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### Constitutionalism and Shari'a

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## Constitutionalism and Shari'a

### Abstract

Constitutionalism is the idea that government can and should be legally limited in its powers, and that its authority depends on enforcing these limitations. Lane explains that two ideas are basic to constitutionalism: (a) the limitation of the state versus society in the form of respect for a set of human rights covering not only civic rights but also political and economic rights; and (b) the implementation of separation of powers within the state.

### Keywords

shari, constitutionalism

### Disciplines

Arts and Humanities | Law

### Publication Details

N. Hosen, 'Constitutionalism and Shari'a' (2004) 11 (1) ELaw Journal 1-10.

[E LAW HOME](#)[SEARCH](#)[SUBSCRIBE](#)[ISSUES](#)[SUBJECT](#)[AUTHOR](#)[TITLE](#)[MURDOCH](#)E LAW | Murdoch University Electronic Journal of Law ISSN 1321-8247 - [Copyright Policy](#)FORMAT: [FRAMES](#) [PRINT](#)

# Constitutionalism and Syar'ih

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**Subjects:** Constitutional law

Islamic countries - Politics and government

Islamic law

**Issue:** [Volume 11, Number 1 \(March 2004\)](#)**Category:** [Refereed Articles](#)**Contents**

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**Acknowledgement:** The author would like to thank Associate Professor Gary F. Bell of National University of Singapore, Mr. Ian Usman Lewis of the ADF School of Languages, and the anonymous referee for their comments on the draft. All opinions and errors are, of course, those of the author.

## Introduction

1. Constitutionalism is the idea that government can and should be legally limited in its powers, and that its authority depends on enforcing these limitations. Lane explains that two ideas are basic to constitutionalism: (a) the limitation of the state versus society in the form of respect for a set of human rights covering not only civic rights but also political and economic rights; and (b) the implementation of separation of powers within the state.<sup>[1]</sup> Furthermore, Louis Henkin defines constitutionalism as constituting the following elements: (1) government according to the constitution; (2) separation of power; (3) sovereignty of the people and democratic government; (4) constitutional review; (5) independent judiciary; (6) limited government subject to a bill of

individual rights; (7) controlling the police; (8) civilian control of the military; and (9) no state power, or very limited and strictly circumscribed state power, to suspend the operation of some parts of, or the entire, constitution.[2]

2. In other words, constitutionalism has evolved to mean the legal limitations placed upon the rightful power of government in its relation to citizens. It includes the doctrine of official accountability to the people or to its legitimate representatives within the framework of fundamental law for better securing citizen's rights.[3] The philosophy behinds the doctrine is that the people become the best judges about what is and what is not in their own interest.[4] Therefore, a constitution which has the spirit of constitutionalism, at least, must limit the power of the state; guarantee and protect the rights of the citizenry; and regulate the process and procedural paths of authority and accountability.
3. Whilst constitutionalism in the West is mostly identified with secular thought,[5] Islamic constitutionalism has attracted growing interest in recent years. As Ann Elizabeth Mayer points out, Islamic constitutionalism is constitutionalism which is in some form based on Islamic principles, as opposed to the constitutionalism which has developed in countries which happen to be Muslim but which has not been informed by distinctively Islamic principles.[6] However, what Islamic constitutionalism entails remains contested among Muslims, as well as among Western scholars who study the topic.[7]
4. The main question is that "Is the *Syar'ī'ah* compatible with the principle and procedural form of Western constitutionalism?" This article will answer this question by looking at the arguments put forth by opponents of Islamic constitutional law and their counter arguments. One group takes the view that not only the *Syar'ī'ah* is sufficient to meet Muslims, needs and therefore Muslims do not need constitutionalism, but also that the *Syar'ī'ah* as God's law is above the constitution. The *Syar'ī'ah* has already provided a unique system of government or politics. Another group believes that Islam (including the the *Syar'ī'ah*) has no relationship with state affairs. According to this group, it is misleading to enforce the *Syar'ī'ah* through a constitution.
5. Although both groups have different arguments, they share the same conclusion: that the nature and characteristics of the *Syar'ī'ah* do not permit them to acknowledge the compatibility between the *Syar'ī'ah* and constitutionalism. This article will offer a different position on this issue. It argues that the principles of the *Syar'ī'ah* are compatible with constitutionalism either as a formal source (Egypt and Iran) or be used only as an inspiration to a constitution (in Indonesia). However, reform of the *Syar'ī'ah* is needed to articulate the procedural and institutional mechanisms of Islamic constitutional law, particularly to draw a clear line of authority and accountability.

## **Fundamentalism and Secularism**

6. In this section, I discuss the arguments to oppose the compatibility of the *Syar'ī'ah* and constitutionalism. The first four arguments are pointed out by fundamentalist groups, while the rest are provided by secularist groups. As has been pointed out above, although each fundamentalist and secularist group has its own reasons, they take the similar views that the *Syar'ī'ah* is not compatible with constitutionalism.

## **Fundamentalists' views**

7. Firstly, there is the view that Islamic law is immutable because the authoritarian, divine and absolute concept of law in Islam does not allow change in legal concepts and institutions. Therefore, the *Syar'ih* cannot be identified as law in the proper sense, rather it is an ethical or moral system of rules. The *Syar'ih* is immutable, regardless of history, time, culture, and location, as it did not develop an adequate methodology of legal change. Muslims may change, but Islam will not. This means that the rulings pronounced by the *Syar'ih* are static, final, eternal, absolute and unalterable. In other words, its idealistic nature, its religious nature, its rigidity and its casuistic nature lead to the immutability of the *Syar'ih*.<sup>[8]</sup> The power of *Syar'ih* is unlimited. This position is not compatible with the nature of constitutionalism which limits the power of government.
8. Secondly, the *Syar'ih* is based on the revelation of God. The source of Islamic law is the will of God, which is absolute and unchangeable. There has always been a close connection between Islamic law and theology. This means that the laws which do exist must operate within the boundaries set by the *Syar'ih*. This condition is in contradiction with the nature of constitutionalism, which is based on the will of people. Following the point above, in the *Syar'ih*, sovereignty belongs to God; not to the people.<sup>[9]</sup> This means that the government must act according to the *Syar'ih*. It is argued that the fact that a legislative measure has been supported by a majority, does not necessarily imply that it is a 'right' measure. It is always possible that the majority, however large and even well-intentioned, is on occasion mistaken, while the minority, despite being a minority in quantity, is right. What is right and what is wrong should be based on the *Syar'ih*, not on the popular vote.<sup>[10]</sup>
9. Thirdly, constitutionalism is not drawn originally from Islam. It is a Western product and part of hegemony. It is argued that adopting constitutionalism, which is outside of Islamic discourse, will lead Muslims to abandon their own religion. It is alleged that constitutionalism is a Western political agenda in order to control Muslim worlds.
10. Fourthly, it is argued that, based on the *Qur'ān*(5:3),<sup>[11]</sup> *Syar'ih* is perfect and that it covers broad topics such as ritual, social interaction, criminal law, and political law.<sup>[12]</sup> Every single problem can be answered by the *Syar'ih*. It was designed for all times and places and for universal application to all peoples. Meanwhile, constitutionalism will not (and cannot) provide answers for all the problems of human kind. Unlike in a secular state, in the *Syar'ih*, there is no distinction and separation between religion and state. Islam is a religion and a state (*dīn wa dawlah*). Politics of the state is a part of Islamic teachings, in that Islam is a religion as much as it is a legal system.
11. Secularisation is seen as the product of Western conspiracy and colonialism, directed against Islam. During the colonial era, accordingly, the concept of secularisation was introduced into Muslim society in order to maintain Western power. With the separation of religion and politics, the *jihad* would be meaningless. The word, and the idea of, secularisation, become the pejorative terms. Any Muslim scholar who supports this concept would allegedly be seen as a supporter of Western hegemony. Accordingly, constitutionalism is the product of this secular idea.
12. As has been mentioned earlier, the arguments above are supported by fundamentalist groups. Fundamentalism takes the view that the *Syar'ih* is not compatible with constitutionalism in the modern, legal and secular sense. Instead, the *Qur'ān* and the *Sunnah* (tradition of the Prophet) should be seen as the Islamic constitution.

