RELIGIOUS INSTITUTIONS IN THE CONSTITUTIONAL ORDERS OF THE POST-REVOLUTION ARAB COUNTRIES: EGYPT AS A CASE STUDY

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ABSTRACT

In Muslim-majority countries such as Egypt, there has been a consensual premise that the state should acquire Islamic legitimacy. In order to establish faith in the system, Islamic political spirit from Islam must serve as a motivating force to legitimize the state and its institutions. The scholars as a metaconstitutional institution have a key role in helping to define and facilitate that Islamic legitimacy.

In the colonial and post-colonial era, traditional interpreters of Islam, scholars and Islamic jurists, has been typically reduced into specific institutions recognized or even established by the state. This dynamic of state control of Islamic institutions, which are supposed to contribute in the state's legitimacy, instead created an essential dilemma and a crisis of legitimacy. Therefore, to build trust and faith in the system, several Muslim-majority countries adopted a repugnancy clause, or an article (normally Article 2) in its constitution where Islam was recognized as a source or *the* source of legislation.

In this setting, the right to Islamic interpretation became even more crucial because of its impact and legitimizing tools. Hence, the Islamic constitutional articles brought their own issues respecting the question: who has the interpretive authority, and which institutions should have

the final say on Islamic matters? In my dissertation, I focus on the Islamic scholars or jurists and their role as interpreters of Islamic jurisprudence and how their role relates to the constitutional arrangement.

My dissertation will explore the role that juristic institutions play in Islamic states with a primary focus on the role of Egyptian Islamic scholars generally, and those of Al-Azhar in particular. I will show that the scholars themselves, whether or not affiliated with a formal body such as Al-Azhar, in fact constitute important "imagined" institutions. They are not a state institution with a formal role in actual governance, nor can they be regarded merely as a private actor. Instead, juristic institutions play a central role in legitimizing the state, and the state's approach to questions that involve Islam. They do so in a primary, constitutive fashion that, I contend, renders their arena the "meta-constitutional sphere."

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1.0 INTRODUCTION

In the final month of 2010, in the small Tunisian city of Sidi Bouzid, Mohammed Bouazizi, a young vendor, self-immolated out of despair. Bouazizi had been prohibited from selling on the street for not having a "permit" - an indirect way of the police to ask for a bribe. Refusing to give a bribe, Bouazizi was also ignored by the governor's office. Bouazizi's story angered the public and started a series of protests that swept from city to city, and country to country in the Arab world. The protesters rallied against corruption, tyranny and social injustice.[1] Then began the upheavals that would later be called the "Arab Spring."

Each country involved in the Arab Spring responded differently to the mass protests, and were led down varying political paths. Tunisia, Egypt, and Libya went through radical regime changes, while other countries such as Yemen, Morocco, and Jordan made important changes to their systems of government. Other states, such as Bahrain and Iraq, resisted any meaningful changes, while most tragically, Syria has largely disintegrated, resulting in a humanitarian disaster of untold proportions. The most important two countries to my research are Tunisia and Egypt. Tunisia represents the model that adopted democracy and participatory politics, with

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[1] Michael Hoffman & Amaney Jamal, *Religion in the Arab spring: Between two competing narratives*, 76 THE JOURNAL OF POLITICS, 2-6 (2014). PHILIP N HOWARD & MUZAMMIL M HUSSAIN, DEMOCRACY'S FOURTH WAVE?: DIGITAL MEDIA AND THE ARAB SPRING 3-16 (Oxford University Press on Demand. 2013).

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bumps in the road. Egypt, on the other hand, is still in a state of relative flux, with the revolutionary and counterrevolutionary forces in contestation with one another.[2]

Within the Arab Spring phenomenon remains the question of the role of Islam, and whether it motivated the protests, or was part of the events at all. Michael Hoffman and Amaney Jamal identified two major narratives. The first is what they call "mosque to square" narrative that recognizes the role of mosques and religious activities in organizing and motivating protests against regimes of Egypt and Tunisia. The other narrative portrays the protests as purely civil demands of young people who aspired to live in a democratic free country that respects human rights. Using data in Tunisia and Egypt (collected shortly after the fall of the regimes in each country in 2011), Hoffman and Jamal concluded,

> [R]eligion was a significant factor in motivating the Arab Spring, but perhaps not in the expected ways. Individual piety played a significant role in influencing protest behavior, but communal religious practice did not. While the mechanisms behind these relationships are indeterminate, there is evidence to suggest that many of the revolutionaries active in the Arab Spring were motivated, at least in part, by a psychological attachment to religion.[3]

The analysis of Hoffman and Jamal emphasizes the role of religion not as an ideological political party, but rather as a broader motivating force. This observation of the Arab Spring in respect to religion reminds us of the historical reemergence of Islam as a strong force during upheavals, crises, and revolutions. With the comeback, Muslim scholars rise as an influential group that survives political and constitutional crises, as they have countless times in Islam's past. Therefore, it is vitally important to study religious institutions and understand their dynamics, especially how the state deals with with the post-revolutionary Islamic institutions and scholars.

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[2] About the revolution and counter-revolution in Egypt, see, Brecht De Smet, *Revolution and counter-revolution in Egypt*, 78 SCIENCE & SOCIETY, 11-3 (2014).
[3] Hoffman & Jamal, THE JOURNAL OF POLITICS, 21 (2014).

The striking feature of Muslim scholars is that, while they are not solely a popular force during crises and upheavals, they tend to play a more important role during these extraordinary times. This role and phenomenon asserts the quality of their operation as a work beyond the constitutional arrangement. Scholars do not collapse as political or constitutional systems do, but instead grow in importance at such times. This is due to the scholars' nature, their relationship to society, and to their ever-lasting role.

Muslim scholars' authority precedes political arrangements because it is established by principles and values that the public observes and follows. Preexisting morals and rules are by and large shaped by the scholars, and their interactions with the people and texts.[4] It is fairly common to see popular values that are typically represented by Islamic scholars prevail during times of tension or even mayhem - their responsibility grows as much as problems do. Crises such as invasions, conflicts, civil wars, transitions and revolutions remind us of the importance of jurists and their relationship to people. This could also explain the nature of scholarly "retreat" from politics at times when an issue is purely political.[5] At the same time, the "retreat" can be overstated. The popular attitude toward scholars also caused them at times to have the basic quality needed in order to be brokers, mediators, and peacemakers between rivals or between ruler and the ruled.[6]

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[4] See in general, CHARLES TAYLOR, MODERN SOCIAL IMAGINARIES 52 (Duke University Press. 2004).

[5] NIKKI R KEDDIE, SCHOLARS, SAINTS, AND SUFIS: MUSLIM RELIGIOUS INSTITUTIONS IN THE MIDDLE EAST SINCE 1500 121 (Univ of California Press. 1972).

[6] MEIR HATINA, 'ULAMA', POLITICS, AND THE PUBLIC SPHERE: AN EGYPTIAN PERSPECTIVE 159 & 24 (2010). Ulama acquired a more active role in politics during the wars between the Ottomans and Mamluk due to the fact that both sides wanted to align with the scholars to appeal to the public and their morals. Similarly, ulama enjoyed a stronger influence during the Hispano-Moroccan war, and during the series of French and English colonization of various countries in the Arab and Muslim world. One commentator described this phase as the "golden age of the ulama." Edmund Burke III, *The Moroccan Ulama, 1860-1912: An Introduction*, *in* SCHOLARS, SAINTS, AND SUFIS: MUSLIM RELIGIOUS INSTITUTIONS IN THE MIDDLE EAST SINCE 1500 98-9 & 121, (Nikki R Keddie ed. 1972); KEDDIE, scholars, saints, and sufis: Muslim Religious Institutions in the Middle east since 1500 173. 1972. For more details on the basic roles of ulama, see the second chapter of this dissertation.

There is a reason that the role of scholars (ulama) seems to increase dramatically with crises. It is because they reside in a non-political sphere, so all political forces seek their support. While political players seek support from these "meta-constitutionalists," society turns to them to guard its interests and values, and build its trust and faith in the system.

In Muslim-majority countries such as Egypt, there has been a consensual premise that the state should acquire Islamic legitimacy in order for there to be faith in the political system. In order to establish this faith, Islamic political spirit from Islam must serve as a motivating force to legitimize the state and its institutions.[7] In any constitutional state in which the people's will is a core constitutive force, and where the people overwhelmingly expect and demand a central role for Islam, Islam will need to be recognized as a basis upon which the state operates. Otherwise, the state will lose the popular legitimacy it requires. The scholars as a metaconstitutional institution have a key role in helping to define and facilitate that Islamic legitimacy.

In the colonial and post-colonial era, traditional interpreters of Islam, scholars and Islamic jurists, has been typically reduced into specific institutions recognized or even established by the state. This dynamic of state control of Islamic institutions, which are supposed to contribute in the state's legitimacy, instead created an essential dilemma and a crisis of legitimacy. Therefore, to build trust and faith in the system, several Muslim-majority countries adopted a repugnancy clause, or an article (normally Article 2) in its constitution where Islam was recognized as a source or *the* source of legislation.

However, scholars and jurists were rarely consulted to determine the contours of repugnancy. In this setting, the right to Islamic interpretation became even more crucial because of its impact and legitimizing tools. Hence, the Islamic constitutional articles brought their own

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7 See, EMILIO GENTILE, POLITICS AS RELIGION 20, 125 &128 (Princeton University Press. 2006).

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issues respecting the question: who has the interpretive authority, and which institutions should have the final say on Islamic matters? In my dissertation, I focus on the Islamic scholars or jurists and their role as interpreters of Islamic jurisprudence and how their role relates to the constitutional arrangement.

My dissertation will explore the role that juristic institutions play in Islamic states with a primary focus on the role of Egyptian Islamic scholars generally, and those of Al-Azhar in particular. I will show that the scholars themselves, whether or not affiliated with a formal body such as Al-Azhar, in fact constitute important "imagined" institutions in the state. Moreover, these institutions are autonomous and nongovernmental. They occupy a unique role that does not easily fit into traditional concepts of the modern, Westphalian nation-state. They are not a state institution with a formal role in actual governance, nor can they be regarded merely as a private actor whose influence is purely that of an outsider. Instead, juristic institutions play a central role in legitimizing the state, and the state's approach to questions that involve Islam. They do so in a primary, constitutive fashion that, I contend, renders their arena the "meta-constitutional sphere."

1.1 CRITICAL LITERATURE REVIEW

Usually, constitutional research about religious institutions is conducted in a top-down approach, in the sense that it focuses on how to position or reposition these religious institutions constitutionally from a state point of view. That is to say that most research is concerned with religious institutions in the constitutional setting and how states treat or should treat them. As a result, researchers tend to discount or deemphasize the role of religious institutions from the people's point of view. For example, researchers investigate how courts or constitutions deal

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with religious institutions, but overlook the class of jurists who work underneath these official apparatuses. In practice the jurists actually empower courts and constitutions in one way or another by creating the popular legitimacy these institutions require to function effectively. Examples of this top-to-down approach include different works such as that of Clark Lombardi, Nathan J. Brown, Ran Hirschl, Larry Backer, Noah Feldman, and the major theme in the book "Constitutionalism in Islamic Countries: Between Upheaval and Continuity."[8]

My methodology is instead a combination of both a bottom-up approach dealing with how religious institutions position themselves, and how their arena affects the state, in addition to the top-down pattern. Unlike the top-down pattern, my research will not ignore the critical role in what I call the "meta-constitutional sphere", where religious institutions function outside of the state manipulation and control. This framework better explains the meta-constitutional sphere, where jurists and religious institutions like Al-Azhar lay down the preexisting concepts of Islam and general rules for interpreting it in the state. Both top-down and bottom-up methods may ask the same question, but understanding the role of religious institutions *toward themselves and the state* is quite a different approach from understanding the role of the state in respect to these institutions. Using both methods will construct a more complete picture of the task religious institutions carry out in the Arab world. Understanding this dual nature of religious institutions themselves will help us know to what extent possibilities exist to resituate religious institutions in the state according to different proposals.

