jurisprudence. During the deductive period, the concept of legislation as a source of Islamic law was nearly non-existent. Rulers issued orders and judges decided cases, but neither executive orders nor

---

89 Griswold v. Connecticut, 381 U.S. 479, 494 (1965); see Samuel Warren & Louis Brandies, The Right to Privacy, 4 HARV. L. REV. 193 (1890) (the seminal article laying the foundation for the constitutional recognition of the right to privacy); Olmstead v. United States, 277 U.S. 438 (Justice Brandeis dissenting and arguing for the recognition of the right to privacy).

90 The concept of compatibility is also found in non-Islamic constitutions. See GERMAN CONST. art. 100.
judicial decisions were elevated to distinct sources of law. For hundreds of years, jurists continued to discharge the primary responsibility of creating, refining, and critiquing the rules of *fiqh*. They debated rules and the rationale of the rules with each other, providing multiple solutions to problems. Each school of jurisprudence believed that their rules and exegetical methods were in superior harmony with the Quran and the Prophet’s Sunnah. Yet, the schools respected good faith juristic difference. No eminent jurist disputed that more than one rule, with respect to the same issue, can be deduced from the primary sources of legal authority.

Muslims were free to choose from many schools of jurisprudence. There were not one but many versions of Islamic *fiqh*. What unified these diverse schools was the Quran, for all schools read and interpreted the same Quran. In another article, I have discussed the free markets of *fiqh*, explaining the non-coercive enterprise of juristic lawmaking.  

---

The methodologies of constitutional jurisprudence have transformed the expansion of Islamic law. One such methodology is judicial preview. While judicial review, the method used in the United States to test the constitutionality of statutes, is conducted after a case or controversy has arisen under a statute, judicial preview tests the constitutionality of legislative bills before enactment.\textsuperscript{92} Although deduction is still a vibrant method of Islamic jurisprudence, the doctrine of compatibility, which draws on the concept of judicial preview, has been introduced to test whether proposed legislation is compatible with the Basic Code. Under the compatibility doctrine, laws are no longer deduced from the text of the Basic Code, but are first made to solve problems, or regulate social and economic affairs. Once the legislation has been prepared, it is submitted to a special council of Muslim jurists who verify whether the proposed legislation is compatible with the Basic Code. The council of experts may propose changes to parts of the proposed legislation that violate the Basic Code.\textsuperscript{93}

The compatibility doctrine need not be confined to judicial preview. It can be equally applied in the form of judicial review under which judges are authorized to review statutes for constitutionality. Accordingly, a Muslim state may empower judges, or judges of the highest court, to test statutes for their compatibility with the Basic Code. This empowerment will allow judges to examine whether a statute as applied is compatible with the Basic Code. An effective and

\textsuperscript{92} For example, a proposal that would ban wearing of the Islamic full veil in France has been submitted to the Council of State, the high court, which previews legislative proposals for constitutionality and advises the Executive in matters of law. \textit{See} Mathew Sal Tmarsh, \textit{French Panel Advises Steps to Ban Muslim Veil}, \textit{N.Y. TIMES}, Jan. 26, 2009.

\textsuperscript{93} \textsc{Pakistan Const.} art. 230.
credible judicial review, however, will require that judges be trained in the Basic Code and Islamic jurisprudence.

The compatibility doctrine shifts the power of Islamic lawmaking from jurists to state institutions. In a democratic Muslim state, where the people elect the Parliament through genuine, periodic elections, the Parliament wields constitutional legitimacy to enact laws for the nation. Even the head of the state, such as the King or the President, may enjoy constitutional powers to issue executive orders while the Parliament is in recess. Under the constitution, therefore, the legislature and the executive may rely on their constitutional powers to make laws. The compatibility doctrine assures that laws passed by state institutions are submitted to the council of experts for judicial preview. The jurists retain the power to preview legislation and executive orders to ensure compatibility with the Basic Code. Yet, Islamic lawmaking is no longer the sovereign province of jurists who, often removed from the will of the people, deduced laws from the primary sources using exegetical methodologies. The introduction of popular will into Islamic lawmaking is a revolutionary development, which has been unknown for centuries. In some countries, such as Saudi Arabia, the popular will, exercised through an elected parliament, continues to be a non-factor in the enterprise of Islamic lawmaking.

