The Quran and the Constitution

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And this Qur’an 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.¹

Many have noted the sacredness surrounding the U.S. Constitution, and comparisons with the Bible are often made.²

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1. Qur’an, Surah Yunus 10:37. It is my view that the Qur’an 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 Qur’an in this Essay are mine.

I. INTRODUCTION

A. Objective of this Essay

The Qur’an is a holy book, whereas the United States Constitution is a political compact. For some believers, any comparison between the two texts is ungainly, and for some, any equivalency between the Word of God and the word of man is sacrilegious. Even for some secularists, including the ones who personally subscribe to religion, an analogical study of the Qur’an and the Constitution is intellectually dubious because the two genres are anchored in divergent epistemologies and sociologies. Without dismissing these reservations, I conduct this study to highlight a few critical points of parity and difference between the Qur’an and the Constitution. This study is instructive for Muslim jurists in understanding 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 overlooked the vibrant nexus that exists between the Qur’an and the Constitution. Because Muslim nations are increasingly inclined to adopt the Qur’an as the supreme source of law, this study clarifies that one should not confuse the supremacy of the Qur’an with political theocracy, religious fundamentalism, intolerance, or international frictions, nor should one view the supremacy of the Qur’an as

4. Qur’an, Surah Yunus 10:37.
5. Secularism, itself a Christian principle derived from the New Testament, 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.
6. See Yousef M. Alkadi, Striking Similarities Join the Quran and the USA Constitution 6 (2009) (highlighting notions of justice, saying truth, peace, security, equality, and owning property are common values that both the Qur’an and the U.S. Constitution protect).
incompatible with the concept of the constitution, a democratic form of government, or the rule of law.

Note that the term “constitution” (when printed in lower case in this Essay) refers to the generic constitution found in most modern states. By contrast, the specific constitution (when printed in upper case in this Essay) refers to 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 that are 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, layers of government, and rights and liberties of individuals.

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 the specific constitutions of several nations, both Muslim and non-Muslim, and much of the comparison offered here relates specifically to the U.S. Constitution.

B. 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 Qur’an and the Prophet’s Sunnah, which, when combined, form the Basic Code. The Prophet Muhammad was the transmitter of the Word of God, that is, the Qur’an and the Sunnah. Consider the 1796 Treaty of Peace and Friendship with Tripoli made under the administration of President George Washington. Article 11 of the Treaty, a remarkable piece of conceptual harmony between the secular United States and the Muslim world, states:

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 [sic] 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 Mahometan 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.


9. See Philip Allott, Eunomia: New Order for a New World 168 (2001) (describing 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).

10. In this Essay, the Basic Code is synonymous with the Shariah. However, because the word Shariah has been muddled in legal literature, mixing the revealed law with human law (fiqh), the term Basic Code consists exclusively of the two primary sources of Islamic law: the Qur’an and the Sunnah. See Ali Khan, The Reopening of the Islamic Code: The Second Era of Ijtihad, 1 U. St. Thomas L.J. 341, 344 (2003).
the Qur’an. 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. These deeds and opinions are known as *hadith* (traditions).11 The Prophet did not blur the two sources. The Prophet dictated only the Word of God, the Qur’an, to scribes.12 He prohibited the scribes from recording any *ahadith*.13 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 and handed down to succeeding generations in the form of sacred stories.14 While the Qur’an was meticulously recorded as it was revealed, the Sunnah remained oral knowledge until its authentication and compilation decades after Muhammad’s death.15

The Prophet’s Sunnah contains practical applications of the Qur’an. The Qur’an was the text and the Sunnah was the case law.16 Because the Prophet was the receiver and transmitter of the Qur’an, the Prophet’s private decisions, methods of dispute resolution, substantive and procedural rulings, advice, deeds, and opinions are all informed by, and in harmony with, the injunctions of the Qur’an. Accordingly, the Prophet’s Sunnah is, and must be, compatible with the injunctions of the Qur’an. Any *hadith* that cannot be reconciled with the letter and spirit of the Qur’an is considered weak and excluded from the Sunnah.17 However, any *hadith* that is compatible

11. The plural of *hadith* is *ahadith*.
13. Id.
14. 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).
17. Because the Sunnah was not contemporaneously recorded, thousands of false *ahadith* were attributed to the Prophet after his death. Individuals with vested interests, including those in authority, concocted the Prophet’s *ahadith* to advance self-serving legal and moral viewpoints. Because of the fraud associated with the transmission of *ahadith*, Muslim jurists developed the science of gathering and verifying authentic *ahadith*. About 250 years after the Prophet’s death, certain collections of *ahadith*, particularly those of Sahih Bukhari and Sahih Muslim, gained acceptance as authentic. See Khan, supra note 10, at 351-54.
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 Qur’an and the Sunnah. Since the dawn of Islamic jurisprudence (fiqh), these two sources have constituted the Basic Code from which new rules can be deduced to answer new questions. In Islamic jurisprudence, the Qur’an is interpreted in light of the Sunnah, and the Sunnah is examined in light of the text of the Qur’an. This mirrors how the U.S. Constitution is interpreted in light of constitutional precedents and how constitutional precedents are examined in light of the text of the Constitution. The Basic Code, composed of the Qur’an and the Prophet’s Sunnah, is the unified supreme text of Islamic legal systems. However, the Qur’an as the Word of God is the ultimate source of Islamic law.