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[8] CLARK B LOMBARDI, STATE LAW AS ISLAMIC LAW IN MODERN EGYPT: THE INCORPORATION OF THE SHARĪʿA INTO EGYPTIAN CONSTITUTIONAL LAW 88-267 § 19 (Brill Academic Publishers. 2006);NATHAN J BROWN, CONSTITUTIONS IN A NONCONSTITUTIONAL WORLD: ARAB BASIC LAWS AND THE PROSPECTS FOR ACCOUNTABLE GOVERNMENT 161-195 (Suny Press. 2002); RAN HIRSCHL, CONSTITUTIONAL THEOCRACY 26-40 (Harvard University Press. 2011);Larry Catá Backer, *Theocratic Constitutionalism: An Introduction to a New Global Legal Ordering*, 16 INDIANA JOURNAL OF GLOBAL LEGAL STUDIES, 1 (2009);NOAH FELDMAN, *The Fall and Rise of the Islamic State*, 103-51 (2008);RAINER GROTE & TILMANN J RODER, CONSTITUTIONALISM IN ISLAMIC COUNTRIES: BETWEEN UPHEAVAL AND CONTINUITY 77, 89, 109, 121, 135, 147, 171 & 201 (Oxford University Press. 2012).

Noah Feldman and Asifa Quraishi come closest to recognizing the historical role of the Muslim scholar and religious and scholastic institutions, but there are limitations to their work. Specifically, Feldman mostly compares them to the role of the legislature.[9] However, jurists are not and have never been lawmakers. Although they acknowledge the fact that the role of scholars was to counterbalance the ruler, it is important to note that the rulings of the scholars in Islamic history, at least in the Sunni school, were not binding laws.[10] These scholastic institutions therefore fall into the realm of "meta-constitutional" institutions more than that of a separate, official branch of government.

There is some literature on how religious institutions may operate outside the state setting, in civil society in particular. Niels Nielsen's and Jose Casanova's works demonstrate how religious institutions thought to have undergone a history hostile to modernization, can actually be democracy standard-bearers, or at least positive participants in democratic change, as civil society institutions of a sort.[11] However, these two works seem to scrutinize the transitional role of revolutionary religious institutions rather than their long-term role in a post-revolutionary democracy. Moreover, Islamic institutions and scholars have deeper influence on the people than civil society institutions alone usually do.

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[9] FELDMAN, 103-51 (2008);Asifa Quraishi, *The Separation of Powers in the Tradition of Muslim Governments*, *in* CONSTITUTIONALISM IN ISLAMIC COUNTRIES: BETWEEN UPHEAVAL AND CONTINUITY 71-2, (Rainer Grote & Tilmann Roder eds., 2011).

[10] *See* for the Islamic "Law" whether it is Law, Haider Ala Hamoudi, *Baghdad booksellers, Basra carpet merchants, and the law of God and man: Legal pluralism and the contemporary Muslim experience*, 83 (2008). Abdullahi Ahmed An-Na'im, *Religion, the state, and constitutionalism in islamic and comparative perspectives*, 57 DRAKE L. REV., 1-44 (2008).

[11] NIELS C NIELSEN JR, REVOLUTION IN EASTERN EUROPE: THE RELIGIOUS ROOTS 2, 5, 14, 20, 42, 50, 61, 68& 159 (Orbis Books. 1991);José Casanova, *Civil society and religion: retrospective reflections on Catholicism and prospective reflections on Islam*, SOCIAL RESEARCH, 4 (2001).

According to Intisar Rabb, by employing "coordinate Islamic constitutionalization" in the Iraqi case, jurists function as the "Fourth Branch." [12] However, her work on the subject is more focused on Shi'ism with its history and approach toward jurists. In the case of An-Najaf, as an example of the Shi'i school, there is a more formal institutional structure, the "*marji'yyah*," as opposed to the flexible or dispersed authority generally seen in the Sunni case.

Respecting the presence of religion broadly, David Hollenbach argues for a more involved religion in civil society and criticizes privatization of religion and religious institutions.[13] Hollenbach describes the locus of religious presence as the "cultural sphere" where preexisting cultural backgrounds shape our shared values. Nevertheless, Hollenbach tends to utilize theological reasoning for religion's civil role from a Roman Catholic perspective, and in a functionalist way that uses religious discourse more than recognizes it and respects it on its own terms.

Examining the modern roles of Al-Azhar and political Islam, Kristen Stilt has presented and analyzed the proposals of political Islamists, mostly the Muslim Brotherhood, for how to promote independent and active Islamic religious institutions.[14] Other studies have dealt with the religious institutions in Egypt, but usually from a historic and scholastic perspective more than on the basis of how to understand their contemporary political and legal relevance in a post-revolutionary Egypt.[15]

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[12] Intisar A. Rabb, *"We the jurists": Islamic constitutionalism in Iraq*, 10 UNIVERSITY OF PENNSYLVANIA JOURNAL OF CONSTITUTIONAL LAW, 10 (2008).

[13] David Hollenbach, *Contexts of the political role of religion: Civil society and culture*, 30 SAN DIEGO L. REV., 877 (1993).

[14] Kristen Stilt, *Islam is the solution: constitutional visions of the Egyptian Muslim Brotherhood*, 46 TEX. INT'L LJ, 73 (2010).

[15] *See for e.g.*, MUHAMMED ABD AL-MUN'IM KHAFAJI, AL-AZHAR KHILAL ALF 'AM [AL-AZHAR DURING A THOUSAND YEARS] § 1 ('Alam al-Kutub & Maktabat al-Kullyyat al-Azharyyah 2nd ed. 1988). For Al-Azhar's roles in Egyptian political society particular in post-revolutionary age, *see* NATHAN J BROWN, POST-REVOLUTIONARY AL-AZHAR 3-15 (Carnegie Endowment for International Peace Washington. 2011).

In this review, I should emphasize that these works are insightful and that I benefitted from this literature to fill gaps in these studies. Various works used different approaches that inspired me to incorporate different elements into my own proposal. Departing from their varying approaches, I will use these valuable works to try to develop a more comprehensive project aimed at understanding the role religious institutions from within, in addition to the constitutional view.

1.2   METHODOLOGY AND CHAPTERS

This research is deemed to be theoretical in nature, presenting detailed, legal analytical discussions of the current role of religious institutions and their possibilities in the public sphere. History contextualizes the movements and concepts of today's jurists with regard to their role in the state and society, whereas legal comparison will help in understanding the mixed system that has grafted traditional and modern elements onto what is described as a democratic state with a Muslim majority. Egypt will be a case study, while Islamic scholars and al-Azhar, the main Islamic institution in Egypt, will be examined with a focus on their role within their own sphere. This will be developed by observing their attitudes toward political and public issues, reading the legislative history of constitutional articles and proposals related to the role of al-Azhar, and studying the different narratives about al-Azhar in the political players' discourses. I will include discussion of their rulings, and how the public, including political players, adapt to the consensual rulings of the Islamic scholars. This will show how these political players adopt juristic language deployed by Al-Azhar in order to appeal to the public.

Observers and researchers often fear more religious semi-theocratic states in the Muslim world. The study of the genuine role of these institutions will help guide us in dealing with religious-inspired societies and their political models. It will show that theocracy would not be a fulfillment of the traditional juristic role, but rather a distortion of it.

The first chapter will discuss three main issues. First, it will address the role of political faith in establishing a political system and constitutional orders. This is a process that traditional religions' representatives participate in to shape civil religion. This chapter will also provide descriptions of competing forms of legitimacy found in the academic literature. It will argue that a form of legitimacy, such as procedural legality, is insufficient for a long-term stable system which needs a normative initiatory, along with continuous legitimacy to respond to popular expectations and political imagination. Finally, it will address the concept of religious legitimacy generally, which effectively influences even some secular regimes. From there I reach the point that Islamic legitimacy is a particularly important form of religious legitimacy to establish confidence in the political system. This task is typically exercised by religious institutions; specifically, unofficial independent institutions that are not politically controlled by the regime.

Following the legitimacy discussion, I will assess the locus of authority and where Islamic scholars operate in society. The debate about where religious, and particularly Islamic, jurisprudential work resides in today's Muslim state is related to the legitimacy debate. States whose religious institutions participate in the making of legitimacy continuously encounter debate respecting these religious institutions' work and sphere. The first chapter suggests that the legitimacy of the religious institutions themselves, as well as the legitimacy of the states, requires that these institutions be independent and autonomous.

The second chapter focuses on the space of Islamic institutions in Muslim countries, specifically on Egypt as a case study. The second chapter is divided into four main sections. The first section discusses the meaning of "religious institutions" as imagined institutions in the Islamic context. This is important, because we must first understand precisely what we mean by a "religious institution" in Sunni Islamic discourse before discussing its role in the state. In short, religious institutions are imagined institutions that are represented by dispersed Muslim jurists. This is true in Islamic history, and to a larger extent in today's Muslim states. The second section presents the different roles of these scholars historically. The third section deals with the conception of scholars and their very nature and sphere, describing it in modernity as being "metaconstitutional." It is "meta-constitutional" to imply that the sphere is not established by constitutional power, does not need official recognition of its existence, and does not have direct constitutional power. This meta-constitutional sphere emphasizes that there is no binding authority like a state institution, but the scholars can define and redefine cultural and religious vocabulary in its own sphere. The fourth section discusses the idea that, although autonomy is crucial for Muslim religious institutions to operate in the meta-constitutional sphere, these institutions do not and should not acquire direct power, as this goes against their very own nature. I will use history to show that this proposal is the position that the ulama historically occupied, and what they have always normatively theorized.

On the basis of this, I craft a role that fits the ulama's nature according to their very own literature and social dynamics. This role places them in a position that is socially stable, as well as constitutionally plausible.

Having discussed the traditional role of the scholars in the second chapter, the third turns to the issue of the modern constitutional setting and the role of Muslim scholars in the Muslim-

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majority states. Examining the scholars in modernity is a way to test the stability of the traditional locus of these scholars. The different constitutional experiments in the Muslim world provide examples of how the Islamic elements and Islamic scholars are treated. Egypt is given special attention as a case study while other countries sharing similar features, such as Pakistan, are also included where relevant insights may be gleaned.

The third chapter is divided into four main sections. The first section explores the current constitutional context in the Muslim and Arab world, and the different early phases of Islamic constitutionalism. The second section explains the role of Islamic scholars in the constitutional orders and in constitution-making. The scholars' role is examined in two areas: law-making, and judicial adjudication. The third section discusses Islamic constitutional articles with special emphasis on Article 2 of the Egyptian constitution. Then, it will turn to the issue of authority of interpretation, concluding with the judicial application of Islamic law in Egypt. The final section examines my two-prong proposal of overlapping jurisdictions. This is to recognize the traditionally established imagined institution of the jurists to continue to strongly retain their space as a forum for Islamic jurisprudential debates and discussions. Through these means, the jurists remain the primary force that legitimates the state from a constitutive metaconstitutional perspective. At the same time, at the state level, the legislature should be the main interpreter of what Islamic law is.

Thus, the first chapter introduces the nature of the relationship between scholars, the people, and the state in light of the jurisprudential mechanisms and socially powerful tools the scholars have. The relationship revolves around the concepts of faith, trust and legitimacy. The second chapter is to study the sphere that the scholars typically operate in, and how that can affect the state and its political sphere. The third chapter explores in greater depth the discussion

of the meta-constitutional sphere as well as the constitutional debates respecting Islamic articles, and their interpretation. As a result, the chapter defends the precedence of the legislature over other institutions in regard to question: who has the right to Islamic interpretation?

In answering this question, the chapter concludes by reinforcing the two-prong proposal that bifurcates the question into one of interpretation for the perspective of state law, which the legislature controls, and traditional jurisprudential expression as a source of metaconstitutional legitimation, which remains, as it has always been, within the locus of control of the jurists.

2.0   CHAPTER ONE: THE ROAD TO LEGITIMACY

Religious institutions within the Islamic thought are composed of different jurists. The jurists' relationship to people makes them the resource of the traditional legitimacy as carriers and protectors of the traditions and jurisprudence. Because religion is politically inevitable especially in Islamic communities, jurists acquired their importance as religious legitimizers. This paper addresses the manner in which jurists and juristic academies in the modern Sunni world retain a great deal of relevance. This is because they confer a form of legitimacy on the nascent Muslim democratic state that is necessary if it is to succeed, and on the current Muslim democratic state in order to survive and revive.

This chapter will discuss three main issues. First, it will discuss the role of political faith in establishing a political system and constitutional orders, a process that traditional religions' representatives participate in to shape the civil religion. Second, the chapter will provide descriptions of competing forms of legitimacy found in the academic literature. It will argue that a form of legitimacy like procedural legality is insufficient for a long-term stable system that needs a normative initiatory along with continuous legitimacy to respond to popular expectations and political imagination. Finally, it will address the religious legitimacy which effectively influences even some secular regimes. From there I reach the point that Islamic legitimacy is a particularly important form of religious legitimacy to establish confidence in the political system. This task is typically exercised by religious institutions; specifically, unofficial independent

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institutions that are not politically controlled by the regime. This is because such control will curtail the jurists themselves, and thereby detract from their credibility and legitimacy.