§ 3.6. Reservations to International Treaties: Just like the United States protects its constitutional supremacy, many Muslim states make reservations on international treaties to preserve the supremacy of the Basic Code. The United States ratifies human rights treaties frequently with the following reservation: “That nothing in the (Treaty) requires or authorizes legislation or other action by the United States of America prohibited by the Constitution of the United
States as interpreted by the United States. This reservation declares the U.S. Constitution to be the supreme text that overrides any incompatible provisions of the treaty. Note that the reservation not only refers to text of the Constitution, but also to its interpretations, which means the constitutional case law. Thus, treaty provisions incompatible with Supreme Court decisions would have no legal effect under the reservation. Even with respect to treaties prohibiting “torture, cruel, inhuman or degrading treatment or punishment,” the United States reserves the right to only be bound to the extent these actions are “prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States.”

This commitment to uphold the supremacy of the Constitution, not unique to just the United States, demonstrates that nations, while accepting international obligations, do not compromise fundamental cultural and social values.

Many Muslim states make reservations to international agreements to uphold the supremacy of the Basic Code. Most Muslim states are signatories to the Convention on the Elimination of All Forms of Discrimination against Women, a treaty that advances political, economic, social, cultural, and civil rights for women.

---


95 U.S. Reservations, Understandings, and Declarations to the International Covenant on Civil and Political Rights. see http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en#EndDec

Article 2 of the Convention obligates state parties “to embody the principle of the equality of men and women in their national constitutions or other appropriate legislation.”97 Building on the principle of equality, Article 16 guarantees “the same rights and responsibilities during marriage and at its dissolution.”98 These Convention provisions are incompatible with some aspects of Islamic law, under which rights and obligations of men and women are not the same. During marriage, for example, the husband has the sole responsibility to provide for the household, even if the wife possesses wealth or has personal means of income. Likewise, the Islamic law of divorce prescribes rules for spousal maintenance and property distribution, which are not based on equality. Accordingly, many Muslim states have made reservations to the articles of the Convention, which, in their judgment, cannot be reconciled with the Basic Code.

Bangladesh, whose constitution declares Islam to be the state religion,99 ratified the Convention with the following reservation: “The Government of the People’s Republic of Bangladesh does not consider as binding upon itself the provisions of article 2, [... and ...] 16 (1) (c) as they conflict with Sharia law based on Holy Quran and Sunna.”100 In making reservations to Articles 2 and 16, Libya refers to “the peremptory norms of the Islamic Sharia.”101 Saudi Arabia has made a broad reservation to the entire Convention, stating that “In

97 Id.
98 Id.
99 BANGLADESH CONST. Art. 2(A).
101 Id. Libyan Arab Jamhiriya Reservation.
case of contradiction between any term of the Convention and the norms of Islamic law, the Kingdom is not under obligation to observe the contradictory terms of the Convention.\(^\text{102}\)

Israel, which has a substantial Muslim population who are Israeli citizens, made a reservation to Article 16 of the Convention “to the extent that the laws on personal status which are binding on the various religious communities in Israel do not conform with the provisions of that article.”\(^\text{103}\)