II. CONSCIENCE OF THE CONSTITUTION

A. Conscience of the Nation

The constitution, in the generic sense, is a flexible device that organizes and shapes diverse political and legal systems. Since the middle of the twentieth century, the universal popularity of the constitution has 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 liberal democracy as the form of government. The constitution is open to all forms of government, such as monarchy, democracy, one-party rule, plutocracy, and theocracy. Likewise, secularism is not an integral part of the constitution in the generic sense, 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 each 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

19. Though attributed to the will of the people, constitution-making is essentially an elitist, epistemic undertaking because constitutions are frequently drafted by committees and groups that may or may not have any popular roots. See LEVENT GÖNEÇ, PROSPECTS FOR CONSTITUTIONALISM IN POST-COMMUNIST COUNTRIES 110-12 (2002).
specific constitution may require a federation as the form of government or require that the economic system protect free markets. It may mandate that church be separated from state and school be separated 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 into the conscience of its constitution. Almost all Muslim states, with their varying political and economic ideologies, have promulgated national constitutions.

True, the Qur’an constitutes the conscience of many Muslim communities, yet the belief that Muslim states need no unifying document besides the Qur’an misunderstands the function of the constitution in establishing a modern state. The constitution is by no means adversative to the Qur’an. 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 Qur’an is open to cultural diversity, each Muslim state may inscribe its fundamental cultural preferences into the national constitution. After resisting the idea of the constitution as a super-normative instrument for years, Saudi Arabia has finally promulgated a national constitution that, nonetheless, declares, “Its religion is Islam, and its Constitution, the Holy Quran and the Prophet’s Sunnah.” 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.

B. Political Pluralism

Just like the constitution in the generic sense, the Qur’an does not prescribe any specific form of government. However, specific national

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20. For example, the consultation principle lies at the heart of Islamic government. The Qur’an recommends that decisions must be made after due deliberation and consultation. Qur’an, Surah Ash-Shura 42:38; see also Qanuni Assassi Jumhuri Islamai Iran [The Constitution of the Islamic Republic of Iran] art. 7, 1358 [1980] (incorporating the consultation principle).

constitutions cannot function unless a form of government is established. Muslim jurists have relied on the Qur’an to defend monarchies as well as democracies. Over the centuries, the Qur’an has been open to various forms of government, such as caliphate, kingship, democracy, and rule of the clergy.

The Ottoman Constitution of 1876, the first in the Muslim world, was promulgated in the closing decades of the Islamic Caliphate. Under combined pressures from domestic unrest and dominance by European colonial powers, the 1876 Constitution was established to infuse rudimentary elements of democracy into a dying empire, one which the Ottoman Sultans had ruled for nearly four centuries. Just like the U.S. Constitution, the Ottoman Constitution established a bicameral legislature wherein the lower house was to be elected in periodic general elections by secret ballot. Religious provisions of the Constitution were noteworthy. The Sultan, also called the Supreme Caliph, continued to claim a blend of worldly and divine authority. The person of the Sultan was sacred and his name was to be mentioned in mosques after daily prayers. The Caliph was the protector of the Muslim religion. As the sole sovereign, he enjoyed the prerogative to carry out the laws of the Shariah. Although Islam was the declared state religion, the courts were bifurcated into Shariah courts and civil tribunals with separate subject matter jurisdictions. The 1876 Constitution failed, however, to protect the empire, the caliphate, and the sultanate. The founder of the Constitution, Midhat Pasha, was exiled and later murdered. The Constitution was eventually abandoned in favor of another constitution, one that would establish a secular Turkish state.