## Saudi Arabia

13. The best model of this fundamentalist position is Saudi Arabia. The *Qur`ān* and the *Sunnah* became the Constitution and the *Syar`i`ah* is the basic law, implemented by the *Syar`i`ah* courts with *ulamā* as judges and legal advisors. The head of state is a king, elected by and from the big Saudi family. The King, assisted by a council of ministers, supervises legislative and executive institutions, and the judiciary. It has no House of Representatives whose members are elected by the people, and also no political parties.
14. It is worth noting that demands for reform initiatives led the Saudi rulers to promulgate their 1992 Basic Law, which has been loosely referred to as a kind of constitution, even though it carefully avoids calling itself one. Having discussed the Basic Law, Ann Mayer comments that “The Basic Law does not set down constitutional limitations on government or establish a genuine system of separation of powers and protection for the rights of citizens.”[13]
15. The evidence comes from Article 1 which provides: “The Kingdom of Saudi Arabia is a sovereign Arab Islamic state with Islam as its religion. The Holy *Qur`ān* and the Prophet’s *Sunnah* are its constitution. Its language is Arabic, and its capital Riyadh.” Further, Article 44 stipulates: “The authorities of the state consist of the following: the judicial authority; the executive authority; the regulatory authority. These authorities co-operate in the performance of their duties, in accordance with this and other laws. The King shall be the point of reference for all these authorities.”
16. In Article 68, the national Consultative Council, the *majlis al-syūrā*, was established with its members, all appointed by the King, having powers to give advice to the government on issues of public interest, whilst in Article 46, the Constitution provides that “The judicial authority is an independent organ and nobody has authority over the judges except the authority of the Islamic *Syar`i`ah*.” Another interesting Article is Article 8, which offers a different picture of the basis of the Saudi state, providing: “Government in the Kingdom of Saudi Arabia is based on the premise of justice, consultation, and equality, in accordance with the Islamic *Syar`i`ah*.”
17. Meanwhile, the secular group is in a position to reject the constitutionalisation of the *Syar`i`ah*. According to this latter group, in Islamic history, the *Syar`i`ah* was never the constitution of the traditional Islamic caliphate, which was in fact an “absolute monarchy”. It is not possible to enforce the *Syar`i`ah* in a constitutional way, since they contradict each other. This leads to this article’s attempt to examine and evaluate secularist arguments together with those of the fundamentalist groups.

## Secularists’ views

18. According to secularist groups, the *Syar`i`ah* is not compatible with constitutionalism since the *Syar`i`ah* is a matter for individual compliance. States do not have the right to intervene nor to enforce the *Syar`i`ah* law on the public. One may observe that Islamic law began with the activities of jurists owing to religious motives, it was not created by state legislation. This results in the jurists’ conviction of the independence of Islamic law from state control. States should encourage their citizens’ compliance with the *Syar`i`ah*, such as in paying *zakāt*, fasting, going on the pilgrimage to Mecca, etcetera, but a state cannot force its citizenry to comply. Unlike the fundamentalists’ view, this group believe in the secular state and, therefore say the *Syar`i`ah* cannot (and should not) take the place of the constitution. They introduce the idea of

de-politicising Islam, and determine it solely as a religious faith, as once articulated by the Islamic scholar ‘Ali ‘Abd al-Raziq.<sup>[14]</sup>

19. In addition, the *Syar'ih* was sent down fifteen centuries ago and it is fit only for the conditional, political and institutional conditions of that time. The *Syar'ih* could be operated only in a traditional state (or city-state) which is based on a personal charisma of the leader; not based on the constitutional system. Fifteen centuries ago, there was no parliament, no check-and-balance system, no judicial review, good governance, separation of powers, and so on. The implementation of the *Syar'ih* therefore is in contradiction with modern institutions and concepts. Historically, the decision of the Caliph would be based heavily on his discretion, or his interpretation of the *Syar'ih*; not on the rule of law. Moreover, constitutions cannot be viable documents in the absence of the ideological, cultural, and political prerequisites for constitutional life. How can constitutionalism emerge in societies in which liberalism and secularism is so far from hegemonic?
20. As has been mentioned earlier, the *Syar'ih* does not limit the power of governments. In the Islamic tradition, the Caliph could do anything he wanted without the fear of facing the opposition party or even impeachment procedures. The implementation of the *Syar'ih* would lead to an undemocratic state. The power of the Caliph is unlimited. In the words of Bassam Tibi, "none of them was a legal ruler in the modern constitutional sense".[15] One of the reasons was that there existed no institutional authority able to control the caliph's compliance with the *Syar'ih*.
21. Moreover, in Islamic history, the world was split into two divisions: the territory of Islam (*ḍ̤ar al-Islām*), comprising Islamic and non-Islamic communities which accepted Islamic sovereignty, and the rest of the world, called the *ḍ̤ar al-harb* or the territory of war. Muslims enjoyed full rights of citizenship while others enjoyed only partial civil rights. For instance, a non-Muslim could not be appointed as a caliph or a president. This means that there would be no equality before the law, should the *Syar'ih* be implemented. In other words, the *Syar'ih* does not guarantee and protect the rights of minority groups. This condition should be seen as being against the spirit of constitutionalism.

## Turkey

22. The best model of secular state in the Muslim world is Turkey. The republic that Kemal Atatürk founded and subsequent leaders have shaped is radically different from the imperial society of the Islamic Ottoman Empire. The fifth constitution was established in 1982 by the last military regime after its seizing power in 1980. The 1995 amendments abolish about 20 articles and the preamble that stated the people's will to accept military rule. Civil servants will be allowed to engage in collective bargaining and unions may take part in politics.<sup>[16]</sup>
23. Turkey is a parliamentary democracy. Although the population is 99% Muslim, the Turkish constitution establishes the Republic of Turkey as a democratic, secular and social state, governed by the rule of law and respecting fundamental human rights and freedoms.<sup>[17]</sup> Legislative power is vested in the 550-member Turkish Grand National Assembly (TBMM), whose members are elected to five-year terms by the votes of Turkish citizens over the age of 18.<sup>[18]</sup> Internationally recognised human rights are protected but can be limited in times of emergency and cannot be used to violate the integrity of the state or to impose a non-secular or non-democratic system of government. Turkish women gained the right to vote in 1934, well



ahead of women in many other European countries. Turkish women do not wear chadors, burkhas, or any of the head-to-toe coverings.

24. **The president and the prime minister divide the functions and executive power of the president of the United States, in a way similar to the system of government in France. The Turkish president is the country's head of state, but he also has important governmental powers. He is commander-in-chief of the armed forces. He signs bills passed by the Grand National Assembly or may return them for reconsideration. He may call a referendum on certain issues relating to the constitution. And he decides who among the members of the Grand National Assembly should have the right to seek to form a government as prime minister. The president is elected by the Grand National Assembly for one term of seven years.**<sup>[19]</sup>
25. The prime minister appoints the members of the Council of Ministers. The prime minister and Council of Ministers share executive power, taking care of such matters as foreign policy, defense, public works, internal revenue, customs, health, education, and welfare. Usually, as in most European democracies, the prime minister is the head of the majority party in parliament.
26. According to the Constitution, the judiciary is independent and includes a system of lower courts, the national Court of Appeals and the Constitutional Court. The Constitutional Court has the task of ensuring the compatibility of laws and administrative acts with the constitution. It may also act as Supreme Court in hearing cases against high public officials. The first woman was appointed to the Turkish Constitutional Court in 1932. The Council of State is the highest administrative court.
27. Turkish law is codified, with civil and commercial law originally based on the Swiss system, administrative law on the French system, and criminal law on the Italian system. Turkey today is a secular state.<sup>[20]</sup> Turkey has mosques, churches, and synagogues open to all, but politicians are forbidden to exploit religion for political purposes.