\textit{§ 3.7. The Common Law of Islam:} The supremacy of the Basic Code in multiple Muslim states establishes supra-national common law over constitutional diversity. Consider three Muslim states, Saudi Arabia, Pakistan, and Iran. Each of these states has declared the Quran and the Prophet’s Sunnah to be the supreme law of the land. Since these states share no common governmental institutions, they have established neither a federation nor a confederation. In fact, each state has a radically different form of government and a distinct constitution. Saudi Arabia is a monarchy. Iran blends theocracy with the presidential form of government. Pakistan is a parliamentary democracy that functions under the shadow of a strong and intrusive military, which frequently overthrows democratically elected governments. Even in terms of religion, profound differences divide these states. Saudi Arabia practices a puritanical version of Sunni Islam articulated in the works of Abdul Wahab.\(^\text{104}\) Iran is officially Shia. Pakistan, a religiously pluralistic nation, has not officially subscribed to any sect, or school of jurisprudence. Even linguistically,

\[^{102}\text{Id. Saudi Arabia Reservation.}\]
\[^{103}\text{Id. Israel Reservation.}\]
these states share little in common. Saudi Arabia speaks Arabic. Iran speaks Persian. Pakistan is a composite of numerous linguistic communities, even though Urdu and English have been adopted as official languages. This diversity affirms the Quran’s injunctions that God has created diverse languages, colors, and communities to establish ties among individuals and to bind them in identities.\textsuperscript{105}

Despite their diverse forms of governments, languages, customs, laws, and constitutions, Saudi Arabia, Iran, and Pakistan, each has submitted to the supremacy of the Quran and the Prophet’s Sunnah. Each has made a constitutional commitment not to make laws contrary to the teachings of the supreme texts. This commitment to the Basic Code demonstrates three important points. First, diverse legal systems and constitutions can be compatible with the Basic Code. Second, Islamic law is not a monolithic body of law as it can vary from nation to nation. Third, constitutional commitments to the supremacy of the Basic Code would generate a common body of law. This common law of Islam furnishes supra-national normative unity among diverse Muslim nations.

The common law of Islam will further develop through cases and precedents if judges in Muslim states are empowered to review legislation, local customs, and other sources of rules and regulations under the compatibility doctrine. Such judicial opinions delivered under the compatibility doctrine, though emanating from diverse legal systems, will contribute to the development of the common law of Islam. For example, the Pakistan Supreme Court has been petitioned to resolve whether Article 248(2) of the Pakistan Constitution, under which “no criminal proceedings whatsoever shall be instituted or continued against the President in any court during his term of

\textsuperscript{105} QURAN, sura ar-Rum 30:22
office,” is compatible with the Basic Code. If the Supreme Court holds that no such immunity is available under the Basic Code, a rule of Islamic law will emerge. If this rule is followed in the courts of other Muslim states, a common law rule of immunity under the Basic Code will be established.

This phenomenon is similar to supra-national common law that human rights treaties are generating under auspices of the Council of Europe, the African Union, and the Organization of American States. States in the Council of Europe have subscribed to the European Convention on Human Rights and accepted the jurisdiction of the European Court of Human Rights. Consequently, cases have been brought to the Court, challenging human rights violations under national laws and constitutions. The Court decisions have generated a common law of human rights for member states of the Council of Europe. A similar phenomenon is taking place under the African Charter of Peoples Rights and the American Convention on Human Rights. Because Muslim states have not established any supranational legislative and judicial institutions to


harmonize jurisprudence under the Basic Code, the common law of Islam will likely emerge through national legislatures and high courts.

IV. CONCLUSION

§ 4.1. Points of Parity and Difference: The Quran and the constitution are mutually supportive supreme texts; one does not negate the other. Numerous forms of government, cultural traditions, and economic systems are compatible with both supreme texts. Muslim nations are free to promulgate specific constitutions that reflect their social, political, and economic preferences rooted in history and culture. The specific constitution must reflect the conscience of the nation, for constitutions that fail to do so are vulnerable to amendment, even revolutionary replacement. Because the human condition is constantly evolving, the Quran, though a permanent divine text immune to alteration or amendment, is amenable to the evolutionary calls of believers. Each generation of Muslims is free to understand the Quran for meeting its needs. Interpreters as believers, however, summon the luminosity of faith while analyzing the Word of God and refrain from deforming the meaning of the divine text. They should not project personal agendas into the meaning of the Quran as do some interpreters of the constitution.