In the early twentieth century, the dissolution of the Ottoman Empire gave rise to Muslim nation-states. Political pluralism, however, remained. While the Ottoman Constitution faltered, a new wave of constitutionalism surged to prominence in the twentieth-century Islamic consciousness after a number of Muslim nations obtained independence from Western colonialism. Under Western influence, the ideas of constitution and democracy were gaining momentum among decolonized peoples of diverse Muslim lands. The nostalgia for the caliphate lingered, but various notions of Islamic democracy animated the political imaginations of twentieth-century Muslims. No single notion of constitutional democracy has claimed a

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monopoly over the blessings of the Qur’an. Iran’s democratic Constitution, filled with verses of the Qur’an, provides a riveting contrast to the Pakistan Constitution, written with a remarkably subdued religious fervor. Nevertheless, both the Pakistan and Iran Constitutions submit to the Qur’an as the supreme law of the land. The Saudi monarchy, which, as a matter of survival, resists the idea of democracy, instead stipulates that “[i]ts rule will be confined to the sons of the kingdom’s founder . . . and grandsons.”24 Even so, the Saudi Arabia Constitution submits to the Qur’an.25

One must not assume that the Qur’an establishes theocracy, that is, the rule of the clergy. The Pakistan Constitution embraces the supremacy of the Qur’an but does not establish a theocracy. Most state institutions in Pakistan are nonclerical. The Saudi Arabia Constitution establishes the supremacy of the Qur’an, but the state is a kingdom ruled by the Saud family, not by clerics. Even in Iran, although the Shia clergy wield tremendous powers, the Iran Constitution allows nonclerical institutions to run numerous affairs of the state. However, the Qur’an does establish a spiritual normative order under which all systemic norms are subjected to God’s authority as embodied in the Qur’an. One could, therefore, argue that a legal system in which the Qur’an 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 learned in the science of the Qur’an play a central role in the 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 Qur’an mandates the rule of the sons of a specific family or that it requires a government of clerics. The Qur’an is open to various forms of government that submit to the rule of law and to the normative injunctions of the Qur’an. Some Muslims carry nostalgic memories of the caliphate, a form of government that survived several centuries after the dawn of Islam.26 Some even argue that the caliphate is a preferred political system under the Qur’an.27 Such theses confuse the historical and cultural preferences of Muslim

24. KINGDOM OF SAUDI ARABIA CONST. art. 5.
25. Id. art. 1.
populations with the injunctions of the Qur’an.\textsuperscript{28} Because the Qur’an is revealed to diverse nations throughout 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.

C. Constitutional Supremacy of the Qur’an

In some states, the constitution, placed at the top of the legal pyramid, is the master text and the supreme law of the land.\textsuperscript{29} However, a constitution may concede its supremacy to the Qur’an. In some Muslim states, the national constitution itself declares that the Qur’an is the supreme text. In such states, including Saudi Arabia, Iran, and Pakistan, all laws must conform to the injunctions of the Qur’an. Muslim nations that subscribe to both the Qur’an and the constitution require laws that are 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{30}

Technically, a constitutional provision that declares the Qur’an to be the supreme law can be modified and repealed, unless it is declared unamendable.\textsuperscript{31} Article 227 of the Pakistan Constitution, which declares that the Qur’an is the supreme source of law, can be repealed through amendment procedures listed within the Constitution.\textsuperscript{32} Because Article 227 can be repealed, one might argue that the Pakistan Constitution, and not the Qur’an, ought to be considered the supreme text. This argument, though technically credible, does not diminish the supremacy of the Qur’an. It is a sociological question whether or not a Muslim nation that constitutionally subscribes to the supremacy of the Qur’an 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

\textsuperscript{28} The Qur’an does indicate that God has appointed Adam as the \textit{khaleefa} (vicegerent or caliph) on the earth. \textsc{Qur’an}, Surah Al-Baqarah 2:30-33. At another place, the Qur’an addresses David as the \textit{khaleefa} of the earth. \textit{Id.}, Surah Sad 38:26. The expression “\textit{khaleefa} of the earth” should not be confused with “\textit{khaleefa} of the empire” or king of the nation-state.

\textsuperscript{29} See, e.g., U.S. \textsc{const.} art. VI, \S\ 2.

\textsuperscript{30} \textsc{Pakistan Const.} art. 227, \S\ 1.

\textsuperscript{31} See, e.g., \textsc{Qanuni Assassi Jumihurii Islamai Iran [The Constitution of the Islamic Republic of Iran]} art. 177, 1358 [1980] (stating that Islamic provisions are unalterable).

\textsuperscript{32} \textsc{Pakistan Const.} arts. 238-239.
Amendment of the U.S. Constitution can technically be repealed, but such repeal might be declared unconstitutional. Its potential amendability does not mean that the First Amendment is vulnerable to amendment or that the United States would indeed repeal the amendment and deny its citizens the rights to speech, association, and religion.

D. Fusion States

In examining the modern constitutions of Muslim states, I have presented the concept of the fusion state in other works. Here, a brief description of the fusion state is helpful in understanding the comparative dynamics of the Qur’an 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, but it may still allow the free exercise of religion. Accordingly, the secular state refrains from aiding any religion or preferring one religion over another. 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.”