In a later chapter, I will locate the arena in which these legitimizers should work. However, this chapter is to understand legitimacy itself in the way that shapes constitutional orders.

2.1   THE FAITH IN THE SYSTEM AS A LEGITIMIZING VEHICLE

For a people to have faith in their political system is to accept its legitimacy and the standards that this system is subjected to and judged by. Faith, in this sense, is a legitimizing vehicle that a state, especially recently established ones, needs to utilize in order to stabilize and prosper. In this part, I will discuss the profound need for faith, and how it underpins the legitimization process.

Max Weber distinguishes between three types of legitimate authority according to the claims they pose and the grounds that they rest on:

1- Legitimacy on rational grounds when validity is based on a normative ground that is rationally proven and accepted.

2- Legitimacy on traditional grounds when the basis of the authority is based on inherited principles.

3- Legitimacy on charismatic grounds when the authority centers on individual hero, person, or the like.[16]

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[16] MAX WEBER, ON CHARISMA AND INSTITUTION BUILDING 46-47 (University of Chicago Press. 1968).

In Weber's account, the rational legitimacy associates loyalty with the individual or individuals who occupy the rationally accepted positions *only for the time and tasks assigned*. In the case of the traditional legitimacy, loyalty and obedience are associated with individuals who are authorized and bound by the traditions. In the third type, charismatic legitimacy, loyalty is paid to the individual that carries the charismatic nature.[17] These distinctions are powerful when we, in later chapters, want to draw attention to the authority some group or institution has in the society. However, for the purposes of this chapter, I focus on how Weber classified legitimacy grounds according to the claims of the authority or order and, thus, linked loyalty and obedience of the people to these objective grounds.

Interestingly, any notion of faith carries less significance in Weber's account. In other words, Weber seems to focus more on grounds and claims rather than the belief in them. Thus, Weber's approach seems to address legitimacy grounds and claims as standards that are measureable *objectively*. This can be contrasted with the position of another theorist, Paul Ricoeur. Ricoeur's approach is to deal with the legitimacy grounds more as societal belief that can vary according to the people's backgrounds and culture. In other words, it is intersubjective.[18] Ricoeur thinks the belief of a given ground of legitimacy is what gives legitimacy its meaning rather than just the objective normativity of a certain claim.[19] Ricoeur asserts that "the equivalence of belief with claim is never totally actual but rather always more or

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[17] Id. at, 46.

[18] See, MOHAMMED A BAMYEH, ANARCHY AS ORDER: THE HISTORY AND FUTURE OF CIVIC HUMANITY 65-66 (FT14) (Rowman & Littlefield Publishers. 2009). (Bamyeh speaks of different degrees and levels of legitimacy.) A notable aspect of intersubjectivity that depends on social belief is to vary from a group/individual to another of the degrees and levels of belief. Interestingly, Islam speaks in Quran about the decrease and increase of faith (Quran 3:178). This conception is accurately the case here in the intersubjective nature of the social belief of a claim of legitimacy.

[19] George H Taylor, *Developing Ricoeur's Concept of Political Legitimacy*, PAUL RICOEUR AND THE TASK OF POLITICAL PHILOSOPHY, 66-67 (2012);Paul Ricoeur, *Lectures on ideology and utopia*, 202-203 (1986). For Weber, see, WEBER, On charisma and institution building 46-47. 1968.

less a cultural fabrication."[20] Therefore, in Ricoeur's account, the intersubjectivity of the legitimacy grounds indicates that a societal belief in a claim of legitimacy is what empowers this "legitimacy" or even what makes it legitimacy in the first place.[21] Consequently, the normative presuppositions of rules and ethics of a society are more likely to work here as a mechanism to recognize a ground as legitimate, and a claim of legitimacy itself as legitimate. This element of social recognition of a claim of legitimacy happens by means of political belief.

I will start this part by emphasizing the inevitability of faith, then focus on *political* faith as a requisite for new democracies, and end this part by showing how the public imaginary contributes to building legitimacy.

2.1.1   The Inevitability of Faith

Why Faith at all? Faith in fact is inevitable. It is not whether you have faith or not but what kind of faith you have and to what degree. Practically, there must be some faith for anything to be operative in our life. Even the most agnostic approach in regard to metaphysics ought to have some faith in other areas of life to live. Traditional atheists have a faith of their own on the idea of godlessness to different degrees.[22] Ironically, the further a group reaches toward the "disbelief" of something, the closer they get toward another belief even though that *belief* is the absoluteness of "disbelief". The dogma of the denial of believing in God or gods, for example, is no different than the other dogma of believing in God or gods. The faith on science or nature is

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[20] Ricoeur, 13 (1986).
[21] Id. at, 201.
[22] The French Philosopher Simone Weil described this issue perfectly by saying
No human being escapes the necessity of conceiving some good outside himself towards which his thought turns in a movement of desire, supplication, and hope. Consequently, the only choice is between worshipping the true God or an idol SIMONE WEIL, FIRST AND LAST NOTEBOOKS 308 (Oxford University Press. 1970).I am indebted to Haider Hamoudi who drew my attention to this great quote.

no different than the faith on God or gods as far as the core and characteristics of faith are concerned. That marks what Ronald Dworkin describes as "religious atheism".[23] Dworkin brilliantly notes that "[m]any millions of people who count themselves atheists have convictions and experiences very like and just as profound as those that believers count as religious".[24]

In the US case *United States v. Seeger*, [25] the Supreme Court decided that atheism that prohibits military services on an ethical basis is treated legally as religion in regard to the "conscientious objection" exemption that Congress provided. It is obvious that the Court did not intend to examine the religiosity of every secular or atheist group but it looked at the characteristics of some atheists and found that they have similar features that religious have in regard to the consequences. If someone *believes* that military service is prohibited based on a moral *faith*, it does not make difference whether she or he confirms that God presents or denies it. In the end, denying some religion or even religiosity altogether could itself qualify for another religion. On the other hand, if someone practices a secular or seemingly non-religious act but thinks or *believes* it is related to religion, this belief is what matters in some jurisdiction to qualify for a "religious act." In 2004, the Canadian Supreme Court in *Syndicat Northcrest v. Amselem*[26] ruled that a practice where the individual sincerely believes it is practiced out of a religious conviction is treated as religion regardless of whether the practice is required by a religious authority or not. The point here is that someone does not have to identify herself or

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[23] RONALD DWORKIN, RELIGION WITHOUT GOD 4 (Harvard University Press. 2013).

[24] Id. at, 2. The case of New Atheism is a good example of the extreme irreligious (or rather: religious) trend that advocates a godless world and *believes* that traditional religions (including Judaism, Christianity, and Islam) are themselves a delusion that "poisons everything" See, CHRISTOPHER HITCHENS, GOD IS NOT GREAT: HOW RELIGION POISONS EVERYTHING 0 (Random House Digital, Inc. 2008). RICHARD DAWKINS & LALLA WARD, THE GOD DELUSION (SciELO Brasil. 2006);SAM HARRIS, THE END OF FAITH: RELIGION, TERROR, AND THE FUTURE OF REASON (WW Norton & Company. 2005). *Compare*, DWORKIN, Religion without God 7-9. 2013;BRUCE LEDEWITZ, CHURCH, STATE, AND THE CRISIS IN AMERICAN SECULARISM 171-190 (Indiana University Press. 2011).

[25] United States v. Seeger, 380 U.S. 163, 85 S. Ct. 850, 13 L. Ed. 2d 733 (1965). See, DWORKIN, Religion without God 4. 2013.

[26] Syndicat Northcrest v. Amselem, 2 S.C.R. 551, 2004 SCC 47. See, HIRSCHL, Constitutional theocracy 169. 2011.

himself as being affiliated with a traditionally known religion or "authoritative" source of belief for their stand to be considered as a faith or belief. This is the latent but powerful feature of any sociopolitical entity or active group that seeks change or aspires to influence in (political) life. When religion is kicked out the door, it comes in through the window.

Ibn al-Qayyim (d. 1349) in his theological poem[27] argued tirelessly against all his theological opponents, and was faced with the anti-theological project proposed by atheists and materialists. According to Ibn al-Qayyim, the argument is that the atheistic and materialistic argument is that theologians are all worshippers of God while atheists are free from worship.[28] Ibn al-Qayyim responded with the interesting remark that worship of and devotion to God that materialists escaped were simply replaced by worship of and devotion to self and devil.[29] Regardless of whether his theological project was plausible or not, his early comment of how worship and religion can take naturalistic and materialistic forms was irrefutable. In Qur'an, a verse dealing with similar idea condemns whoever "takes his own lust (vain desires) as his *ilah* (god)"[30] pointing out that one's self and desires can be her or his own gods and fetishes. The features of religion, then, are apparent in some religions and faiths while latent in others but in

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[27] The full name of Ibn al-Qayyim is: Mohammed Bin Abi Bakr Ibn al-Qayyim al-Jawzyyah . Ibn al-Qayyim's poem is one of many in different sciences and literatures in medieval Islam. The use of poetry was common among scholars to make it easier to both memorize and comprehend the knowledge of a certain science. See, BRINKLEY MORRIS MESSICK, THE CALLIGRAPHIC STATE: TEXTUAL DOMINATION AND HISTORY IN A MUSLIM SOCIETY 26-28 (Univ of California Press. 1993).

[28] Materialism is a modern term but in Islamic medieval literature was sometimes described as *Jismaneyyeen* (from the Arabic word *Jisim* which means body/substance) like in AlShaherstani ABU AL-FATH AL-SHEHRESTANI, AL-MILAL WA AL-NIHAL 4 (Dar Al-Kutub Al'ilmyyah 2nd ed. 1992). In other books, what is known now as materialism is interestingly classified as a separate faith called *dahri* (derived from the Arabic noun *dahr* which means eon or era implying that *dahris* (which we can call eonists) directly or indirectly worship materialistic life and the spirit of the time where they live. See Jamal al-Din al-Afghani's book in Arabic that was titled "Al-rad 'ala Al-Dahreyyen" and interestingly translated into English as "Refutation of the Materialists." NIKI R KEDDIE, AN ISLAMIC RESPONSE TO IMPERIALISM: POLITICAL AND RELIGIOUS WRTITINGS OF SAYYID JAMĀL AD-DĪN'' AL-AFGHĀNĪ'' 130-191 § 21 (University of California Pr. 1983).

[29] Ibn AlQayyem Aljawzeyyah, *AlKafyah AlShafyah (known as: Noonyat Ibn AlQayyem),* 1925, at 218, *available at* AlTaqaddum Al'elmyyah Publisher.

[30] Quran (54:23).

both cases religion easily finds its way back and restore some crucial features even in the heart of the most inimical or neutral toward it.

Faith in a modern philosophical context indicates that those who do not *believe* that religion can be rational in nature could end up believing that rationality is religious in nature.[31] According to Habermas' interpretation, Kant finds faith as something that could be religious or secular. Thus, Kant translates the religious concept of "in the image of God" into the secular context of promoting "equality."[32] Ironically, even Marx, who is associated with the idea of condemning using religion as the "opium of the people,"[33] has taken advantage himself of the religious concept "kingdom of God" to preach a secular salvation that categorically rejects the traditional use of religion but falls within the same trap of exploiting traditional religious concepts for modern religious (or secular) purposes.[34] Habermas, in the end, justifies these secular translations of religious concepts in order to relax this "scientific" self-worshiping world and to infuse it with ethical limitations and standards.[35] It seems, though, that religion is unavoidable but the issue is whether someone is able to *consciously* recognize it, deal with it, translate some of its concepts to other arenas, and take advantage of its powerful faith. Otherwise, religion will *subconsciously* maneuver and come back even if its believers refrain from calling it "religion."

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[31] See in general, JURGEN HABERMAS, BETWEEN NATURALISM AND RELIGION: PHILOSOPHICAL ESSAYS (Polity. 2008);DWORKIN, Religion without God. 2013.
[32] HABERMAS, Between naturalism and religion: Philosophical essays 221. 2008.
[33] Karl Marx, *Introduction to A Contribution to the Critique of Hegel's Philosophy of Right*, DEUTSCH-FRANZÖSISCHE JAHRBÜCHER, 1 (1844).
[34] HABERMAS, Between naturalism and religion: Philosophical essays 231. 2008.
[35] Id. at, 107&238.