### **Is *Syar'ih* ah Compatible with Constitutionalism?**

28. As can be seen from the discussion above, both fundamentalist and secularist groups believe that the *Syar'ih* ah is not compatible with constitutionalism. How do we explain their similar positions? Although both have similar views, they have different arguments in support of these views. Whilst fundamentalists believe that the *Syar'ih* ah is better than constitutionalism, the secularists take the position that the *Syar'ih* ah is part of a religious faith, and not a system of government. It seems that both groups put different interpretations on the word, and the meaning of, "*Syar'ih* ah". Therefore, the notions of the *Syar'ih* ah and its relationship with the idea of constitutionalism will be examined critically.

### **Rejecting Fundamentalists' and Secularists' views**

29. Firstly, conversely to the Fundamentalists' views, the *Syar'ih* ah must involve human interpretation. Islamic law is, in fact, the product of a very slow and gradual process of interpretation of the *Qur'ān* and the collection, verification and interpretation of the *Sunnah* during the first three centuries of Islam (the seventh to the ninth centuries CE). This process took place amongst scholars and jurist who developed their own methodology for classification of sources, derivation of specific rules from general principles, and so forth.
30. This led the scholars to distinguish between the *Syar'ih* ah and *fiqh*. While the *Syar'ih* ah can be



seen as the totality of divine categorisations of human acts, *fiqh* might be described as the articulation of the divine categorisations, by human scholars. These articulations represent or express the scholars' understanding of the *Syar'ih*. This means that jurists or scholars in the Islamic tradition, however highly respected they may be, can present only their own personal views or understanding of what the *Syar'ih* is on any given matter. Moreover, the *Qur'ān* and the *Sunnah* cannot be understood or have any influence on human behaviour except through the efforts of (fallible) human beings.

**31.** Bernard Weiss has correctly pointed out that:

Although the law is of divine provenance, the actual construction of the law is a human activity, and its results represent the law of God *as humanly understood*. Since the law does not descend from heaven ready-made, it is the human understanding of the law—the human *fiqh* (literally meaning understanding)—that must be normative for society.<sup>[21]</sup>

**32.** Therefore, even though the *Syar'ih* is based on the revelations of God, it cannot possibly be drawn up except through human understanding, which means both the inevitability of differences of opinion and the possibility of error, whether amongst scholars, or the community in general. Khaled Abou El Fadl explains further:

All laws articulated and applied in a state are thoroughly human, and should be treated as such. Consequently, any codification of Shari'ah law produces a set of laws that are thoroughly and fundamentally human. These laws are a part of Shari'ah law only to the extent that any set of human legal opinions is arguably a part of Shari'ah. A code, even if inspired by Shari'ah, is not Shari'ah — a code is simply a set of positive commandments that were informed by an ideal but do not represent the ideal. In my view, human legislation or codifications, regardless of their basis or quality, can never represent the Divine ideal.<sup>[22]</sup>

**33.** Secondly, since *Syar'ih* involves human understanding, the social norms of the *Syar'ih* follow the nature of human beings because they are derived from specific historical circumstances. For instance, the caliphate was the product of history, an institution of human, rather than divine, origin, a temporary convenience, and therefore a purely political office. This means that most of the regulations in Islamic law may be amended, changed, altered, and adapted to social change.

**34.** Whilst the *Qur'ān* contains a variety of elements, such as stories, moral injunctions, and general, as well as specific, legal principles, it should be noted that the *Qur'ān* prescribes only those details which are essential. It thus leaves considerable room for development, and safeguards against restrictive rigidity. The universality of Islam lies not in its political structure, but in its faith and religious guidance.

**35.** Another source of Islamic jurisprudence, secondary only to the *Qur'ān*, is the examples and words of the Prophet Muhammad, or his *Sunnah*. Not only do both the *Qur'ān* and the *Sunnah* not cover all issues, but quite often they also use words which have speculative meanings, interpretable and debatable.

**36.** This leads to the third source. *Ijtihād* in Islamic law can be defined simply as 'interpretation.' It is the most important source of Islamic law next to the *Qur'ān* and the *Sunnah*. The main difference between *ijtihad* and both the *Qur'ān* and the *Sunnah* is that *ijtihad* is a continuous process of development whereas the *Qur'ān* and the *Sunnah* are fixed sources of authority and

were not altered or added to after the death of the Prophet.[23]

37. *Ijtihad* literally means, 'striving, or self-exertion in any activity which entails a measure of hardship'.<sup>[24]</sup> According to al-ʿAmidī,<sup>[25]</sup> *ijtihad* is defined as "the total expenditure of effort made by a jurist to infer, with a degree of probability, the rules of Islamic law".<sup>[26]</sup> In this sense, al-Gazālī defined *ijtihad* as "the expending, on the part of a *Mujtahid*, of all that he is capable of in order to seek knowledge of the injunctions of Islamic law".<sup>[27]</sup>
38. The rule of *ijtihad* originated at the time of the Prophet, when he sent Mu'az ibn Jabbal to Yemen as a judge. They are reported to have engaged in the following dialogue before the latter's departure:

'What will you do if a matter is referred to you for judgement?' Mu'az said, 'I will judge according to the Book of Allah.' The Prophet asked, 'What if you find no solution in the Book of Allah?' Mu'az said, 'Then I will judge by the *Sunnah* of the Prophet.' The Prophet asked: 'And what if you do not find it in the *Sunnah* of the Prophet?' Mu'az said: 'Then I will make *ijtihad* to formulate my own judgement.' The Prophet patted Mu'az's chest and said: 'Praise be to Allah Who has guided the messenger of His prophet to that which pleases him and His Messenger'.<sup>[28]</sup>

39. *Ijtihad* can be conducted in one of three ways: *ijtihad bayʿanī*, *ijtihad qiyāsī* and *ijtihad istiṣlahī*.<sup>[29]</sup> The first (*ijtihad bayʿanī*) may be applied to cases which are explicitly mentioned in the *Qurʿan* or *Ḥadīth*s but need further explanation. The second (*ijtihad qiyāsī*) may be applied to cases which are not mentioned in these two sources, but which are similar to cases mentioned in either of them. The third method, *ijtihad istiṣlahī*, may be applied to those cases which are not regulated by the *Qurʿan* or *Ḥadīth*s, and cannot be solved by using analogical reasoning. In this case, *maṣlaḥah* (utilities) is considered to be the basis for legal decisions.
40. From the short discussion above, it could safely be stated that *Ijtihad* is a tool for Muslims to understand and practice the *Syarʿah* (God's law) in line with the nature and the characteristics of human beings. Having performed *Ijtihad*, Muslim scholars can build a fresh theoretical construct and a contextual approach to legal language and legal interpretation, to follow the dynamic character of human beings. The Fundamentalists' views discussed above that the *Syarʿah* is immutable can be rejected. At the same time, the Secularists' views that *Syarʿah* fits only for the conditional, political and institutional conditions fifteen centuries ago can be refused.
41. Thirdly, the rule of *Ijtihad* might also be seen to indicate "the imperfectness of the *Syarʿah*". This means that the *Syarʿah* alone does not cover all issues, as claimed by fundamentalist groups. The Fundamentalists' interpretation of QS 5:3, as has been mentioned above, could be criticised. There is a school of thought that the verse is only about the complete and perfect teachings of Islamic ritual; from prayers to pilgrimage. Another takes the view that after Allah sent down this verse, there were other verses such as the verse on *kalalah*.
42. This means that, "This day, I have perfected your religion for you", should be read in the context of this verse alone. QS 5:3 actually talks about prohibitions against the eating of some foods, prohibitions against using arrows to seek luck or decisions and prohibitions against fearing unbelievers. Accordingly, the word 'perfect' in this verse should refer to what is permitted and what is forbidden in Islam. The word 'perfect' in this verse does not regulate the establishment of the caliphate. In other words, from this verse, one could not argue that the *Syarʿah* deals with

any specific form of government. In fact, there is no single verse in the *Qur'ān* which directly regulates the power of a state. If the *Qur'ān* is a comprehensive compendium of knowledge on every issue, then why does the *Qur'ān* leave this issue without further clarification? As will be explained below, the *Qur'ān* provides only some basic principles on this matter.