In contrast to the secular state, which promises state neutrality towards 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 the sense that each Constitution designates Islam as the official state religion. This fusion mandates 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. The fusion state is compatible with various forms of government, including democracy.

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33. Scholars have argued that amendments can be challenged for their unconstitutionality. In other words, an amendment that does not fit with fundamental values may be declared unconstitutional. See Miriam Galston, Theocracy in America: Should Core First Amendment Values Be Permanent?, 37 Hastings Const. L.Q. 65 (2009).
38. Khan, supra note 34, at 227.
A fusion state may allow or even express intolerance towards other religions, but religious intolerance is not a defining characteristic of the fusion state. In fact, any such intolerance would violate the Basic Code under which there is no compulsion in matters of religion. Many fusion constitutions in Muslim states make an explicit commitment to religious tolerance. In addition to constitutional commitments to freedom of religion, the fusion state must proactively engage itself in protecting the rights of religious minorities. Protecting the rights of religious minorities is not an act of charity, but rather a prescription of the Qur’an.

There is no guarantee that the secular state will 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 United States Supreme Court refused to extend constitutional protection to the Native American Church’s sacrament of ingesting peyote cactus, thereby punishing this 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, despite knowing 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 to free speech, free association, and free exercise of religion.

While religious freedom has emerged as a universal value, a nation or community cannot escape the social and cultural impact of the dominant religion whether its constitution adopts secularism or

40. Qur’an, Surah Al-Baqarah 2:256.
41. CONST. OF MALAYSIA art. 3(1); PAKISTAN CONST. art. 227(3).
42. Qur’an, Surah Al-Mumtahanah 60:8.
fusion. 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 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. Likewise, in Turkey, a predominantly Muslim state, cities and the countryside are filled with the images, rituals, and practices of Islam even though its Constitution adopts secularism. These dichotomies demonstrate that even when the constitution formally embraces secularism, social reality might interstitially nurture fusion rather than separation of church and state.

E. Non-Islamic Constitutions

The Qur’an 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, which ideologically opposed religion and showed little respect for holy books, including the Qur’an, failed to survive. In the United States, the Constitution, not the Qur’an, is the supreme law of the land. Yet the U.S. Constitution, though non-Islamic, is not anti-Islamic. Even though the September 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 lives in accordance with the injunctions of the Qur’an. 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


47. Thomas Frank, What’s the Matter with Kansas?: How Conservatives Won the Heart of America 67-71 (2005) (discussing how Kansas’ mostly Republican political leaders talk about “the crisis of soul” as the source of ill in the United States).
mandatory daily prayers, fast during the month of Ramadan, give charity, and make a pilgrimage.\textsuperscript{48}

Muslims, however, cannot demand that the U.S. Constitution enforce all prescriptions and permissions of the Qur’an. It is unlikely, for example, that the U.S. Constitution would ever allow polygamy.\textsuperscript{49} Although the Qur’an permits polygamy, it does not mandate that Muslim men have multiple wives.\textsuperscript{50} Muslims living under non-Islamic constitutions must respect national and local laws. If laws do prohibit them from practicing the basics of Islam, Muslims must engage themselves politically and assert their rights to freedom of religion. If persecution continues and the practice of religion becomes perilous, Muslims may migrate to safer towns and cities because migration from the domain of evil is a virtue under the Qur’an.\textsuperscript{51} The Prophet himself migrated to Medina to escape persecution in Mecca, the town where he was born and raised.\textsuperscript{52}

\textbf{F. 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 Qur’an and the Constitution are highly vulnerable to change; such constitutions may be amended or even completely discarded.\textsuperscript{53} 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 unamendable.\textsuperscript{54} Because secular

\textsuperscript{48} Some Islamic charities, however, have been closed for their alleged support of international terrorism. See, e.g., Holy Land Found. for Relief & Dev. v. Ashcroft, 333 F.3d 156, 167 (D.C. Cir. 2003).

\textsuperscript{49} It is ironic, though, that states may constitutionally prohibit polygamy (Reynolds v. United States, 98 U.S. 145, 166-67 (1878)) but see little harm to civilization while married men and married women are having both short-term and long-term extramarital affairs. For extramarital affair statistics, see Peggy Vaughan, The Monogamy Myth: A Personal Handbook for Recovering from Affairs 26 (2003).

\textsuperscript{50} Qur’an, Surah An-Nisa’ 4:3.

\textsuperscript{51} Qur’an, Surah An-Nisa’ 4:3.

\textsuperscript{52} Qur’an, Surah Al-Anfal 8:72.

\textsuperscript{53} Qur’an, Surah Al-Anfal 8:72.

\textsuperscript{54} Qur’an, Surah Al-Anfal 8:72.