2.1.2 Why The Need for Political Faith?

The inevitability of faith[36] applies to political and constitutional domains almost as much as it does to traditional religions even if some societies are far more apparently sympathetic to traditional religious discourse.[37] In the previous section, we have seen that some religious concepts have been secularized while others have leaked and influenced politics. We will see in this section that some of religion's genuine characteristics have been lent to political and constitutional domains. The political faith and constitutional salvation narrative were examples of this process of secularization of religion on one hand, and religionization of politics on the other.[38] Legitimacy rests upon not only meeting the ethical and political requirements for a state but also responding to the belief of the people on what the state is supposed to be.[39]

Whereas traditional religions have been reduced to certain arenas and suffered different degrees of privatization, the concept of religion has been reborn anew. The secular world has produced its religions that replaced traditional scriptures, prophets, ethics, and faith with new ones, all present in the public sphere. In his book, *Politics as Religion*, Emilio Gentile studies modern secular religions and demonstrates that democratic systems with the passage of time

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[36]See, Ricoeur, 201-294 (1986). I should here distance the idea of "political faith" here from the notorious concept of "political religion" that was associated with the totalitarian regimes in the nineteenth century like Nazism and Fascism. In contrast, political faith refers to the basic idea when people have faith in their state and its institutions. For more about "political faith," see generally, J. M. BALKIN, CONSTITUTIONAL REDEMPTION: POLITICAL FAITH IN AN UNJUST WORLD (Harvard University Press. 2011). This basic idea of political faith, however, is sometimes described in its more religious dimension as "secular religion" For the concepts "political religion," "secular religion," and "civil religion," see, GENTILE, Politics as religion 2, 21,129& 59-70 2006.

[37]37 BALKIN, Constitutional Redemption: Political Faith in an Unjust World 74. 2011. See generally, SANFORD LEVINSON, CONSTITUTIONAL FAITH (Princeton University Press. 2011);George P Fletcher, *Three Nearly Sacred Books in Western Law*, 54 ARK. L. REV. (2001).

[38] See, TAHA ABDULRAHMMAN, ROOH AD-DEEN 51-181 (Al-Markaz Al-Thaqafi Al-'arabi 2 ed. 2012).(In this book, AbdulRahman devotes a good deal in describing the two processes: the first is the secularization of religions, and the other is the religionization of the secular world).

[39] Taylor, PAUL RICOEUR AND THE TASK OF POLITICAL PHILOSOPHY, 15 (2012). See, BALKIN, Constitutional Redemption: Political Faith in an Unjust World 230-233. 2011.

have crystallized *civil religion* that centers on a democratic national salvation story while totalitarian systems have produced *political religion* to preach its own national political narrative. Despite the great systematic difference between these two secular religions, both have incorporated, *inter alia*, themes, concepts, vocabularies, and historic references from traditional religions to build popular faith in the system.[40]

The first civil prophet that used the term "civil religion" to preach civil salvation and its covenant, the social contract, is Jean-Jacques Rousseau, the Enlightenment philosopher (d. 1779).[41] Rousseau does not deny that civil religion, like its traditional counterparts, entails faith in the social contract as a worldly redemption, but also he thinks this faith formed the "positive dogma" in the relationship between authority and the citizens.[42] This religiosity of the social contract inspires the faithful believer to protect its temples (institutions) and legitimate rules.[43]

Tocqueville compares the French Revolution to a religious revolution, stressing that "[t]he French Revolution, though political, assumed the guise and tactics of a religions revolution." He explained this religiosity by noting that the French Revolution, "like religious revolutions, spread by preaching and propagandism." [44] The secular religion that the French Revolution embedded was accurately realized just decades after it took place:

> The French Revolution acted, with regard to things of this world,
> precisely as religious revolutions have acted with regard to things
> of the other. It dealt with the citizen in the abstract, independent of
> particular social organizations, just as religions deal with mankind
> in general, independent of time and place…. It inspired

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[40] GENTILE, Politics as religion 16-45. 2006. It is not my intention here to analyze and compare the two religions but to understand them and how they made their contribution in crafting the political faith , an element is needed for any system.

[41] JEAN-JACQUES ROUSSEAU, THE SOCIAL CONTRACT: AND DISCOURSES 129-141 (Dutton. 1950). See, GENTILE, Politics as religion 1-2. 2006.

[42] ROUSSEAU, The social contract: and Discourses 139-140. 1950.

[43] See, HIRSCHL, Constitutional theocracy 211. 2011.(Hirschl recognizes the phenomenon of religionizing the political institutions and constitution and dealing with them as traditional religious institutions and documents.)

[44] Alexis De Tocqueville, The Old Regime and The Revolution, trans. John Bonner 25 (New York: Harper & Brothers 1856).

proselytism, and gave birth to propagandism; and hence assumed
that quasi religious character which so terrified those who saw it,
or, rather, became a sort of *new religion*, imperfect, it is true,
without God, worship, or future life, but still able, like Islamism, to
cover the earth with its soldiers, its apostles, and its martyrs.[45]

Tocqueville describes the Revolution that is deemed secular but obviously incorporated remarkable components of religion; namely, the "passion" and faith that inspires "its soldiers, its apostles, and its martyrs."[46] In the course of state-building and afterward especially in the more religious societies like most of the Muslim-majority countries, secular religion (civil or political) needs traditional religions in order to clothe its institutions and rules with faith that guarantees a sort of stability in the long run. For a secular religion, civil religion in our case, to be popularly built with its "system of beliefs, myths, values, symbols, and rituals that confer a sacred aura on political institutions," it may have to translate some traditional religious concepts to civil religion. It may thus leverage the power of traditional religion in order to proselytize a civil religion.[47] This process is even more foundational for states that experience a transitional period toward democracy but at the same time, deal with mostly Islamic society.

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[45] Id. at, 26-27. Italics are mine. I should comment on this quotation in two points. The first: although it is a brilliant observation by Tocqueville that the French Revolution resembles a religious revolution in some features, he failed to treat the concept "worship" the same way that he did to "religion." Other later researchers dealt with "worship" as a concept that applies to political interaction as much as religion. The relationship between what is considered a "national hero" and an ordinary citizen when the former claims authority that needs submission and subordination by the later looks like worship in a secular religion. See e.g., GENTILE, Politics as religion 9, 29, 32, 63, 68 & 86. 2006. The second point I want to make here is that the word "Islamism" that Tocqueville used seems to mean "Islam" as a religion while about a century later of Tocqueville's work "Islamism" has become a different phenomenon that describes not just typical Muslims but those among them who work socially and politically to implement Islamic principles according to the Islamic authority according to the Islamists' claim. For more about Islamism, see RICHARD MARTIN & ABBAS BARZEGAR, ISLAMISM: CONTESTED PERSPECTIVES ON POLITICAL ISLAM (Stanford University Press. 2010).

[46] De Tocqueville, The Old Regime and The Revolution, trans. John Bonner 27. 1856.

[47] GENTILE, Politics as religion XV. 2006.

Some analysts see that the faith in the civil salvation story is the only way to enjoy the worldly democratic heaven.[48] Just as in the Bible, the wicked son was excluded from the Covenant because he did not believe in the narrative, the modern bibles, the constitutions, represent a modern civil salvation narrative whereby whoever believes in it shall enjoy its civil covenant, the social contract.[49] William Cavanaugh criticizes the attempts to strip the society of the sacred salvation story. He notes that their attempt ended up creating its alternative sacred narrative. According to Cavanaugh, this process of substituting one sacred narrative for another takes advantage "of the sacred from some profane remainder".[50]

Out of the traditional Jewish story and its survival from slavery, the American survival from political modern slavery and persecution became a national narrative. The American narrative, just like its Jewish sister, has conveyed a set of rituals, faiths, rules, lessons from the past, promises for the future, and resulted in even a newer testament, the United States Constitution.[51] Ran Hirschl notes that "[c]onstitutions and constitutionalism may become a religion-like domain of their own, thereby counterbalancing or even replacing more traditional religious symbols, interpretive discourses, and sources of authority."[52] In American political history, Roosevelt speaks of the Constitution as a political and civil bible, saying "[l]ike the

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[48] BALKIN, Constitutional Redemption: Political Faith in an Unjust World 53. 2011;TAYLOR, Modern social imaginaries 101. 2004. See, GEORGE LAKOFF, THE POLITICAL MIND: WHY YOU CAN'T UNDERSTAND 21ST-CENTURY POLITICS WITH AN 18TH-CENTURY BRAIN 22 (Viking. 2008).

[49] BALKIN, Constitutional Redemption: Political Faith in an Unjust World 53. 2011.

[50] JOHN MILBANK, et al., RADICAL ORTHODOXY: A NEW THEOLOGY 203 (Routledge. 2002).(Cavanaugh here criticizes progressive secularist wing of being paradoxical in the way that they distance themselves from traditional sacred narrative while, in the end, adopted another sacred but modern one. I, however, focus on this premise of the need for a narrative disregarding the original argument by Cavanaugh in criticizing the progressive story.) See, JEFFREY STOUT, DEMOCRACY AND TRADITION 101 (Princeton University Press. 2004).

[51] BALKIN, Constitutional Redemption: Political Faith in an Unjust World 53. 2011. See, STOUT, Democracy and tradition 20. 2004. Stout deals with the American civil religion and its interpretation while "Bloom…declares Emerson the founding prophet of *the* American religion." Id. at.

[52] HIRSCHL, Constitutional theocracy 82. 2011;Taylor, PAUL RICOEUR AND THE TASK OF POLITICAL PHILOSOPHY, 3 (2012).

Bible, it ought to be read again and again"[53] which spurred some constitutionalists to think of the constitutional interpretations and schools as similar to the theological schools and its interpretation. Jack M. Balkin sees the American "constitutional legitimacy" partially as a result of "protestant constitutionalism."[54]

Political faith is the intersubjective, and very significant, dimension of legitimacy. Believing in the civil religion, like a traditional religion, varies according, among other factors, to the state's fulfillment of the "justice," and the degree of conviction, i.e. whether it meets the intersubjective doctrine and whether it succeeds to trigger the traditional sociopolitical components that empower the faith. In this sense, political faith can be a very effective vehicle that carries popular legitimacy. That being said, as discussed further herein, the Muslim countries that struggle toward building democratic systems should consider more the need and respect for the traditional religion, Islam in our case, in order to strengthen or even build a civil religion of its own.

2.1.3   The Legitimizing Imaginary

Legitimation is a complex process that involves dynamics that range from rational to emotional, and from the real to the imagined world. From the role that initiatory legitimacy plays in setting up the original role model for the state, the efforts exerted to convince people of the current generation may lead to the establishment of an imagined state that later people use as standards

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[53] BALKIN, Constitutional Redemption: Political Faith in an Unjust World 240. 2011.
[54] Id. at, 232.

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for their state and order.[55] This is one way to build this imagined state while another, important, way is the long narrated model or rule that is found in history, religion, or culture in general.[56]

The work of legitimation is no different than any other work that involves communication with others in that legitimation uses imagined states and the subconscious mind. Cognitive scientists assert that 98% of thinking is subconscious, and they further declare that emotion can be legitimately used in politics.[57] Political narratives, figurative stories, artistic tales and expressions, and myths build different parts of the consciousness.[58] As George Lakoff, has said "[c]ognitive studies show that thinking is imaginative and it depends fundamentally on metaphorical understanding."[59]

The imagined legitimate state is not the real world state, but one that provides the basic tools necessary to understand the real state. The descriptive nature and hermeneutic role of imagined states and utopias, however, becomes prescriptive and normative. The imagined states of the past that we describe and admire could become part of the normative standards that inspire the new states.[60] Therefore, the legitimizing imaginary is the set of rules, expectations, policies, etc. that reside in the public imagination and affect how people evaluate the legitimacy of the real state and react to it. The social imaginary in this context works as part of normative legitimacy. Legitimacy may employ the imagined state's characteristics to either challenge a real state's legitimacy or to render a certain rule or polity legitimate.