43. Scholars who believe that Islam was meant to be a political order have performed their *ijtihād* on this matter based on their understanding and interpretation of the rule of the *Syar'ih*. Whilst their interpretations should be respected as intellectual exercises, their *ijtihād* is not legally binding on all Muslims, nor it is regarded as is the *Syar'ih* itself. This means that scholars who have different opinions on this matter have also performed their *ijtihād* and whatever the outcome of their intellectual activities could not be seen as against the Divine Law. It is safe to argue that the issue whether or not the *Syar'ih* is compatible with constitutionalism is the issue of *ijtihād*.
44. The secularist views mentioned earlier hold that historically the power of the caliphs were unlimited, and that therefore the *Syar'ih* is not compatible with constitutionalism, could be rejected on the grounds that the legitimacy of the unlimited and unchallenged power of caliphs is based on interpretations and practices which could be altered, amended and modified to suit different times and places. It is worth noting that the idea of constitutionalism had not yet come into existence, five or six centuries ago when the caliphate did exist. It seems that human consciousness needed time to recognise the evils of authoritarianism, and reject it in favour of constitutionalism. The *Qur'ān* provided the basic principles for a constitutional democracy without providing the details of a specific system. Muslims were to interpret these basic principles in the light of their customs and the demands of their historical consciousness. This partly explains why Muslims currently need a new reinterpretation or *ijtihād*.
45. Following on the point above, one may come to argue that the *Syar'ih* is not perfect in the sense that it is changeable through the *ijtihād* of Muslim scholars; according to the requirements of different places and times. For instance, Muhammad b. Idris al-Syafi'i (the founding father of Syafi'i school) changed several of his views in Iraq (*qaul qad'im*) when he moved to Cairo (*qaul Jad'id*). Much earlier before al-Syafi'i, 'Umar bin al-Khattab is known as the caliph who practised *ijtihād* on several occasions, not only when there was no guidance in both the *Qur'ān* and the *Hadīth*s, but also when he thought that the law mentioned in both sources was no longer suitable for dealing with the circumstances of his era. The two texts below provide examples of how the result of 'Umar's *ijtihād* differs from the Prophet's decision:

Narrated 'Imran: 'We performed *Hajj al-Tamattu'* in the lifetime of Allah's Apostle and then the *Qur'ān* was revealed (regarding *Hajj al-Tamattu'*) and somebody ['Umar] said what he wished (regarding *Hajj al-Tamattu'*) according to his own opinion (*ra'y*).<sup>[30]</sup>

Yahya related to me from Malik, from Ibn Syihab, that Muhammad ibn Abdillah ibn al-Haris ibn Nawfal ibn 'Abd al-Muttalib told him that he had heard Sa'd ibn Abi Waqqas and al-Dahhak ibn Qays discussing *tamattu'* (performing '*umrah*' first, then *Hajj*) in between '*umrah*' and *Hajj*. Al-Dahhak ibn Qays said, 'Only someone who is ignorant of what Allah, the Exalted and Glorified, says would do that.' Whereupon Sa'd said, 'How wrong is what you have just said, son of my brother!' al-Dahhak said, 'Umar ibn al-Khattab forbade that,' and Sa'd said, 'The Messenger of Allah, may Allah bless him and grant him peace, did it, and we did it with him'.<sup>[31]</sup>

46. 'Umar believed that the situation had changed and this forced him to apply *ijtihād* which, in several cases, caused him to differ from the position adopted by the Prophet. 'Umar's decision not to distribute the lands of Iraq and Syria among the companions furnishes another example. Muslims insisted on distributing the land among them according to the Prophet's practice. To all their contentions 'Umar replied that if he kept on distributing the lands, where would he maintain the army to protect the borders and the newly conquered towns. The companions, therefore, finally agreed with him and remarked, '*al-ra'y ra'yuka*' (Yours is the correct opinion). 'Umar later found the justification for this decision in the *Qur'ān* [59: 6-10].<sup>[32]</sup>
47. 'Umar actually preferred actions which benefited Muslims in general, rather than individuals. Social justice, in 'Umar's time, demanded that conquered lands should not be distributed amongst the army. Another interesting example occurred when a man was found guilty of theft but 'Umar, as a Caliph, did not amputate his hand, because at that time famine ravaged his territory.<sup>[33]</sup> In deciding this, it seems that 'Umar contravened the formal *Qur'ānic* injunction.<sup>[34]</sup> But 'Umar was still regarded and respected as one of the four rightly-guided caliphs. The 'Umar cases above suggest that the *Syar'ih* is not unchangeable.
48. It is important to note that the *Syar'ih* is not a single entity. It has many faces, as reflected by several schools of thought. The *Syar'ih* is diverse and practiced differently in different times and places. *Syar'ih* is considered not to be 'perfect' on the grounds that there is much disagreement and disputation amongst scholars concerning the meaning and significance of different aspects of the sources with which they are working. For example, one School takes the view that analogy is one of the sources of Islamic law, while others reject it. It is worth noting that, as has been mentioned earlier, in the case of al-Syafi'i, the scholars' work cannot be in isolation from the prevailing conditions of their communities in local as well as broader regional contexts. The interpretations of scholars, '*ulamā* and *mujtahid* would reflect the state of their human and political consciousness, and usually that of their people, at that particular time and place. Disagreements between one School and others (and even amongst scholars of the same School), as history tells us, provide other evidence that the *Syar'ih*, as humanly understood, is not static, final, eternal, absolute and unalterable.
49. The *Qur'ān* encourages ethnic and other types of diversity as blessings from God. Consequently, classic Muslim jurists recognized the fact that what may suit one culture may not be quite suitable for another. For this reason, they encouraged each country to introduce its own customs into its laws, provided that these customs did not contradict basic Islamic principles. As a result, even today, the Islamic laws of Muslim countries differ significantly on various matters.
50. Fourthly, while rejecting the *Qur'ān* and the *Hadīth* as the Islamic Constitution (fundamentalist view), at the same time, I also reject the secularist view that Islam is a religion, in the Western sense, which regulates only the relationship between man and the Supreme Creator. The *Qur'ān* and the *Hadīth* cannot be seen as the Islamic Constitution, but perhaps as its Code of High Constitutional Principles. They comprise guidance on legislation, morality, and meaningful stories which, unlike other constitutions and laws, were un-systematically recorded. As will be explained in the next section, although both the *Qur'ān* and the *Hadīth* do not give their preferences for a definite political system, both primary sources have laid down a set of principles, or ethical values and political morals, to be followed by Muslims in developing life within a state.
51. For instance, Muhammad Husayn Haikal takes the view that Islam does not provide direct and detailed guidance on how the Islamic community shall manage state affairs. According to him, Islam does lay down the basic principles for human civilization, nor basic provisions to regulate human behaviour in life and in association with fellow humans, and which, in turn, will

characterise the pattern of politics. In short, according to Haykal, there is no standard government system in Islam. The Islamic Community is free to follow any government system, as long as it assures equality among its citizens, both in rights and responsibilities, and also in the sight of the law, and manages affairs of state based on the *syūrḥa* consultation, by adhering to the moral and ethical values taught by Islam for mankind's civilization.

52. Haykal believes that a governmental system according to Islamic provisions is a system assuring freedom and which is based on the principle of the appointment of a head of state having the people's approval, and that the people have the right to control the implementation of government and to call on the government to give account of its actions. Islam appeals to mankind, especially Muslims, to make an effort to carry out those above-mentioned principles as far as possible. This position is a middle position between fundamentalist and secularist views. In this context, one may see that Haykal's views clearly oppose the strict opinions raised by fundamentalist groups, that sovereignty belongs to Allah; not to the people. However, at the same time, Haykal also opposes the view that Islam does not teach methods of living within a community and within a state.<sup>[35]</sup>
53. The first four counter-arguments above specifically reject some ideas of the incompatibility of the nature and the characteristics of the *Syar'ih* and constitutionalism. The next arguments below will be focused on examining the principles of the *Syar'ih* in relation to constitutionalism.