\textsuperscript{55} Qur’an, Surah Al-Anfal 8:72.
provisions cannot be amended, the Qur’an cannot be declared the supreme text in the Turkish legal system. However, the inability to amend any of the secular provisions may threaten the 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.55 If the Turkish population alters its secular orientation and demands the supremacy of the Qur’an, a new constitution will have to replace the existing one.

Constitutional replacements are not novel or rare. The U.S. Constitution replaced the Articles of Confederation.56 The Russian Federation, which holds Muslim Chechnya, discarded the atheistic Constitution of the Soviet Union57 in favor of the present Constitution that, though secular, guarantees a vigorous right to profess and disseminate religious beliefs.58 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 Qur’an.59

G. Constitutional Revolutions

A constitutional revolution means a fundamental change in the form of government, in its fundamental values, or in both. A
constitutional revolution can be 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.\(^{60}\) Revolution through amendment is more orderly, whereas revolution through replacement may or may not be peaceful.\(^{61}\) Over the decades, the U.S. Constitution has been revolutionized through the amendment procedure. Amendments introduced a set of fundamental rights;\(^{62}\) abolished slavery;\(^{63}\) furnished equal protection of laws without discrimination on the basis of race, color, religion, or national origin;\(^{64}\) and extended the right to vote to nonwhites,\(^{65}\) women,\(^{66}\) and persons eighteen years of age or older.\(^{67}\) 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 Iran Constitution, which replaced the 1906 Royal Constitution, offers an example of a constitutional revolution affected through replacement rather than amendment of a prior constitution. 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.\(^{68}\) The 1979 Constitution also established the primacy of Shia clergy in the administration of state affairs.\(^{69}\) Even the 1906 Royal Constitution was by no means secular. Its preamble had committed itself to “the carrying out of the laws of His Holiness the Prophet.”\(^{70}\) In 1907, the Royal Constitution was amended to establish the orthodox Ja’fari doctrine of the Ithna ‘Ashariyya (Shia Islam) as


\(^{61}\) For a discussion of why constitutional directives may not be established in ways other than the constitutionally ordained amendment procedures, see Michael J. Perry, *What Is “the Constitution”? (and Other Fundamental Questions)*, in *CONSTITUTIONALISM: PHILOSOPHICAL FOUNDATIONS* 99, 101-02 (Larty Alexander ed., 1998).

\(^{62}\) U.S. CONST. amends. I-X.

\(^{63}\) Id. amend. XIII.

\(^{64}\) Id. amend. XIV.

\(^{65}\) Id. amend. XV.

\(^{66}\) Id. amend. XIX.

\(^{67}\) Id. amend. XXVI.


\(^{69}\) Id. art. 12.

\(^{70}\) QANUNI ASSASSI IRAN [IRANIAN CONSTITUTION] 1906, pmbl.
the official religion of Persia.\textsuperscript{71} The 1979 Constitution, in reinforcing the supremacy of the Qur’an and the Prophet’s Sunnah, is, in some ways, the continuation of Islamization of law that began, though feebly, under the Shah of Iran.\textsuperscript{72}

The Qur’an is not opposed to constitutional revolutions either through amendment or replacement, provided that the new constitution establishes the supremacy of the Qur’an. The Qur’an mandates that Muslims obey God, the Prophet, and the leaders in charge of their affairs.\textsuperscript{73} 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 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.\textsuperscript{74} He used verses of the Qur’an to legitimize his ill-gotten authority, saying God gives power to whom He pleases.\textsuperscript{75} The people of Pakistan are still in the process of restoring the 1973 democratic Constitution that General Zia (and later General Pervez Musharraf) unlawfully amended to weaken the power of the elected Parliament.

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\item \textsuperscript{71} Id., supplemented by The Supplementary Constitutional Law of 7 October 1907, art. 1, available at http://www.fis-iran.org/en/resources/legaldoc/iranconstitution.
\item \textsuperscript{72} See QANUNI ASSASSI JUMHURIJI IRAN [THE CONSTITUTION OF THE ISLAMIC REPUBLIC OF IRAN] arts. 5, 107, 1358 [1980] (discussing the installation of the religious leader). See generally HOUCHANG E. CHEHABI, IRANIAN POLITICS AND RELIGIOUS MODERNISM (1990). The doctrine of velayat-al-Faqih (the rule of the religious jurisprudent), though made popular during the 1979 Islamic revolution, was invented in the early nineteenth century. \textit{Id.} at 18.
\item \textsuperscript{73} QUR’AN, Surah An-Nisa’ 4:59, 4:83.
\item \textsuperscript{74} Akmal Hussain, Pakistan’s Economy in Historical Perspective, in PAKISTAN: THE STRUGGLE WITHIN 34, 50 (Wilson John ed., 2009). The Taliban in Afghanistan also employed spectacular Islamic punishments, such as public executions, to establish a regime of fear. Such regimes breach the social balance that the Qur’an enforces.
\item \textsuperscript{75} QUR’AN, Surah Al-’Imran 3:26; Khan, \textit{supra} note 34, at 61.
\end{itemize}
III. EVOLUTION OF THE QUR’AN