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[55] See in general, TAYLOR, Modern social imaginaries. 2004.
[56] See in general, LAKOFF, The political mind: why you can't understand 21st-century politics with an 18th-century brain. 2008.
[57] Id. at, 3&8.
[58] Id. at, 22-24.
[59] GEORGE LAKOFF, MORAL POLITICS: HOW LIBERALS AND CONSERVATIVES THINK 41 (University of Chicago Press. 2002).
[60] TAYLOR, Modern social imaginaries 6-9. 2004.

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Because normative legitimacy derives from wide public support, the social imaginary is a public imagined field that creates standards according to culturally accepted and widely shared norms. Theories (and jurisprudence rules, in our case) that succeeded in convincing people to adopt them as part of their core normative convictions will end up as legitimizing social imaginaries.[61] Imagination is the typical playground for what is sometimes called the "Higher law."[62] Higher law is the ethical and general principles that may govern the society in the public sphere even sometimes if the state's law is in conflict with some of the higher law principles.[63] In other words, Higher law is the imagined law in the imagined sphere that crucially affects the understanding of state's law and its making.

Similar to De Tocqueville's early idea of common belief as a prerequisite for a possible common action, Charles Taylor stresses that "[t]he social imaginary is that common understanding that makes possible common practices and a widely shared sense of legitimacy."[64] The common belief and public opinion is created in the imagined public sphere to facilitate people's action and social practices.[65] The legitimizing social imaginary, then, is in a dialectical relationship with the social practices, as these practices may be a product of long imagined and desired society. Conversely, new social practices may themselves make up a new legitimizing social imaginary. The imagined public sphere and its forces are entitled socially to draw the borders of legitimacy. Therefore, the process of legitimization is not necessarily imprisoned in

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[61] Id. at, 23.

[62] STOUT, Democracy and tradition 241. 2004. For Higher law idea, see, Edward S Corwin, *The" Higher Law" Background of American Constitutional Law*, HARVARD LAW REVIEW, 365 (1929).

[63] LEDEWITZ, Church, state, and the crisis in American secularism 113. 2011. (Ledewitz here proposes that the some religious symbols and principles can be accepted in secular society as part of the higher law).

[64] TAYLOR, Modern social imaginaries 23. 2004.

[65]Id. at, 85.

the current constitutional setting. Rather, it could be done beyond the scope of a given political hierarchy and order.[66]

Public will, public sphere, higher law, people as a whole, and even the nation are just politically and legally involved examples of imagined parties and fields.[67] Although the actual, written Constitution of the United States gained legal, political, and social attention in the everyday lives of Americans, Jack Balkin declares, "[we, Americans] bow down to a Constitutions of our imagination."[68] He does not imply that this Constitution of the United States is not real but refers instead to the very wide and legitimate interpretations of the Constitution that are largely constructed rather than an accurate reflection of the legal state of the document.

The imagination that empowers the Constitution is itself part of the working legitimacy. One interesting dimension of this legitimizing imaginary is Ricoeur's idea of "prospective identity." In our context, this allows a constitution to contain the generations-to-come by the flexibility of the texts, and the creativity of the interpretations. Identity can derive from our future as well in committing to the future's expectations and conditions.[69] For a constitution to be continuously legitimate, it must be flexible enough to be understood by different interpreters according to the general principles, and to be flexible enough to include future interpretations and elaborations according to the context and understanding of that future.[70]

In this part, I have shown that faith is inevitably part of our social and political fabric. This faith takes a political shape when legitimizing a state through interaction with people. A

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[66] Id. at, 28-33&86.
[67] See, id. at, 79-80. STOUT, Democracy and tradition 32&45. 2004. (Martin Luther King, like Elijah Muhammad, addressed black Americans as "a people." Id); BALKIN, Constitutional Redemption: Political Faith in an Unjust World 130&241. 2011.
[68] BALKIN, Constitutional Redemption: Political Faith in an Unjust World. 2011.
[69] Ricoeur, 31 (1986). See, Taylor, PAUL RICOEUR AND THE TASK OF POLITICAL PHILOSOPHY, 20-21 (2012).
[70] BALKIN, Constitutional Redemption: Political Faith in an Unjust World 9. 2011. See in general, LAURENCE H TRIBE, ON READING THE CONSTITUTION (Harvard University Press. 1992).

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notable way of the interaction is to understand the public imaginary and how it affects the way legitimacy works.

The following part will discuss the different forms of legitimacy and how these forms undergird the foundation of a state that still look at faith and even traditional faith as a basis for life.

2.2   THE ROAD TO LEGITIMACY (FORMS OF LEGITIMACY)

Legitimacy as a concept is loaded with different meanings and can be looked at from different perspectives. It is not the intention of this chapter, however, to present all of the rich meanings of the term and debates surrounding them. However, it is important to highlight and utilize different aspects of the concept in order to build towards my final argument. To understand how legitimacy works in the context of Islamic jurists, it is important to lay out some aspects of legitimacy and legitimation processes.

In the previous part, we have seen how faith can play in upholding legitimacy; in this part, we will see how different forms of legitimacy can found the state and stabilize it, and why this cannot be achieved without considering the faith of the people and its values.

2.2.1   Procedural Validity as a Reductionist "Legitimacy"

Procedural validity, sometimes called procedural legitimacy,[71] is the typical legal force that judges and lawyers incorporate in their arguments on almost a daily basis to prove whether a

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[71] BALKIN, Constitutional Redemption: Political Faith in an Unjust World 34-35. 2011.

party is right or wrong. Lawyers and jurists are usually preoccupied with the validity of an argument or a party's position according to the already legislated official codes, laws, and procedures. Procedural legality simply ensures that everything is following the procedures of the system laid down.[72]

Because procedural validity is solely concerned with meeting procedural requirements and conditions, it is sometimes described as validity and legality more than legitimacy.[73] Therefore, what is called "procedural legitimacy" is best described as legal validity to distinguish it from legitimacy that goes beyond the procedural level. Validity is to fulfill the legal and official conditions and procedures while legitimacy, in a more specific sense, is to measure and examine these conditions and procedures. Legal validity (procedural legitimacy) is descriptive and performative in nature whereas legitimacy, in a more specific conception, is prescriptive and normative.

When Carl Schmitt dealt with legitimacy, he stressed the difference between "legality" and "legitimacy," where legality refers to fulfilling the official procedures and requirements

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[72] The school of legal positivism may have facilitated shifting the focus to the issue of whether administrations follow the procedures or not, instead of also investigating the normative legitimacy of the procedures themselves. For legal positivism, see, H. L. A. HART, THE CONCEPT OF LAW (Oxford University Press. 2012).(Positivism, in respect to procedural legitimacy, is from the verb "to posit." It is to imply that what has been posited is and should be the only concern of researchers and lawyers, as opposed to legal naturalism. Legal naturalism, on the other hand, focuses more on the universal and normative nature of the investigated issue. For natural law in our context here, see, HABERMAS, Between naturalism and religion: Philosophical essays 104. 2008;Robert S. Barker, *NATURAL LAW AND THE UNITED STATES CONSTITUTION*, 66 THE REVIEW OF METAPHYSICS (2012).

[73] See in general, CARL SCHMITT, et al., LEGALITY AND LEGITIMACY (Duke University Press. 2004).; HABERMAS, Between naturalism and religion: Philosophical essays 104. 2008.It is an interesting comparison that I can draw here between the differentiation between validity and legitimacy in Western literature on one hand, and a similar distinction between validity and morality in Islamic jurisprudence. In Islamic jurisprudential logic, jurists introduced the concept of *infikak aljihah* (literally: the disentanglement of sides) by which they could describe an action as religiously and legaly valid but at the same time religiously not allowed. Most Islamic jurists ruled that the prayers are religiously valid (*sahihah*) but the person is wrongdoer (*aathim*) because the two sides, validity and morality are disentangled. I will explain the concept later in this chapter. For more about it, see, ABU HAMID AL-GHZALI, AL-MUSTASFA 3:199-203 (1995);MUHAMMED AL-'MEEN AL-SHINQEETI, AL-MUDHAKKIRAH FI USUL AL-FIQH 27-31 (Maktabat Al'ulum Wal Hikam 5th ed. 2001).

while legitimacy goes beyond legal procedures. Legitimacy, according to Schmitt, depends on pre-legal values and norms.[74]

Legitimacy thus precedes legality in time and importance. Legitimacy is what gives legality and procedures its authority, and the more legitimacy a legal procedure has, the more lasting and authoritative it is. Habermas describes this difference between validity (legality, procedural "legitimacy") and legitimacy when discussing Bockenforde's question about the positive constitutional system to hint that legitimacy is "pre-political." Habermas accurately takes Bockenforde's question to reach the conclusion that:

> a completely positive constitutional system requires religion or some other "sustaining power" to lend cognitive support to its legitimizing principles. The claim to validity of positive law, on this reading, is supposed to require grounding in the pre-political ethical convictions of religious or national communities. The reasoning is that such a legal order cannot legitimate itself in a self-reflexive fashion through a democratic legal procedure alone.[75]

A salient aspect of Schmitt's distinction of legality (procedural validity) and legitimacy (pre-political authority) is the locus of legitimizers. He launched an attack on what he described as a "closed system of legality," accusing it of exercising a monopoly over legislation and destroying itself. He made reference to the "legislative state" where "there cannot be numerous 'sources of law.'" To overcome this dilemma of a monopoly over legislation, he proposed a more open system that is characterized by a counterbalancing power to end up with a form of state that guarantees, inter alia, moderation and freedom.[76] His proposal involved more power to

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[74] SCHMITT, et al., Legality and legitimacy 23&137. 2004. See also, HABERMAS, Between naturalism and religion: Philosophical essays 104. 2008.

[75] HABERMAS, Between naturalism and religion: Philosophical essays 104. 2008. (Pre-political ethics, I suppose, are borne and developed in what I in, a later chapter, will call "meta-constitutional sphere" which is a central them in my thesis).

[76] SCHMITT, et al., Legality and legitimacy 19-20. 2004.(Schmitt in his criticism of the "closed system of legality," he was pointing to the Parliamentary German system and Weimer Constitution quoting some of the Constitution's clauses and articles. It was, however, a striking incident to note that ideas such as Schmitt's on Weimar's

the radical "legitimate" revolutionary, the popular president, which turned out to be quite dangerous and problematic in the context of Weimar Germany.[77] By contrast, I argue for a power-free zone in a meta-constitutional sphere which I will discuss in more details in a separate chapter.

Bockenforde's pre-political values[78] and Schmitt's pre-legal norms[79] emphasize that legitimizers cannot legitimize themselves in closed circle of legality. Rather, for legitimation to be more authoritative, and the legitimizers to be more impartial, it must be exercised from outside the system. Even in a constitutional order, Habermas comments, "[t]he exercise of power that cannot be justified in an impartial manner is illegitimate because it reflects the fact that one party is forcing its will on another."[80] This idea of the need for free will to recognize the legitimacy of an order is what leads to the necessity for outside legitimizers who work in harmony with the system but independently enough to exercise legitimation impartially.[81] Legitimacy is best attained through fair legitimizers who are more socially trusted to have been providing the definitions and meanings of the pre-legal pre-political values. Even in a democratic

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Constitution are what paved the way for the emergence of Nazism, a movement that Schmitt himself joined at some point. One main point that Schmitt proposed regarding legitimacy, which is thought to help the rise of Nazism, is the concentration of power in the hand of a president under the claim that this power is radically revolutionary to provide untraditional legitimacy. Therefore, although my proposal makes use of idea of the pre-legal values and the criticism of a closed system of legislation, it strongly opposes another power concentration; it suggests that outside or meta-constitutional sphere should be completely free from any state-like power and force. For more about Schmitt and Weimar's Constitution, see, A DIRK MOSES, GERMAN INTELLECTUALS AND THE NAZI PAST 55-74 (Cambridge University Press Cambridge. 2007).