### Principles of Syar'ih

54. Nathan J. Brown points out that the *Syar'ih* does provide such a basis for constitutionalism and that Islamic political thought is increasingly inclined toward constitutionalist ideas. Whilst it is true that attempts to put these ideas into practice have not so far been successful, the problem could be seen to lie in the lack of attention to the structures of political accountability, rather than flaws in the concept of Islamic constitutionalism.<sup>[36]</sup>
55. Brown's and Haykal's views, above, lead to the examination in this article of some principles of the *Syar'ih* which have similarities with ideas of constitutionalism. Azizah Y. al-Hibri explains some key concepts of Islamic law in order to support the view that the *Syar'ih* is compatible with constitutionalism. A state must satisfy two basic conditions to meet Islamic standards: the political process must be based on 'elections' or *bay'ah*; and the elective and governing process must be based on 'broad deliberation' or *syūrḥa*. These two principles are part of the criteria employed to determine or to judge Islamic constitutional law. According to al-Hibri, these two principles, together with other factors (the ruler in a Muslim state has no divine attributes and there is no ecclesiastical structure in an Islamic setting), indicate that there is, in fact, little difference between an Islamic constitutional setting and a secular one.<sup>[37]</sup>
56. Given the alleged parallels she discovers between the Charter of Medina and the U.S. Constitution, al-Hibri considers the possibility that the Founding Fathers of the United States were directly or indirectly influenced by the Islamic precedent. She notes that Thomas Jefferson was aware of Islam, since he had in his library a copy of George Sale's translation of the *Qur'ān*. Al-Hibri suggests that Sale presented Islam in as fair a light as possible, under the circumstances of the eighteenth century, thereby making the Prophet's precedent amenable to Jefferson. Al-Hibri argues that if the founding fathers were, in fact, influenced by the Islamic model of constitutionalism, then this would "support the argument that American constitutional principles have a lot in common with Islamic principles. Such a conclusion would be helpful in evaluating the possibility of exporting American democracy to Muslim countries".<sup>[38]</sup>



57. Although Al-Hibri's argument could be considered to have fallen into an apologetic approach, [39] there is a school of thought that Al-Hibri has attempted to show some similarities between the two traditions, using the American standard as the standard of evaluation. The comparison between two legal traditions is, borrowing Patrick Glenn's term, a multivalent thinking. Glenn takes the view that all traditions contain elements of others. Western legal traditions may contain some of Eastern legal traditions. In other words, "there are always common elements and common subjects of discussion".[40] Therefore, Glenn rejects the claim that a religious legal tradition is incompatible or incommensurable with secular legal tradition.
58. In addition, a Muslim scholar could readily conclude that a Muslim country may choose to be a republic and still be in compliance with the *Syar'ih*, as long as the vote for the president is genuinely free, and the consultation among all branches of government is broad. Furthermore, the existence of a House of Representatives would ensure that the people's voice is heard in legislative matters, even if indirectly. Another scholar, however, may make similar arguments for a constitutional monarchy based on the British example. One can see that Muslim countries may, or may not, satisfy the two criteria above, in their constitutions.
59. In relation to the protection of the rights of the citizen, despite some rights which are established in the the *Qur'ān* and the *Sunnah*, *maqāsid al-syar'ih* (the objectives of Islamic law) should become another principle or criterium of Islamic constitutional law. This view is supported by UCLA Professor of Islamic Law, Khaled Abou El Fadl.[41] According to Muhammad Husein Kamali, *maqāsid al-syar'ih* is an important but neglected aspects in the discourse of the *Syar'ih*. Kamali claims that even today many reputable textbooks on *Uṣūl al-Fiqh* do not include *maqāsid al-syar'ih* in their usual coverage of familiar topics. Generally those textbooks are more concerned with conformity to the letter of the divine text. This, directly or not, has contributed to the literalist orientation of juristic thought.
60. The *maqāsid al-syar'ih* consists of the five juristic core values of protection (*al-daruriyah al-khams*) for religion, life, intellect, honor or lineage, and property. Basically, the *Syar'ih*, on the whole, seeks primarily to protect and promote these essential values, and validates all measures necessary for their preservation and advancement. El Fadl argues that the protection of religion would have to mean protecting the freedom of religious belief; the protection of life would mean that the taking of life must be for a just reason, and the result of a just process; the protection of the intellect would have to mean the right to freedom of thought, expression and belief; the protection of honor would have to mean the protection of the dignity of a human being; and the protection of property would ensure the right to compensation for the taking of property.
61. As El Fadl also points out, these five core values are not divine, but human values, since they are developed by Muslim jurists based on their interpretations of the *Qur'ān* and the *Sunnah*. This could mean that the *maqāsid al-syar'ih* is not limited to the five core values. Ibn Taimiyah departs from the notion of confining the *maqāsid al-syar'ih* to a specific number of values.[42] Yusuf al-Qardawi takes a similar approach. He extends the list of the *maqāsid al-syar'ih* to include human dignity, freedom, social welfare, and human fraternity among the higher *maqāsid* of the *Syar'ih*. [43] The existence of additional objectives is upheld by the weight of both general and detailed evidence, in the *Qur'ān* and the *Sunnah*.
62. A new *ijtihād* could be performed by considering the theory of the *maqāsid al-syar'ih*, examining the *Syar'ih* as a unity in which the detailed rules are to be read in the light of their broader premises and objectives. This means that by looking at the *maqāsid al-syar'ih*, the

*Syar'ih* could be analysed beyond the particularities of the text. In Kamali's words, "the focus is not so much on the words and sentences of the text, as on the purposes and goals that are being upheld and advocated".<sup>[44]</sup> It is worth noting that the principles and the procedural form of Islamic constitutional law could be found through the theory of the *maqāṣid al-syar'ih*.

63. In relation to the position of religion vis-a-vis the state, another principle or criterium could be drawn from the Charter of Medina. One of the challenges for Islamic Constitutional law is the position of Islam (or the *Syar'ih*) in the constitution. This could be examined on three levels: the position of Islam within Muslim community itself, the position of Islam in relation to other religions, and the relationship between Islam and the state.
64. In this context, the Charter of Medina is a document reportedly drawn up by the Prophet Muhammad (d. 11/632), upon his migration from Mecca to Medina. The document establishes rights and obligations among the *Ansar* of Medina, the *Muhajir* who left Mecca with the Prophet, and the Jewish tribes of Medina as they embarked upon a new journey of co-existence and cooperation in the nascent Muslim polity founded in Medina. The text itself consists of a preamble and forty seven clauses outlining various aspects of community organisation, procedures for common defense, and the relationship between the Muslims and the Jewish inhabitants of Medina.
65. The Charter of Medina declared all Muslim and Jewish tribes of Medina (apparently, there were no Christians) to be one community. It also stipulated that Non-Muslim minorities (Jews) had the same right of life protection (as Muslims); guaranteed peace and security for all Muslims based on equality and justice; guaranteed freedom of religion for both the Muslims and non-Muslim minorities (the Jews); and ensured equality between the rights of the Jews of Banu Najjar and those of the Jews of Banu Awf.<sup>[45]</sup>
66. Instead of strictly using the text, the spirit of the Charter of Medina could be used as a principle or criterium of the modern Islamic constitutional law. Although there is not a single word in the Charter of Medina which referred to an Islamic state, the text states that "where a contention arises between two parties on a matter, the issue is to be referred to God and to Muhammad for a decision". Using both an historical and a legal approach, one may examine the significance of the ambiguity of texts in a modern pluralistic society. This would help to clarify the debate between fundamentalists and secularists on Islam being a religion and a state (*d'in wa dawlah*).