A. Normative Reversals

The Qur’an is a permanent and immutable divine text. No force of emergency or catastrophe can repeal its divine prescriptions. Note the difference between the Qur’an and the constitution: the constitution can be amended, whereas the Qur’an cannot. The specific constitution itself prescribes procedures for its own textual amendments. The Qur’an prescribes no procedures for its textual amendments. In fact, the Qur’an prohibits any alteration to the Word of God. Over the past 1400 years, the Arabic text of the Qur’an has remained intact. The inability to amend the Qur’an assures the permanence of its values. By contrast, the ability to amend 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. Contrast this value reversal with the prohibition of intoxicating liquors under the Qur’an. Because the Qur’an cannot be amended, the prohibition of intoxicating liquors is timeless. Secular Muslim states that do not subscribe to the supremacy of the Qur’an may ignore the prohibition and allow the sale and consumption of intoxicating liquors. The nonenforcement of the Qur’an’s injunctions against intoxicating liquors, however, does not amend or repeal the Qur’an’s prescriptions. Muslim nations that ignore the sumptuary laws of the Qur’an may reverse their laws and bring them into conformity with the injunctions of the Qur’an.

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

77. QUR’AN, Surah Yunus 10:64.
78. U.S. CONST. amend. XVIII (repealed 1933).
79. Id. amend. XXI.
80. QUR’AN, Surah Al-Ma’idah 5:90.
81. 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 the death penalty for juveniles under the Eighth Amendment. Rendering 5-4 split decisions, the Supreme Court Justices have frequently read the same provisions of the Constitution in diametrically opposite ways. Likewise, one might argue that the Qur’an can be interpreted to allow traditionally proscribed behaviors, such as the consumption of intoxicating liquors.

However, the sweeping argument that supreme texts are inherently vulnerable to any and all interpretations must fail, both with respect to the constitution and the Qur’an, because the argument effectively renders the supreme texts irrelevant. The argument either asserts that interpreters ignore the meaning of the text or presumes that the 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 the 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 the 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.

Even though the Qur’an is a permanent text, it is nonetheless evolutionary. The evolution of the Qur’an is directly related to the evolution of believers. Because the Qur’an is timeless and universal, it must respond to all times and to the evolving human condition. The social conditions of the believers in the seventh century, when the Qur’an was revealed, have little in common with the social conditions of believers in the twenty-first century. A text that cannot respond to evolving human conditions is not universal, but rather historically

84. However, the question of punishment for consuming intoxicating liquors is amenable to conflicting interpretations.
85. Planes would crash if the argument of textual meaninglessness were applied to communications between pilots and controllers (though sometimes crashes do occur because of a failure in communication). Under this argument, manuals that provide instruction on the assembly of products would be useless texts (though sometimes they indeed are).
rooted. A timeless text is good for times foregone, times here, and for times to come. The Qur’an is revealed for all worlds and for all times. As such, the believers are constantly in search of meaning in the Qur’an and the answers to their questions. Past interpretations are helpful, but they cannot bind subsequent generations of believers.  

B. Interpretive Approaches

While the constitution evolves through both amendment and interpretation, the Qur’an evolves through interpretation only. Both the constitution and the Qur’an 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 as to 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 to 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 and creative merriment. Smart and linguistically suave judges, vested with life tenure on the bench, can act as demigods by offering their 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 rather on their own “personal views.”

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

While few believers would blatantly distort the Word of God, the cultural conditioning of interpreters affects the readings of the Qur’an. 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.

C. Text Beyond Language

The specific constitution rarely requires translation for its application, but the Qur’an does. The Qur’an and the constitution are texts, each an organized assemblage of finite words. While the constitution is most often written in the national language, the Qur’an is revealed in Arabic as spoken in seventh-century Mecca and Medina. Despite the passage of more than two hundred 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 yet to arise, questions of constitutional interpretation can ignite heated debates over the

90. QUR’AN, Surah Al Waqi’ah 56:79. Here, impurity means lack of faith or a predetermined inclination or mindset to find faults in the Qur’an.
91. Id. Surah Al-‘Imran 3:7. For a detailed explanation of this verse, see Khan, supra note 76, at 838.
93. QUR’AN, Surah Ibrahim 14:25. God coins parables for human beings so that they can reflect.
meaning of words found in the U.S. Constitution. The text of the Qur’an, 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 Qur’an’s diction, syntax, vocabulary, and verbal structures are unique. The Qur’an, as the Word of God, is not easily translatable, further complicating the hermeneutic enterprise of understanding.\textsuperscript{95} For the most part, even educated Arabic speaking persons need to devote a considerable amount of special effort to understand the meaning of the Qur’an. When the Qur’an 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 Qur’an to various cases and situations.