[77] See, MOSES, German intellectuals and the Nazi past 55-74. 2007.
[78] HABERMAS, Between naturalism and religion: Philosophical essays 104. 2008.
[79] SCHMITT, et al., Legality and legitimacy 23&137. 2004.
[80] HABERMAS, Between naturalism and religion: Philosophical essays 122. 2008.
[81] See, BAMYEH, Anarchy as Order: The History and Future of Civic Humanity 65-66. 2009.(Bamyeh criticizes Weber in his famous idea that the state is what has a legitimate monopoly over violence. Bamyeh thinks this statement "answers the wrong Question." He smartly notes that "[l]egitimacy is not simply a state attribute; it is fundamentally a social feeling, without which the state's own claim to legitimacy remains contested…." Id. at. For Weber's theory, see, MAX WEBER, et al., THE THEORY OF SOCIAL AND ECONOMIC ORGANIZATION (Free Press. 1947).

constitutional system, constitutional legitimacy is achieved through popular and hegemonic struggles that usually reside in the public sphere away from the state's direct surveillance.[82]

A state can perfectly *procedurally* claim "legitimacy", but if these procedures are not popularly ratified, the procedures themselves will be deemed illegitimate. Even authoritarian regimes may follow certain procedures and formalities but this does not prevent them from being despotic.[83] Therefore, even with the "legitimate" constitutional procedures found inside a system, this system needs to resort continuously and simultaneously outside of its own system but within the society to carry the task of legitimation. This process of continuous need for outside legitimizers may encompass some compromises, which are part of counterbalancing the powers, but it prevents procedural tyranny and legal monopoly.[84]

As an initial point in regard to the Islamic religious institutions, jurists' use of legitimation is more normative and ethical than procedural and formal. Therefore, the legitimacy that jurists are controlling is not comprehensive in its domain (because it is normative and not procedural), nor in its nature. The jurists' very arena in regard to rendering legitimacy is not the procedural, legal, and formal sphere where a political and legal state's institutions operate; rather, the jurists manage the scope of legitimacy by interacting with people, influencing the social imaginary, and empowering constitutional faith.

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[82] See, BROWN, Constitutions in a nonconstitutional world: Arab basic laws and the prospects for accountable government 197. 2002. I here used the word "hegemonic" in neutral manner to describe how social forces battle to appeal to more "legitimate" causes. For profound analysis of the concept hegemony and its word, see, ERNESTO LACLAU & CHANTAL MOUFFE, HEGEMONY AND SOCIALIST STRATEGY: TOWARDS A RADICAL DEMOCRATIC POLITICS (Verso. 2001).

[83] See, SCHMITT, et al., Legality and legitimacy 10. 2004.

[84] See, NOAH FELDMAN, THE FALL AND RISE OF THE ISLAMIC STATE:[NEW IN PAPER] 38-39 (Princeton University Press. 2012). (In this book, the case of Islamic jurists, such as al-Mawardi and al-Ghazali is discussed as legitimizers. These jurists accepted an implied compromise that they would legitimize the state but in the implied condition that the state would recognize the authority and independence of these jurists and would follow the Islamic law that jurists provided. Id. at.).

Legitimacy, thus, is far more than procedural, and operates well beyond legal formalism. It goes to a deeper set of shared values and beliefs.

2.2.2   Normative Legitimacy

In constitutional orders, the legitimation process is the way toward stability in the long run. In order to obtain long-term stability, such orders must obtain a legitimacy that is normative in nature and widely accepted.[85] When legitimacy is referred to as normative, it means that the establishing principles of an order are justified and supported by preexisting ethics, religion, doctrines, and traditions.[86] For a constitutional order to be widely accepted, it needs what Alexis De Tocqueville referred to as "common belief" in order to make "common action." This is because without common action, he asserts, no society can exist.[87] Although Tocqueville does not suggest that a polity should adopt a sectarian faith, he seems to imply that there should be a reasonable level of common belief to make things work in any constitutional project.[88]

To reach the common belief, John Rawls introduced the idea of "overlapping consensus" to allow necessary, or rather helpful, pluralism and set the ground rules for all comprehensive doctrines to reach liberal and democratic ends.[89] This consensus Rawls argues for is based in every group's own preexisting beliefs and tradition as those groups conceive this consensus.

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[85] ANDREW F MARCH, ISLAM AND LIBERAL CITIZENSHIP: THE SEARCH FOR AN OVERLAPPING CONSENSUS 29 (Oxford University Press Oxford. 2009). (March emphasizes the need for stability that is "not merely a political or historical, but a normative one" inspired by the philosopher John Rawls' theory of "overlapping consensus." *Id*. For more understanding of Rawls' theory, see John Rawls, *The Idea of an Overlapping Consensus*, 7 OXFORD JOURNAT OF LEGAT STUDIES 1(1987).).

[86] See, STOUT, Democracy and tradition. 2004.

[87] Alexis de Tocqueville, *Democracy in America,* 2002, at 493, *available at* Penn State University.

[88] Id. at.

[89] Rawls, OXFORD JOURNAT OF LEGAT STUDIES, (1987). See, MARCH, Islam and liberal citizenship: the search for an overlapping consensus. 2009. (March elaborated Rawls' idea of overlapping consensus by applying it to the Islamic discourse on the issue of liberal citizenship). Compare with different critiques presented in, STOUT, Democracy and tradition 66-78. 2004.

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Regardless of the plausibility of Rawls' idea, his project indicates the need for agreed upon values that go beyond the temporary agreements and *modus vivendi*. According to Ricoeur, even in secular states, legitimacy needs something more lasting than "contractual agreements;"[90] there have to be shared values. These shared values and common belief do not, however, require being merely religious in the traditional understanding of the word; they could be societal values or cultural beliefs.[91] Nonetheless, traditional religions are commonly root sources of these widely accepted values. As Charles Taylor rightly puts it, "[e]ven great innovative religious founders have to draw on a preexisting vocabulary available in their society."[92] The idea here is the role of traditional religions in producing and processing these vocabularies as part of the powerful preexisting traditions. These traditions are what define a certain course as normatively legitimate, and, thus, allow for smoothly initiating an order that is compliant with, or at least not contradictory to, the traditionally accepted rules.

The prerequisite of drawing on already accepted or widely agreed upon tradition is indispensable for any new system to be established. A good example of this prerequisite in modern times is the Enlightenment elaboration of the social contract. Grotius, in anti-revolutionary mode, delivered the idea of social contract for reasons that were opposite of those who came after him. Grotius agreed with others on the requirement of people's consent for a political order to be legitimate. All this theorization was done not to limit the government, but rather to justify that current rule as being legitimate, because illegitimate rule will cease to exist if it is thought of by people as such. With this context, John Locke used the same theory but for

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[90] Taylor, PAUL RICOEUR AND THE TASK OF POLITICAL PHILOSOPHY, 1 (2012).
[91] See, GENTILE, Politics as religion. 2006.
[92] TAYLOR, Modern social imaginaries 52. 2004.

revolutionary purposes and to demand a limited government.[93] It is interesting here to note that this Enlightenment movement was, then, under pressure to use the same language and adopt the same theories and metaphors of that period even if they wanted to reach different meanings. In other words, despite the revolutionary nature of the Enlightenment, it borrowed concepts from preexisting, even sometimes opposing, long-established traditions in order to catch the heart of the targeted audience, the people. The Enlightenment acted out of the realization that a *legitimate* system must be justified with the widely accepted traditional and ethical rules.[94]

From a cognitive perspective, George Lakoff asserts that "[p]eople can't obey your orders if they have a different idea than you do of what those orders are."[95] If we are to have a common understanding of the basic orders, we have to lean on our shared ethics and virtues. Although they differ on whether the current liberal democracy has it or not, both traditionalists along with new traditionalists and pragmatists agree that shared values are necessary to establish an admirable and stable system.[96] The popular consensus is normative and actual when it is reached after long-standing cultural debates.[97] Therefore, a normative legitimacy emerges from values that are consented to by the society as a whole and seen as such for long enough to be a basis for any current or future constitutional order.

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[93] Id. at, 3-5. It is may be worth noting here that a similar old concept in the relationship between ruler and ruled in Islamic context is the idea of "*bay'ah*" which can be literally translated as "deal" or "contract" but commonly translated by meaning as "allegiance." Similarly, the word *bay'ah* that is historically used to justify a de facto ruler could be used to challenge it which some civil commissions are doing in Saudi Arabia where the word is "*bay'ah*" still being used to describe the relationship between the Kings and the subjects. See in general, MADAWI AL-RASHEED, A HISTORY OF SAUDI ARABIA 37-68 (Cambridge University Press. 2010).

[94] See e.g., Barker, THE REVIEW OF METAPHYSICS, 114 (2012).

[95] LAKOFF, Moral politics: how liberals and conservatives think 368. 2002.

[96] STOUT, Democracy and tradition 118, 152. 2004. (Stout as a pragmatist argues that the social practices that have been long practiced have become themselves part of the tradition. This innovative approach, however, does not apply to the situation where initiatory legitimacy is on issue. As this dissertation argues, initiatory legitimacy for democracy itself to be established needs to be based on older traditions. This older tradition strategy for building legitimacy was the case of the United States' initiatory legitimacy for example. See references to God's natural law in the founding fathers' discourse, Barker, THE REVIEW OF METAPHYSICS, (2012).

[97] JURGEN HABERMAS, LEGITIMATION CRISIS 11 § 519 (Boston: Beacon Press. 1975).

2.2.3 Initiatory Verses Continuous Legitimacy

Because proceduralism is a reductionist approach toward legitimacy, normative approach is essential as I have shown above. Here I discuss two different forms of legitimacy as how to apply legitimation process in the new established state (initiatory legitimacy), as opposed to the long established system (continuous legitimacy).

The debate of initiatory legitimacy dates back to medieval Islamic history. When Ibn Khaldun (d. 1406) dealt with his theory of *assabyyah* (group solidarity),[98] he complained of the problematic scholastic analyses that center around the role of force and power but disregard, or overlook, the role of "group solidarity." He attributed their unfinished analyses to the methodology that they adopted in focusing on the way an order can continue rather than the way it was originally established. Therefore, a new order to take place needs more dependence on the targeted group's or people's accepted ideals than any existing order that seeks continuity, though both need them. As a result, Ibn Khaldun proposed the idea of group solidarity. He thinks that this idea of solidarity is what explains the legitimation process that sets up a given political system throughout history. Until today, some researchers define the work of legitimacy as to safeguard the *continuity* of a state.[99] In fact, legitimacy starts long before that; it starts in the moment when the state comes into existence. This is initiatory legitimacy.[100]

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[98] In his work, the Well-Protected Domains, Deringil described Ibn Khaldun's theory as "the requisite nature (assabiyya) to constitute this authority, served in particular to legitimate the rule." SELIM DERINGIL, THE WELL-PROTECTED DOMAINS 20 (IB Tauris. 1998). However, Ibn Khaldun's theory describes something that constitute solidarity and sociopolitical belonging more than a merely "nature." From my reading of Ibn Khaldun, he is using the word "a*ssabiyya*" in a similar meaning of today's use of the word "ideology." *Assabiya*, as far as this account is concern, describes the meaning that brings a group together and justifies their existence together whereby they can constitute a political order. See, Ibn Khaldun, *Al-Muqaddimah*, at 100-184.

[99] E. g., see in general, HABERMAS, Legitimation crisis 16. 1975;DERINGIL, The well-protected domains 43. 1998.

[100] Compare, WEBER, et al., The theory of social and economic organization 154. 1947. (Here Weber can be a good example of what Ibn Khaldun more than five centuries ago criticized. Max Weber in defining the state as the only entity that can legitimately use physical force, he was preoccupied with the continuous legitimacy rather than the initiatory normative legitimacy).

After Jeffrey Stout, a pragmatist, criticized at length traditionalists and new traditionalists for their reductionist interpretation of traditions, he argued that the social practices that have long been incorporated in modern democracies have become themselves a tradition. [101] From this perspective, we can predict that this process of the traditionalization of democratic culture took generations to be transmitted and inherited as part of a legacy passing through generations. The understanding of tradition being expanded by Stout is not merely of a religious or pre-modern nature. Instead, it is something that modern democracies and secular systems do as well. This innovative approach, however, does not apply to the situation where what can be called "initiatory legitimacy" is at issue. In order for a democracy to be established and continue as a stable state, its initial legitimacy needs to be based on older traditions. This older tradition strategy for building legitimacy was the case of the United States' initiatory legitimacy, for example, as will be shown shortly.[102]

Thus, in transitional periods and times, and when founding fathers of any proposed democracy or state seek to build a new democratic system, initiatory legitimacy becomes a defining component of the constitutional building process. Whereas continuous legitimacy tends to meet its establishing demands throughout an existing state's operation, initiatory legitimacy is what defines these demands in the first place.[103] Therefore, initiatory legitimacy works to institute a state in reality, while continuous legitimacy gives the state the ongoing popular justification to maintain its current status as legitimate. As Deringil explains, "[w]hen the population at large accepts the historical inertia of a particular order of things, half the battle has

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[101] BALKIN, Constitutional Redemption: Political Faith in an Unjust World 118&152. 2011.
[102] See references to God's natural law in the founding fathers' discourse, Barker, THE REVIEW OF METAPHYSICS, 105-9 (2012).
[103] See in general, TAYLOR, Modern social imaginaries 87. 2004;HABERMAS, Legitimation crisis 3-4. 1975. DERINGIL, The well-protected domains 181. 1998.

been won; it then becomes a question of maintaining the status quo."[104] But this early phase of people's accepting and inheriting an order, which is the task of initiatory legitimacy, is much easier said than done.