### **Formal and Substantive Syar'ih**

67. Thus far, the article has argued that the principles of the *Syar'ih* are compatible with the principle of constitutionalism. However, the problem remains: how to set a procedural form of power and accountability into Islamic constitutional law. In other words, how does one explore and put the principles of the *Syar'ih*, such as *syūr'ah* and *bay'ah*, into a constitution which conforms with the idea of constitutionalism. Should *Syar'ih* become the primary source by inserting its elements into a constitution? Should it be present *only* in spirit or as an inspiration?
68. Kurzman takes the view that, within the Islamic discourse, there are three main tropes of *Syar'ih*. The first one is the liberal *Syar'ih* which argues that the revelations of the *Qur'ān* and the practices of the Prophet command Muslims to follow liberal positions. The second trope, the silent *Syar'ih*, holds that coexistence is not required by the *Syar'ih*, but is allowed. This trope argues that the *Syar'ih* is silent on certain topics, not because divine revelation was incomplete or faulty, but because the revelation intentionally left certain issues for humans to



choose. The first trope of liberal Islam holds that the *Syar'ah* requires democracy, and the second trope holds that the *Syar'ah* allows democracy.

69. However, there is a third trope that takes issue with each of the first two. This trope is interpreted Islam. According to this view, the revelation is divine, but interpretation is human and fallible and inevitably plural. This third trope suggests that religious diversity is inevitable, not just among religious communities but within Islam itself.<sup>[46]</sup>
70. Despite their different opinions, those tropes of *Syar'ah* can simply be classified as substantive *Syar'ah*. It holds that *Syar'ah* should be reinterpreted in the line of democracy and constitutionalism. I would add another type of *Syar'ah*'s thought in contrast to substantive *Syar'ah*: formal *Syar'ah*. The formal *Syar'ah* holds the view that all constitutional issues should be based on *Syar'ah* practiced by the Prophet and the companions in Medina fifteen centuries ago. They refer to the *Qur`an*, the tradition of the Prophet and even Medina Constitution. Whilst fundamentalist group believes that *Syar'ah* is above the constitution and, therefore, it is incompatible with constitutionalism, the formal *Syar'ah* group takes the view that *Syar'ah* can have a place in a constitution and become the source of such constitution.

## Egypt

71. Egypt is an interesting model of how the country put *Syar'ah* provision in the constitution through amendment of the constitution.<sup>[47]</sup> From the Arab Republic of Egypt's Constitution of 1980, it can be said that Egypt is a democratic socialist state. Islam is the state's religion. The *Syar'ah* has been made the main source of law. However, sovereignty belongs to the people and the people are the source of the State's power. Egypt follows a multi-party system. All citizens have equal legal status. They have equal rights and responsibilities, without distinction based on race, heredity, language, religion or belief. According to the Constitution, the State assures freedom of expression, and of establishing or joining associations or political parties. On the requirements for those elected as Head of State, aspirants for President shall be citizens of Egypt, progeny of an Egyptian father and mother, not have lost their civilian and political rights, and be at least 40 years of age. The condition of being Muslim is not included.
72. In 1980 Egypt amended Article 2 of the Constitution. The wording of Article 2 of the Constitution was thus changed from *mab`adi' al-Syar'ah al-Islamiyyah ma`sdar ra'is i li al-tasyr i'* (The Principles of the Islamic *Syar'ah* are **a** principal source of legislation) to the more forceful statement, *mab`adi' al-Syar'ah al-Islamiyyah al-ma`sdar al-ra'is i li al-tasyr i'* (The Principles of the Islamic *Syar'ah* are **the** principle source of legislation). The act of amending Article 2 was a concession by the Government to Islamists, and it implied that the Islamic *Syar'ah* was henceforth to have a more important role in Egyptian society.<sup>[48]</sup>
73. It was, however, unclear exactly what the new Article 2 meant, nor exactly what it committed the government to do. The dispute over the meaning of Article 2 centered on two crucial interpretive questions: what did it mean for the *Syar'ah* to be "the chief of source of Egyptian legislation," and what was the "Islamic *Syar'ah*?" The Supreme Constitutional Court of Egypt has attempted to interpret and apply the Article, as amended.<sup>[49]</sup>

## Iran

74. Another example of formal *Syar'ah* group is Iran. The foundation for Islamic Republic of Iran is based on a new Constitution (after the Islamic revolution) which was established in 1979 and was amended in 1989. According to Article 4 of the Constitution, all laws and regulations in civil,

criminal, political and other aspects shall be based on Islamic principles.

75. The 1979 Iranian Constitution is based on religious sovereignty in terms of the doctrine of *wilāyat al-faqīh* (governance of the Islamic jurist) introduced and coined by Ayatullah Khomeini).<sup>[50]</sup> However, one could find borrowed Western institutions which lack Islamic antecedents, such as the republican form of government, the division of the government into three separate branches (separation of powers), a directly elected president who functions as chief executive, a prime minister and cabinet, the ideas of the independence of the judiciary and judicial review, the concept of legality, the notion of an elected legislative body, the need for the cabinet to obtain votes of confidence from the legislative branch, and the concept of national sovereignty. Such rules have counterparts in Western political systems, therefore one could argue that they bear no relation to the traditional function of the *Syī'ah* School.<sup>[51]</sup>

76. Mayer goes further by explaining that:

In many facets, and its general format, the Iranian constitution resembles the 1958 French constitution. The way Islamic content has been injected into provisions with French antecedents can be illustrated by comparing the treatment of national sovereignty in article 56 of the Iranian constitution with article 3 of the French constitution. The French version establishes that sovereignty rests on the will of the people as expressed through referendums and enjoins interference with the exercise of popular sovereignty. It begins: "National sovereignty belongs to the people, which shall exercise this sovereignty through its representatives by means of referendums. No section of the people, nor any individual, may attribute to themselves or himself the exercise thereof." In Chapter 5 of the Iranian constitution under the heading "The Right of National Sovereignty and the Powers Derived from It" one sees in article 56 the Islamized version of the same provision, in which the theological tenet that God is Supreme Ruler is inserted and the French provisions enjoining interferences—this time with Divine Sovereignty—have been incongruously retained: "Absolute sovereignty over the world and mankind is God's and He alone has determined the social destiny of human beings. None shall take away this God-given right from another person or make use of it to serve his special personal or group interest." Wanting to retain the provision for popular referendums, the authors of the Iranian constitution relegated it to article 59, by which placement the clash between the idea that national sovereignty is exercised by the people via referendums and the idea that sovereignty is the exclusive province of the deity has been rendered less obvious. The incongruity remains: there is no room for popular sovereignty exercised via referendum in a system based on the theological premise of divine rule, which at the very least should mean that God's laws are binding and not subject to modification by any human agency, such as popular referendums involve.<sup>[52]</sup>

77. However, the 1979 Iranian Constitution contains some startling new elements. Alongside a popularly elected Assembly and President, the Constitution designated a Leader and a Council of Guardians. The authority of these new institutions is such that Chibli Mallat has described them as forming a second tier of the separation of powers, on top of the more traditional separation between the executive, legislative, and judicial powers.<sup>[53]</sup>

## Indonesia

78. Meanwhile, Indonesia's constitutional reform has used **the substantive Syar'ih** approach. This

holds that the *Syar'ah*, in this context, should be reinterpreted in line with democracy and constitutionalism. Indonesia is neither secular nor Islamic countries. The two largest Islamic organization —Muhammadiyah and Nahdlatul Ulama(NU)— strongly oppose state enforcement of Islamic law, the *Syar'ah*, as conceived by Islamic political parties (PPP and PBB).[54] However, leaders of the Muhammadiyah and the NU do not refuse that the spirit of the *Syar'ah* might contribute to the Amendment of the 1945 Constitution. It is safe to argue that they took the middle position between secularism and fundamentalism.[55]

79. In August 1945, at the last moment, seven words from the Preamble to the Constitution (known as the Jakarta Charter) were removed and thus excluded from the Constitution. The seven words involved a requirement for Muslims to implement *Syar'ah*. Therefore, the Constitution only states that “The State shall be based upon the belief in the One and Only God” (Article 29). However, according to the President’s Decree in 1959, the Jakarta Charter ‘gives life’ or ‘influences’ (*menjiwai*) to the 1945 Constitution and that it forms an inseparable unity with the Constitution. Consequently, although the Charter was not one of the sources of Indonesian law, there should be no law or government regulation which contradicts the spirit of the 1945 Constitution (i.e. the Jakarta Charter).[56]
80. Unlike in Egypt, in 2002, the Indonesian MPR (People’s Consultative Assembly) rejected the efforts of Islamic political parties to re-insert the seven words “*dengan kewajiban menjalankan syariat Islam bagi pemeluknya*”.[57] It could be argued that the rejection is inline with substantive *Syar'ah* approach.