The Qur’an, therefore, is a text not tied to its original language. Overly linguistic analyses derived from classical Arabic contravene the purpose of the Qur’an, which is to constantly guide a humanity that speaks diverse languages. Constitutional theories of originalism, which demand that words be interpreted in the social contexts of the times when the constitution was made, do not apply to the Qur’an or the Basic Code. Each generation of Muslims and each linguistic community is free to understand the meaning of the Qur’an that best suits its social and cultural realities. Of course, new understandings of the Qur’an cannot be separated from its prior understandings. However, 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 Qur’an’s text cannot be confined to any single language, including classical Arabic.

\textit{D. 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.

\textsuperscript{95} The problems of untranslatability are universal and apply to all texts and languages. See James Nolan, \textit{Interpretation: Techniques and Exercises} 57 (2005).
By contrast, the Qur’an cannot be confined to any single culture. Even though verses of the Qur’an were revealed in response to concrete issues facing the Prophet, the Qur’an transcends its socio-temporal placement in seventh-century Arabia. Since the inception of Islam, the Qur’an 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 Mecca and Medina, understood and applied the Qur’an in their diverse cultural and linguistic contexts. Because significant Muslim communities have been established in Europe and North America, applications of the Qur’an 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 will continue to contribute to understandings of the Qur’an.

Rarely has there been a suggestion that Muslim communities all over the world are obligated to accept applications of the Qur’an permitted in Saudi Arabia or in another Arab nation. Though revealed in Arabic, the Qur’an 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 Qur’an’s central message and its fundamental principles have remained intact. The Qur’an influences each culture in more or less the same way. The Qur’an is not so porous as to allow conflicting cultural norms to be read into it, yet it is not so rigid as to repudiate cultural variety. Cross-cultural applications of the Qur’an have been unable to dilute its core legal and moral principles. The Qur’an itself states that cultural and linguistic diversity is part of God’s creation.96

E. Deduction and Compatibility Doctrines

The constitution serves to expand and systematize norms of the legal system in two distinct ways. 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

96. **QUR’AN, Surah Ar-Rum 30:22; see also Khan, supra note 94.**
right to privacy, a right nowhere mentioned in the text of the
Constitution, but found “emanating ‘from the totality of the
constitutional scheme.’”97 Deductive methodologies employ the
internal resources of a constitution and rarely consult external sources.
The second method, 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 the 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 made by other authorized bodies.98

In the first few centuries of Islam, Islamic law was deduced from
the primary divine sources, that is, the Qur’an 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 their hundreds of
followers, established the major Sunni schools of jurisprudence.99
During the deductive period, the concept of legislation as a source of
Islamic law was nearly nonexistent. Rulers issued orders and judges
decided cases, but neither executive orders nor 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 the rules and the
rationales of the rules with each other, providing multiple solutions to
problems. Each school of jurisprudence believed that its rules and
exegetical methods were in superior harmony with the Qur’an and the
Prophet’s Sunnah. Yet the schools respected good faith juristic
differences. Eminent jurists did not dispute that, with respect to the

U.S. 497, 521 (1961)); see also Olmstead v. United States, 277 U.S. 438, 473-75 (1928)
(brandeis, j., dissenting) (arguing for the recognition of the right to privacy), overruled by
katz v. united states, 389 u.s. 347 (1967), and berger v. new york, 388 u.s. 41 (1967).
see generally Samuel D. Warren & Louis D. Brandeis, The Right to Privacy, 4 Harv. L. Rev. 193
(1890) (laying the foundation for the constitutional recognition of the right to privacy).
98. The concept of compatibility is also found in non-Islamic constitutions. See
Grundgesetz Für Die Bundesrepublik Deutschland [Grundgesetz] [GG] [Basic Law],
May 23, 1949, Gbg I art. 100 (Ger.).
99. Chibli Mallat, From Islamic to Middle Eastern Law: A Restatement of the Field
(Part II), 52 Am. J. Comp. L. 209, 266-68 (2004).
same issue, more than one rule could be deduced from the primary sources of legal authority.