As initiatory legitimacy is differentiated from continuous legitimacy, it is worth noting that this distinction is in regard to the task each form of legitimacy is doing. At the same time both are intertwined in some phases and cases. The people's consent and respect that is originally present must be continuously ongoing to uphold legitimacy throughout time and place.[105] When the original "solidarity" of initiatory legitimacy is being transformed into a different focus or ideology, it must reflect current cultural perspective and ideology in order to avoid political deadlocks.[106] The lack of legitimacy starts when the "continuous legitimacy" does not match the tradition of the "initiatory legitimacy" and its cultural rules. Habermas defines the legitimation crisis as "[t]he structural dissimilarity between areas of administrative action, and areas of cultural tradition, [which] constitutes then a systematic limit to attempts to compensate for legitimation deficits, through conscious manipulation".[107] The crisis, then, begins when the legitimation locus shifts from one area to another without supportive cultural background or social backup. The legitimation shift, in order to be smoothly justified, has to carry the still continuously legitimate baggage and elements from the initiatory legitimacy.[108]

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[104] DERINGIL, The well-protected domains 43. 1998.
[105] TAYLOR, Modern social imaginaries 87. 2004;BALKIN, Constitutional Redemption: Political Faith in an Unjust World 34. 2011.
[106] DERINGIL, The well-protected domains 45. 1998. (when reforms, Tanzimat, introduced in the Ottoman Empire, "the field of tension between ruler and ruled shifted onto a different plane."Id. at. Consequently, this shift was neither fulfilled nor reflecting people's cultural tradition of how a state should operate. I here use the word "solidarity" as almost a synonym of assabiyyah in Ibn Khaldun's language. See, Khaldun, Al-Muqaddimah 100-184.).
[107] HABERMAS, Legitimation crisis 71. 1975. See, DERINGIL, The well-protected domains 181. 1998.
[108] DERINGIL, The well-protected domains 45. 1998. See, STOUT, Democracy and tradition 203. 2004.

Initiatory legitimacy is a necessary process to establish a new system or stabilize the system where the democratic states are newer, and the forms less authoritative through centuries of practice. This applies to states in transition toward democracy, and in particular Muslim societies. On the other hand, continuous legitimacy is an on-going resource that usually takes its meanings from agreed-upon values that have existed for centuries. This is certainly the case for Muslim societies and their attachment to the Islamic traditions.

2.2.4 (Enunciative Legitimacy) the Role of Symbols and Formalities

To build confidence that proven essential to legitimacy as I have shown, a state must lean on normative legitimacy that reflects people's values and norms. Symbolic formalities help a state in establishing that normative relationship. These forms may try to ring a bell through using symbolic words or formalities from the inspiring past, or authoritative sacred or almost sacred texts. Enunciative legitimacy carries this task.

In carrying out the task of upholding legitimacy, language is never neutral.[109] None can speak without using cultural and societal references identifiable to and recognizable by the culture in which it is used. The Brazilian philosopher Paul Freire in his argument for "pedagogy for the oppressed" explains, "[t]he language of the educator or the politician…, like the language of the people, cannot exist without thought; and neither language nor thought can exist without a structure to which they refer."[110]

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[109] See, LAKOFF, The political mind: why you can't understand 21st-century politics with an 18th-century brain 231. 2008.

[110] PAULO FREIRE, PEDAGOGY OF THE OPPRESSED 94 (Continuum. 2000).(Freire emphasizes the non-neutral nature of the language and education. In another text he says,

There is no such thing as a *neutral* educational process. Education either functions as an instrument that is used to facilitate the integration of the younger generation into the logic of the present system and bring about conformity to

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Language is part of the message that it conveys and, thus, changes the way we think of the message itself. The cultural references are for far more than neutral clarity and explanation; they utilize available vocabulary in the society but choose one word over another for direct or indirect objectives. For example, using a word that carries a history is very common in the public sphere in order to trigger the subconscious of the society or to awaken a meaning that was buried for some time. Drawing upon traditional or valuable concepts (in the normative sense), or leaning on (historical) individuals, battles, or symbols is a repeated practice that politicians, lawmakers, and public figures alike use, sometimes even for conflicting reasons. Symbols and formalities can be used for mobilization toward what Gerard Leclerc calls "enunciative legitimacy."[111] This repeated practice emphasizes the role of symbols, formalities, and references in contributing to the making up of state legitimacy.

Although Ricoeur notes that enunciative legitimacy is more associated with pre-modern polities, he asserts that even modern and democratic ones still carry some significant components of enunciative legitimacy. While modern states are more identified by "institutional legitimacy" that links authority to institutions,[112] the institutional nature of the latter form of legitimacy adopts enunciative elements inherited from the medieval era. Despite the rationality that the modern democratic state claims and defends, components that had been considered "irrational" during the Enlightenment have influenced modern institutions.[113] Enunciative legitimacy has

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it, *or* it becomes "the practice of freedom," the means by which men and women deal critically and creatively with reality and discover how to participate in the transformation of their world. Id. at, 34.)

[111] GÉRARD LECLERC, HISTOIRE DE L'AUTORITÉ: L'ASSIGNATION DES ÉNONCÉS CULTURELS ET LA GÉNÉALOGIE DE LA CROYANCE (Presses Universitaires de France-PUF. 1996). See, PAUL RICOEUR, REFLECTIONS ON THE JUST 94 (University of Chicago Press. 2007);Taylor, PAUL RICOEUR AND THE TASK OF POLITICAL PHILOSOPHY, 18-19 (2012).

[112] RICOEUR, Reflections on the Just 94. 2007;Taylor, PAUL RICOEUR AND THE TASK OF POLITICAL PHILOSOPHY, 18-19 (2012).

[113] See, LAKOFF, The political mind: why you can't understand 21st-century politics with an 18th-century brain. 2008.

thus never ceased to exist even in today's systems.[114] Ricoeur asserts that "there has never been a purely enunciative authority with no institutional authority, and today there is no purely institutional authority without the contribution, the symbolic support, of some enunciative order"[115]. Institutional legitimacy provides the basis for the constitutional setting while enunciative legitimacy is to clothe the system with a popular faith and trust through cultural hints and references.[116]

Enunciative legitimacy is what collocates religious symbols and references in one state. The enunciative work of these symbols and references contributes to institutional and constitutional legitimacy. The latter are concerned solely with the constitutional authoritativeness of the institutions, but it is important not to overlook the surrounding ornaments that must not just look beautiful but be trustworthy as well. In other words, institutional legitimacy has measurable accurate standards that ensure that state institutions have the legal validity, and the popular trust that use, inter alia, enunciative tools in order to bind legitimacy to democratic modern institutions.

To apply these lessons to a modern Muslim-majority country, I turn to the example of the late Ottoman Empire, which both sought to modernize, and to keep crucial elements of enunciative legitimacy in order to maintain people's faith in the system and their loyalty while undertaking such modernization.

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[114] Ricoeur, 13 (1986);Taylor, PAUL RICOEUR AND THE TASK OF POLITICAL PHILOSOPHY, 16 (2012).
[115] RICOEUR, Reflections on the Just 95. 2007. See, Taylor, PAUL RICOEUR AND THE TASK OF POLITICAL PHILOSOPHY, 19 (2012).
[116]See, RICOEUR, Reflections on the Just 95. 2007;Taylor, PAUL RICOEUR AND THE TASK OF POLITICAL PHILOSOPHY, 19 (2012).

2.2.4.1 The Ottoman Example of Enunciative Legitimacy[117]:

The late period of the Ottoman Empire deployed the tools of enunciative legitimacy widely.[118] Sultan Abdulhamid II inherited some techniques and established others designed to provide enunciative legitimacy.

American ceremonial displays, even religious ones, were justified by the U.S. Supreme Court as a means to legitimize institutions that undergird the Republic.[119] Comparably, the Ottomans in the late nineteenth and early twentieth century used coats of arms or commemorative plaques to legitimize individuals or dynasties.[120] This was a way to remind the society of the toll paid in blood and toil to build the state and reach the status quo. Enunciative legitimacy could be, and was, carried out by symbolic title, garment, the protection of religious places, and architecture. When the Ottomans took over Byzantine, they built the Ottoman Palace (Topkapi) on the site of the Byzantine one, thereby inheriting the implied legitimizing role that the city and site had in the Roman Empire. As Deringil notes "[t]he cathedral of Hagia Sophia, converted to a mosque after the conquest, and purportedly the scene of the Ottoman Sultan Selim I's assuming the mantle of the caliphate in 1519, was especially significant."[121]

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[117] Later in this chapter, Islamic legitimacy is going to be analyzed with the focus on its shared influence on today's Arab states. It is not my intention, though, to study or analyze the Ottoman Empire but to take it as a good example of the role of enunciative legitimacy here especially with its two features: One it lent some of these formalities and symbols to different Muslim and Arab states because of the heritage and linkage between the Ottomans on one hand and Muslims and Arabs on the other. The second feature of the Ottoman Empire as long as my dissertation is concerned is its combination of some historic and modern elements due to the long period of rule (1299–1923). However, the enunciative legitimacy focused on the period (1876-1909) and I heavily rely on DERINGIL, The well-protected domains. 1998.

[118] See, BENEDICT ANDERSON, IMAGINED COMMUNITIES: REFLECTIONS ON THE ORIGIN AND SPREAD OF NATIONALISM (verso. 2006);TAYLOR, Modern social imaginaries. 2004.

[119] See, Steven B. Epstein, *Rethinking the Constitutionality of Ceremonial Deism*, 96 COLUMBIA LAW REVIEW (1996).

[120] DERINGIL, The well-protected domains 30. 1998.

[121] Id. at, 29.

As part of protecting, or rather implicitly claiming, enunciative legitimacy, Abdulhamid tried to sacralize his title by associating it with the holy places. This is a common practice deployed by different leaders by given them some supposedly blessed duty of protecting, and thus obviously ruling, a "holy land." Like the "blessed Tsar" who protects the "Holy Russian land," Abdulhamid would be the guardian of the Holy Mosques.[122] The Sultan's service of the holy mosques had to be a title specified for him only to ensure his sole legitimate right to rule.[123] Along the same lines of sacralization, the Ottoman Sublime had complete monopoly over the publishing and printing of the Quran on the ground that it was protecting it from change and distortion.[124] Different cases were reported where even accurate and perfect copies of the Quran were officially burned to prevent any future "imperfect" or "distorted" version.[125]

Many centuries later, the Ottomans continued their practices of enunciative legitimacy. In the late 19th century, the Ottoman's "robe of honor" would be solely given to the Shareefs[126] of Mecca, so as to imply that nobody can claim authority or power in the Islamic "holy places" except through Ottoman authorization. A document in Topkapi indicates that the Ottoman Sublime refused giving Ibn Rasheed (an influential ruler in Najd then) the "robe of honor" because the Ottomans wanted to make sure that Ibn Rasheed did not covet the holy places of Mecca and Medina. It is interesting that the Ottomans and others in the Arab Peninsula would understand a robe, a sword, or alike as a sign of power and a very political message that could convey an implied legitimacy or disturb an established one.

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[122] Id. at, 17-18.
[123] Id. at, 44&57.
[124] Id. at, 53.
[125] Id. at.
[126] Shareefs are those who are known as descendents of the prophets (P.B.U.H.).

Abdulhamid's rule has largely been dismissed as despotic.[127] Nevertheless, similar methods have been used in Arab (and Muslim) countries today, including states that claim some sort of democratic system.[128] To apply Ricoeur's historical observation that today's democratic institutional legitimacy requires some elements of enunciative legitimacy,[129] modern Arab states' institutional legitimacy requires the support of enunciative legitimacy inspired by some significant components, including those that were used in the late Ottoman Empire, in addition to other innovative ones. However, these enunciative legitimacy components should not exceed the acceptable standard of political and legal behavior of a given state. In the end, symbolic and enunciative legitimacy must also support the institutional legitimacy. This dynamic support helps associate authority with the institutions that fulfill the requirements of legitimacy rather than legitimizing individuals. This is what makes a state a more stable system.