## **Conclusion**

81. Constitutionalism means the sovereignty of the people, elected government accountable to the people, government being guided by constitutional prescriptions and limitations, constraints on government pursuant to principles of human rights, preclusion of extra-constitutional government, and adequate institutions to ensure that constitutional rules are observed. In this article, I argue that the *Syar'ah* is compatible with constitutionalism. I believe that the *Syar'ah* is not static and final. As has been argued earlier, it can be amended, reformed, modified or even altered, without neglecting its fundamental basis. The *Syar'ah* is changeable and adaptable to social change. The *Syar'ah*, as humanly understood, follows the dynamics and the characteristics of human beings. The revelation is divine, but interpretation is human, and fallible and, inevitably, plural. It is also suggested that religious diversity is inevitable, not just amongst religious communities, but within Islam itself. This position rejects both the Fundamentalists’ (as in Saudi Arabia) and the Secularists’ views (as in Turkey) on this subject. Instead, the principles of the *Syar'ah* could be a formal source (as in Egypt and Iran) or be used only as an inspiration to a constitution (as in Indonesia).

## **Notes**

(Fonts for this article: [JAISITW.TTF](#); [JAISTB\\_.TTF](#); [JAISTI\\_.TTF](#))

[1] J. Lane, *Constitutions and Political Theory*, Manchester, Manchester University Press, 1996, p. 25; see also Francis D. Wormuth, *The Origins of Modern Constitutionalism*, New York, Harper & Brothers, 1949.

[2] Louis Henkin, ‘Elements of Constitutionalism’, Occasional Paper Series, Center for the Study of Human Rights, 1994.

[3] Dario Castiglione, 'The Political Theory of the Constitution', in Richard Bellamy and Dario Castiglione (eds.), *Constitutionalism in Transformation*, London, Blackwell Publishers, 1996, p. 5.

[4] Alan S. Rosenbaum (ed.), *Constitutionalism: The Philosophical Dimension*, Connecticut, Greenwood Press, 1988, p. 8 (Introduction).

[5] Graham Hassal and Cheryl Saunders, *Asia-Pacific Constitutional Systems*, Cambridge, Cambridge University Press, 2002, p. 42; see also Said Amir Arjomand, 'Religion and Constitutionalism in Western History and in Modern Iran and Pakistan', in Arjomand (ed), *The Political Dimensions of Religion*, Albany, State University of New York Press, 1993, p. 69-99. The tension between church and state in the Western tradition is evident in all European constitutional traditions, and in the constitutions of colonial states such as the US and Australia.

[6] See Ann Elizabeth Mayer, 'Conundrums in Constitutionalism: Islamic Monarchies in an Era of Transition', *1 UCLA J. Islamic & Near E.L.* 183, 2002.

[7] In April 2000, a major international conference on Islam and Constitutionalism, held by Islamic Legal Studies Program, Faculty of Law, Harvard University. The papers will be edited by Sohail Hashmi and Houchang Chehabi and published by Harvard University Press (forthcoming).

[8] See Muhammad Khalid Masud, *Shatibi's Philosophy of Islamic Law*, Pakistan, Islamic Research Institute, 1995, p. 17.

[9] See M. Abd al-Qadir Abu Faris, *al-Nizam al-Siyasī fī al-Islām*, Beirut, Dar al-Qur'an al-Karim, 1984, pp. 15-40.

[10] See Ahmad Syalabi, *al-Siyasah fi al-Fikr al-Islāmī*, al-Qāhira, Nahḍah al-Misriyah, 1983.

[11] "This day, I have perfected your religion for you, completed My Favour upon you, and have chosen for you Islam as your religion" (QS 5:3).

[12] See 'Abdurrahman Taj, *al-Siyasah al-Syar'iyah wa al-Fiqh al-Islāmī*, al-Qāhira, Dār al-Ta'rīf, 1953; see also Muhammad Asad, *The Principles of State and Government in Islam*, Kuala Lumpur, Islamic Book Trust, 1980.

[13] Mayer, above n 6, p. 206.

[14] 'Ali 'Abd al-Raziq (1888-1966) was the most controversial Islamic political thinker in the twentieth century. His book *al-Islām wa Uṣul al-Ḥukm*, written in 1925 invited wide criticism from Muslim world. He was then condemned and isolated the 'ulamā council of al-Azhar, and also dismissed from his position as judge and prohibited from assuming a position in the government. Raziq disagreed with many 'ulamā who considered the establishment of *khilāfah* as obligatory for Muslims and therefore it would sinful if it were not carried out. He could not find any strong foundation to support this belief.

[15] Bassam Tibi, *The Challenge of Fundamentalism: Political Islam and the New World Disorder*, Berkeley, University of California Press, 1998, p. 160.

[16] Full text of Constitution of the Republic of Turkey can be read in <http://www.mfa.gov.tr/grupc/ca/cag/I142.htm>

[17] See Article 2 of the 1982 Constitution.

[18] Article 75 of the 1982 Constitution.

[19] Article 101 of the 1982 Constitution.

[20] Article 24 of the 1982 Constitution.

[21] Bernard Weiss, *The Spirit of Islamic Law*, Athens, University of Georgia Press, 1998, p. 116.

[22] Khaled Abou El Fadl, 'Constitutionalism and the Islamic Sunni Legacy,' *1 UCLA J. Islamic & Near E.L.* 67, 2002.

[23] Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence*, the Islamic Text Society, Cambridge, 1991, p. 366.

[24] *Ibid.*, p. 367; Hans Wehr, *A Dictionary of Modern Written Arabic*, Macdonald & Evans LTD, London, 1974, p. 142-143.

[25] Sayf al-Di'in al-Amidi was a noted scholar who wrote *al-Iḥkām fī Uṣūl al-Aḥkām*. After the first edition of this work appeared, Professor Bernard Weiss of the University of Utah published an exhaustive study of al-Amidi's work in a volume entitled, *The Search for God's Will: Islamic Jurisprudence in the Writings of Sayf al-Dīn al-ʿAmidī*, University of Utah Press, 1992, 745 pages.

[26] Sayf al-Din al-Amidi, *al-Iḥkām fī Uṣūl al-Aḥkām* Vol. 4, Cairo, Dar al-Kutub al-Khidiwiya, 1914, p. 218; Kamali, above n 23; also see Muhammad Taqī al-Ḥakīm, *al-Uṣūl al-ʿAmmah li al-Fiqh al-Muqarrin*, Beirut, Dar al-Andalas, 1963, pp. 561-562.

[27] Abu Hamid Muhammad al-Gazali, *al-Mustaṣfa min ʿIlm al-Uṣūl*, Vol. 4, al-Madinah al-Munawwarah, al-Jami'ah al-Islamiyah, n.d., p. 4; see also Taha Jabir al-Alwani, 'The Crisis of Thought and Ijtihad,' *American Journal of Islamic Social Sciences*, Vol. 10, No. 2, 1993, p. 237.