Muslims were free to choose from many schools of jurisprudence, for there were many versions of Islamic *fiqh*. The Qur’an unified these diverse schools, for all schools read and interpreted the same Qur’an. In another article, I discussed the free markets of *fiqh*, explaining the noncoercive enterprise of juristic lawmaking. Eminent jurists avoided associations with caliphs and kings and jealously protected their intellectual integrity and spiritual purity, fearing that close ties with persons in authority would taint their reputation as free exegetes of the Word of God. State-sponsored lawmaking was considered inherently suspect and could not flourish, despite the fact that Muslim conquerors were able to establish mighty empires over vast areas of the world. The prerogative to deduce laws from the Qur’an and the Prophet’s Sunnah remained with jurists who, on the basis of their knowledge and piety, engaged in the free markets of jurisprudence. Jurists who most influenced the expansion and refinement of Islamic law were the ones most successful in attracting a huge following among Muslims.

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 assess the constitutionality of statutes, is conducted after a case or controversy has arisen under a statute, judicial preview tests the constitutionality of a legislative bill before enactment. 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 to 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

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101. For example, a proposal that would ban wearing 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. See Steven Erlanger, *Face-Veil Issue in France Shifts to Parliament for Debate*, N.Y. TIMES, Jan. 27, 2010, http://www.nytimes.com/2010/01/27/world/europe/27france.html.
propose changes to parts of the proposed legislation that violate the Basic Code.\footnote{Pakistan Const. art. 230, § 1, cl. a.}

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 all judges or the 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 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 that has been unknown for centuries. In some countries, such as Saudi Arabia, the popular will, exercised through an elected parliament, continues to be a nonfactor in the enterprise of Islamic lawmaking.

\section*{F. Reservations to International Treaties}

Just as the United States protects its constitutional supremacy, many Muslim states make reservations to international treaties to preserve the supremacy of the Basic Code. The United States ratifies human rights treaties frequently with the 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 that the U.S. Constitution is 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 U.S. Supreme Court decisions would have no legal effect under the reservation. Even with respect to treaties prohibiting “cruel, inhuman, or degrading treatment or punishment,” the United States reserves the right to only be bound to the extent that 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. Article 2 of the Convention obligates state parties “[t]o embody the principle of the equality of men and women in their national constitutions or other appropriate legislation.” Building on the principle of equality, article 16 guarantees “[t]he same rights and responsibilities during marriage and at its dissolution.” 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

103. 132 CONG. REC. 2349 (1986).
106. Id. at 194.
107. Id. at 196.
108. QUR’AN, Surah An-Nisa’ 4:34.
distribution that 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, ratified the Convention with the reservation that “[t]he 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 Qur’an and Sunna.”

In making reservations to Articles 2 and 16, Libya refers to “the peremptory norms of the Islamic Shariah.” Saudi Arabia has made a broad reservation to the entire Convention, stating, “In 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.”

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.”

G. The Common Law of Islam

The supremacy of the Basic Code in multiple Muslim states establishes supranational common law over constitutional diversity. Consider three Muslim states: Saudi Arabia, Pakistan, and Iran. Each of these states has declared the Qur’an and the Prophet’s Sunnah the supreme law of the land. Because 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 that 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.\footnote{See generally HAMID ALGAR, WAHHABISM: A CRITICAL ESSAY (2002).} Iran is officially Shia. Pakistan, a religiously pluralistic nation, has not officially subscribed to any sect or school of jurisprudence. Even linguistically, these states share little in common. Saudi Arabia speaks Arabic. Iran speaks Persian. Pakistan is a composite of numerous linguistic communities, though Urdu and English have been adopted as official languages. This diversity affirms the Qur’an’s injunctions that God has created diverse languages, colors, and communities to establish ties among individuals and to bind them in identities.\footnote{QUR’AN, Surah Ar-Rum 30:22.}

Despite their diverse forms of governments, languages, customs, laws, and constitutions, Saudi Arabia, Iran, and Pakistan have all submitted to the supremacy of the Qur’an and the Prophet’s Sunnah. Each has made a constitutional commitment to refrain from making 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, for 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 supranational 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, 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 “[n]o criminal proceedings whatsoever shall be instituted or continued against the President or a Governor in any court during his term of office,” is compatible with the Basic Code.\footnote{Zahid Gishkori, Immunity to President Challenged in SC, NATION (Lahore, Pak.), Dec. 20, 2009, at 1 (quoting PAKISTAN CONST. art. 248(2)), available at http://www.nation.com.pk/pakistan-news-newspaper-daily-english-online/Politics/20-Dec-2009/Immunity-to-President-challenged-in-SC.} 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 supranational common law that human rights treaties are generating under the auspices of the Council of Europe, the African Union, and the Organization of American States.117 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’s decisions have generated a common law of human rights for members of the Council of Europe.118 A similar phenomenon is taking place under the African Charter of People’s 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

The Qur’an 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 and even revolutionary replacement. Because the human condition is constantly evolving, the Qur’an, 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 Qur’an in a way that meets 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 Qur’an, as do some interpreters of the constitution.