[28] Abu Dawud Sulaiman, *Sunan Abī Dāwūd*, Beirut, al-Maktabah al-ʿAshriyah (book *al-Aqḍiyyah*, Ḥadīṣ Number [HN]: 3,119); Abu Muhammad al-Darimi, *Sunan al-Dʿarimī*, Cairo, Dar al-Kitab al-ʿArabi, (book *al-Muqaddimah*, HN: 168); Al-Tirmizi, *Sunan at-Tirmizī*, Beirut, Dar al-Fikr, (book *al-Aḥkām*, HN: 1,249); Aḥmad bin Ḥanbal, *Musnad al-Imām Aḥmad*, Riyadh, al-Maktabah al-Islami, (book *Musnad al-Anṣār*, HN: 21,000); see also Taha Jabir al-ʿAlwani, *Source Methodology in Islamic Jurisprudence*, The International Institute of Islamic Thought, USA, pp. 12-13.

[29] Muhammad Ma'ruf al-Dawalibi uses these classifications in his book *al-Madkhal ila ʿIlm al-Uṣūl al-Fiqh*, Damascus, Matba'ah Jami'ah Damsyq, 1959, p. 389. Muhammad Salam Madkur mentioned Dawalibi's book when discussing this issue. However, Muhammad Taqi al-Hakim criticises these categorisations and therefore proposes only two classifications, namely, *al-ijtihād al-ʿaqlī* and *al-ijtihād al-syar'ī*. (See Muhammad Taqi al-Hakim, *al-Uṣūl al-ʿAmmah li al-Fiqh al-Muqarrin*, Dar al-Andalus, Beirut, 1963, pp. 579-576).

[30] Abu ʿAbd Allah Muhammad bin Isma'il bin Ibrahim bin al-Mugirah bin Bukhari, *Ṣaḥīḥ Bukhārī*, book *al-Ḥajj*, Dar al-Qalam, Beirut, 1987, HN: 1,469

[31] Abu ʿAbd Allah Malik, *al-Muwaṭṭaʿ*, book *al-Ḥajj*, al-Syirkah al-ʿAlamiyah, 1993, HN: 671; see also al-Darimi, book *al-Manʿasik*, HN: 1,745.

[32] Fazlur Rahman, *Islamic Methodology in History*, Lahore, 1965, pp. 180-181.

[33] Ahmad Hasan, *The Early Development of Islamic Jurisprudence*, Islamabad, Islamic Research Institute, 1970, p. 120.

[34] The decision of Umar bin Khattab to suspend ḥadd penalty (penalty prescribed by the *Qur'ān* and the



*Sunnah*) of amputation of hand during famine is an example of *Istihsan* (juristic preference). Here positive law of Islam was suspended as an exceptional measure in an exceptional situation. *Istihsan* is considered as a method of seeking facility and ease in legal injunctions and is in accord with the *Qur'ān* (2:185). This suggests that Companions of the Prophet were not merely literalist. On the contrary, their rulings were often based on their understanding of the spirit and purpose of the *Syar'ih*.

[35] More information can be found in Musdah Mulia, *Negara Islam: Pemikiran Politik Husain Haikal*, Jakarta, Paramadina, 2001.

[36] See Nathan J. Brown, *Constitutions in a Non-Constitutional World: Arab Basic Laws and the Prospects for Accountable Government*, Albany, NY, State University of New York Press, 2002, p. 162.

[37] Azizah Y. al-Hibri, "Islamic Constitutionalism and the Concept of Democracy" in Fred Dallmayr (ed.), *Border Crossings: Toward a Comparative Political Theory*, Maryland, Lexington Books, 1999, pp. 63-87.

[38] Azizah Y. al-Hibri, Islamic and American Constitutional Law: Borrowing Possibilities or a History of Borrowing? *1 U. Pa. J. Const. L.* 492, 497 (1999).

[39] El Fadl, above n 22; See also Anver Emon, 'Reflections on the "Constitution of Medina": An Essay on Methodology and Ideology in Islamic Legal History', *1 UCLA J. Islamic & Near E.L.* 103 (2002)

[40] H. Patrick Glenn, *Legal Traditions of the World*, New York, Oxford University Press, 2000, p. 35.

[41] El Fadl, above n 22.

[42] Taqi al-Din Ibn Taimiyah, *Majmu' al-Fatāwā*, Beirut, Mu'assasa al-Risalah, Vol. 32., 1398 H, p. 134.

[43] Yusuf al-Qardawi, *Madkhal li Darasah al-Syar'ih*, p. 75.

[44] Kamali, above n 23, p. 408.

[45] Full text of the Charter of Medina can be found in <http://islamic-world.net/islamic-state/macharter.htm>

[46] Charles Kurzman, 'Liberal Islam: Prospects and Challenges', *Journal Middle East Review of International Affairs*, Vol. 3, No. 3 September 1999. This paper draws and expands on his book *Liberal Islam: A Source-Book*, New York, Oxford University Press, 1988.

[47] See, for example, Kevin Boyle and Adel Omar Sherif (eds), *Human Rights and Democracy: the Role of the Supreme Constitutional Court of Egypt*, London, Kluwer Law International, 1996.

[48] Clark Benner Lombardi, 'Islamic Law as a Source of Constitutional Law in Egypt: The Constitutionalization of the Sharia in a Modern Arab State', *37 Colum. J. Transnat'l L.* 81, 1998.

[49] See Clark Benner Lombardi, 'State Law as Islamic Law in Modern Egypt: The Amendment of Article 2 of the Egyptian Constitution and the Article 2 of Jurisprudence of the Supreme Constitutional Court of Egypt', PhD Thesis, Columbia University, 2001; see also Maurits S. Berger, 'Conflicts Law and Public Policy in Egyptian Family Law: Islamic Law Through the Backdoor', *50 Am. J. Comp. L.* 555, Summer 2002.

[50] See Abdulaziz Abdulhussein Sachedina, *The Just Ruler (al-Sultan al-Adil) in Shiite Islam : the Comprehensive Authority of the Jurist in Imamite Jurisprudence*, New York, Oxford University Press, 1988.

[51] Ann Elizabeth Mayer, 'The Fundamentalist Impact on Law, Politics, and Constitutions in Iran, Pakistan and Sudan', in Martin E. Marty and R. Scott Appleby (eds.), *Fundamentalisms and the State*, Chicago, The University of Chicago Press, 1993, p. 118.

[52] *Ibid*, pp. 118-9.

[53] Chibli Mallat, *The Renewal of Islamic Law*, Cambridge, Cambridge University Press, 1993, Chapters 2 and 3.

[54] Of the big seven political parties in 1999, PBB, which won 2 percent, campaigned in favor of state enforcement of the *Syar'ih*. If PBB's votes are combined with those for PPP, the pro-formal *Syar'ih* total rises to 12 percent (71 seats), a 28 percent decline since 1955.

[55] At the moment, NU is the biggest Islamic organisation numbering thirty million supporters. More information can be found in Greg Barton and Greg Fealy (eds), *Nahdlatul Ulama: Traditionalist Islam and Modernity in Indonesia* (Monash: Monash Asia Institute, Monash University, 1996); see also Nadirsyah Hosen, 'Collective *Ijtihad* and Nahdlatul Ulama', *New Zealand Journal of Asian Studies*, June 2004 (forthcoming). Muhammadiyah is the organisation which represents modernist Muslims. It has twenty eight million supporters in Indonesia, and has built many schools, universities and hospitals. More information can be found in M. Sirajuddin Syamsuddin, 'Religion and Politics in Islam: The Case of Muhammadiyah in Indonesia's New Order,' PhD Thesis, University of California Los Angeles, 1991; see also Nadirsyah Hosen, 'Revelation in a Modern Nation State: Muhammadiyah and Islamic Legal Reasoning in Indonesia', *Australian Journal of Asian Law*, Vol. 4.3, December 2002.

[56] See Hazairin, *Demokrasi Pancasila*, Jakarta, Tintamas, 1970, pp. 58-60.

[57] See Todung Mulya Lubis, 'Constitutional Reforms' in Hadi Soesastro (et.al), *Governance in Indonesia: Challenges Facing the Megawati Presidency*, Singapore, ISEAS, 2003.

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Document author: Nadirsyah Hosen

Document creation: March 2004

HTML last modified: March 2004

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