2.3   RELIGIOUS LEGITIMACY[130]

In the first part, I discussed faith as a political vehicle for legitimation. The second part took the concept of faith to found or solidify legitimation process through showing how different forms of legitimacy work and should work. This final part will show how legitimacy in the Islamic context operates based on the arguments in the previous two parts. This involves working out

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[127] See in general, EDWIN SIR PEARS, LIFE OF ABDUL HAMID (Henry Holt & co. 1917);ALMA STEPHANIE WITTLIN, ABDUL HAMID, THE SHADOW OF GOD (John Lane. 1940). Compare, ABDUHAMID II, MUDHAKKIRAT ABDUHAMID II (ABDUHAMID II MEMOIRS) (Muhammed Harb trans., al_risalah Instition. 1979);MUWAFFAQ BANĪ AL-MARJAH, AL-SULTAN ABDULHAMEED II; SAHWAT AL-RAJUL AL-MAREEDH (Saqar al-Khaleej. 1984).

[128] See in general, BROWN, Constitutions in a nonconstitutional world: Arab basic laws and the prospects for accountable government. 2002.

[129] RICOEUR, Reflections on the Just 95. 2007. See, Taylor, PAUL RICOEUR AND THE TASK OF POLITICAL PHILOSOPHY, 19 (2012).

[130] It is worth noting that I used the word "religion/religious" in this section in the traditional understanding, i.e., referring to traditional religions (e.g., Judaism, Christianity, and Islam).

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legitimacy in Muslim-majority states, and employing some Islamic jurisprudential elements in order to support legitimacy. At the end, the fatwa, or jurist's ruling, will be given a special focus, in particular in Egypt, to show its role in the course of legitimation.

The modern shift from traditional to political and civil religions applies to the concept of legitimacy and the understanding of legitimation processes. The religious legitimacy that would mean the traditional religious authority and clergy in the past has become to mean civil and political authority that occupies a similar position and employs similar techniques. However, this significant shift from traditional to civil religion could not have happened without the aid of the traditional religious authority, at least in one stage or another, and principles that facilitated this shift and *legitimized* it. Using the same religious frequency that people are using is what builds public confidence and maintains the continuous legitimacy. Otherwise, a legitimation crisis will disturb the state and interrupt the public confidence.[131]

Interestingly, the influence of natural law (which was heavily enriched by religious rules) and theological philosophy on constitutional law is comparable to the role of religious legitimation on constitutional legitimacy. It is as if the modern state rid itself of one relationship to traditional religions but developed another relationship with them in order to build a whole different religion in the public sphere, a civil religion.[132] The process of substituting one interpretation for another demonstrates the need for the traditional religion, Islam, as a major source of legitimacy in the Muslim majority countries I deal with here.[133]

The different forms and concepts dealt with in this chapter have a common thread that religion is an indispensable element in legitimation, at least in countries that until today lean on

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[131] See in general, HABERMAS, Legitimation crisis. 1975. See, HIRSCHL, Constitutional theocracy 19. 2011.

[132] See in general, HABERMAS, Between naturalism and religion: Philosophical essays. 2008.

[133] Compare, HARRIS, The end of faith: Religion, terror, and the future of reason. 2005;HITCHENS, God is not great: How religion poisons everything. 2008;DAWKINS & WARD, The god delusion. 2006.

religion as a legitimizing tool. Muslim-majority countries are a good example of societies that still refer to religion for legitimation processes. As indicated in the previous section, normative legitimacy relies on religion or some genuine religious concepts to attain the stability of initiatory legitimacy and continuity of continuous legitimacy. On the other hand, initiatory legitimacy acquired more significance in the transitional periods where a new system is to be established. Thus, if we proceed with democratic change in a society without contextualizing it in cultural and religious ground, the nation-building project will be at great risk. The dilemma of legitimacy occurs when public confidence is lost and the already established morals are shaken. Ricoeur describes that as a "crisis" of "a deaccreditation of authority, authorities, institutions, and persons."[134]

In the "Broken Covenant", Robert Bellah depicts a dilemma that takes place in the United States of America and suggests that "we must draw on deeper sources in our tradition than most liberals imagine if we are ever to build a public will for democratic change in America."[135] This is even truer of Muslim-majority countries, which are far more culturally and legally attached to traditional religious authorities.

Centuries after the Declaration of Independence, and a long time after the establishment of a democratic system in America and Europe, Habermas asserted that "the democratic constitution must fill the gap in legitimation opened up by a secularization that deprives the state

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[134] RICOEUR, Reflections on the Just 94. 2007.

[135] ROBERT N BELLAH, THE BROKEN COVENANT: AMERICAN CIVIL RELIGION IN TIME OF TRIAL XIII (University of Chicago Press. 1992). The United States itself when declaring its independence utilized religious legitimacy by referring to undisputable religious concepts and words like "the Laws of the Nature and of Nature's God," men's "Creator" who is "the Supreme Judge of the world," and "Divine Providence." Declaration of the United States of America, July 4, 1776, U.S.C.A. *Constitution* vol. 1, 1-5. See, Barker, THE REVIEW OF METAPHYSICS, 105 (2012). The founding fathers of the United States as lawyers were influenced by the Blackstone and its Language and respect for "God and His Laws." Thus, even the American secularism and civil religion resorted to religious legitimacy for support to establish the public will and confidence at some point and with different degrees.

of state legitimation."[136] He was implying that mere procedural legitimacy could be fragile if not supported by settled principles in the society. Again, to apply this to the Islamic countries in democratic transition, we can say that the settled principles are inspired by Islam.[137] Thus, in already established democracies, religious groups, communities, and institutions operate in a way that can stabilize and help to root democratic principles.[138] By contrast, in a system which lacks this well-established democratic culture, these religious institutions and communities could help in establishing it for a more stabilized society.

It is interesting to note that the logic behind borrowing some religious idolatry is similar to the use of political idolatry—both defer to an absolute authority that is transcendent and beyond ordinary people's limits.[139] This was a way human beings used to stabilize systems and societies. Regardless of the source of authority, a society needs a lasting moralistic authority that supports its identity and builds or maintains its state entities. "The only defensible form of democratic community is one in which ethical authority is treated as an entitlement (to deference) that one must earn by repeatedly demonstrating one's reliability as an ethical judge."[140]

The legitimizing imaginary that we discussed in the first part is also an arena where traditional religions typically used and are still using by employing the rich concepts, vocabulary, symbols, and references that provide, and, strikingly, are continuously producing.[141]

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[136] HABERMAS, Between naturalism and religion: Philosophical essays 121. 2008.
[137] HIRSCHL, Constitutional theocracy 209. 2011.
[138] HABERMAS, Between naturalism and religion: Philosophical essays 124-5. 2008.
[139] GENTILE, Politics as religion 99. 2006.
[140] STOUT, Democracy and tradition 281. 2004.
[141] See in general, LEVINSON, Constitutional faith. 2011;TAYLOR, Modern social imaginaries. 2004. In the previous pages, we saw how faith in salvation and its story worked and still works, and how civil salvation is no different as far as political faith is concerned. Faith thus utilizes symbolic hints and meaningful cultural references and vocabulary. Habermas notes that despite Heidegger's reservation on religious salvation, he did not hesitate to take advantage of the religious vocabulary to reach "secular objectives," (HABERMAS, Between naturalism and religion: Philosophical essays 246-7 2008, while we have seen Kant and Marx doing the same with very religious vocabulary

It goes without saying that all these different forms of legitimacy discussed above are employing elements from religious legitimacy, or at least constituting one form or another of religious legitimacy. Therefore, in Muslim majority countries, the traditional religion that plays and must play the religious legitimacy role is Islam. I here argue that Islamic jurists who take the position as religious institutions qualify for being the outside authority with no political power except that similar to the civil society, to legitimize the system and continue as a checking mechanism to the state institutions and those in power.

2.3.1   Islamic Legitimacy

The Arabic verb *shara'a* which means establishing a great path is the root that two different words we discuss here are derived. One word is "legitimacy-*shar'yyah*" which usually refers to the validity, legitimacy or similar meaning. The other is "Islamic law (*Shari'a*)" which is widely used in English. It is not a coincidence that these two words share the same root and, thus, influence each other.[142] Similarly, it is intersting to note that the word "*shari'*" in Arabic means the greatest path that most *people* have made use of while "shari'a", which now in both Arabic

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like "in the image of God" (id. at, 110.), and "kingdom of God." (id. at, 230.). These are just examples of the importance of religious and cultural vocabulary in establishing or entrenching the faith which makes up a significant part of the enunciative legitimacy.

[142] JAMAL AD-DEEN BIN MUKARRAM (IBN MANDHOUR), LISAN AL-'ARAB 8:59-61 (Dar Sader. 2003);Majd Ad-Deen Al-Fairuz Abadi, *Al-Qamous Al-Muheet,* 1992, at 676, *available at* Dar Ihya' Alturath. The verb *shara'a* refers originally to the path toward the water resource (usually water wills at the beginning). This may be the reason why the Islamic original rulings were described as "Shari'a" for the similarity implied that these rulings facilitated the path toward the *resource* of life (originally to water, and then went later with the birth of Islam to refer to God, Who is the resource of water itself). It is, thus, very understandable to see in Quran the comparison drawn between God's revelation and water as both revive and heal the dead according to one interpretation. Quran (13:17). Ismail Ibn Kathir Tafsir al-Qur'an al-'Azim 4:447 (Dar al-Fikr 2002). It is of importance to note different meanings of the word "*shara'a*" like "to establish a custom," and "to open the sail in a ship" in addition to the most common use of opening a way. MANDHOUR), Lisan Al-'Arab 8:59-61. 2003. In Qur'an the verse (48:18) in traslation reads, "Then we set thee on a clear path." See, Malik Ghulam Farid, *Dictionary of the Holy Qur'an,* 2006, at 437-8.

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and English soley means Islamic law, could refer to an established custom in the society.[143] By contrast *shar'yyah*, or legitimacy, however, developed from using "*shara'a* (to establish a path)" in legitimization and legalization which derived from "*shari'a*."[144] This suggests the role that *people* and their *customs* play in determining some meanings--interpretations of the *path* (the Shari'a, Islamic law). On the other hand, we could also infer from these meanings the role of people in establishing legitimacy as they are the ones who determine the right process according to their customs and values. Islam as a religion has shaped values and ethics in today's Muslim society, and, thus, it is expected that Islamic legitmacy is fundemental in building a long term stable and democratic state.

In Muslim-majority countries, there has been a consensual premise that the state should acquire Islamic legitimacy in order for there to be faith in the political system. In order to establish this faith, political spirits from the traditional religion (Islam) should work in legitimizing the state and its institutions.[145] In any constitutional state in which the people's will is a core constitutive force and where the people overwhelmingly expect and demand a central role for Islam, Islam in one fashion or another will need to be recognized as a basis upon which the state operates, or the state will lose the popular legitimacy it demands. It is *people* who paved the *great way* to the *resource* of legitimacy establishing a *custom* and value as they did in the past to find water by the (*shari'a*) because the word *shari'a* itself would mean establishing the path to water as a resource and it is the same word that would refer to the people's customs as I have shown.[146]

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[143] MANDHOUR), Lisan Al-'Arab 8:59-61. 2003.

[144] See, Abadi, Al-Qamous Al-Muheet 676. 1992.

[145] See, GENTILE, Politics as religion 20, 125 &128 2006.

[146] Noah Feldman smartly notes,
The creation of stability and predictability resulted from the broad societal recognition that the law—as embodied in the scholarly class—transcended the particular person of any powerful individual in the society, including the ruler. Such recognition is valuable in any society, because it makes individuals believe that they can buy and sell and

2.3.2   The Theological Legitimacy

In the seventh century, the first schism that later inspired the Sunni-Shi'i split in Islam was about legitimacy requirements.[147] Although that dispute used classical theological tools, it can be described as a political conflict that targets people through their doctrinal convictions and values.[148] Needless to say that Islam as a religion inspired these values and convictions, thus, it was plausible to appeal to Islam itself in these political conflicts to approach people and build their faith and confidence in the system, or, on the other hand, to shake their faith and confidence.

Out of the early conflicts of Islam, an anarchistic group known as the Kharijis[149] revolted against and fought the third and later fourth Muslim Caliphs. They specifically denied the possibility of political human arbitration of disputes, on the grounds that decision-making and problem-solving was left to "God". Some historians read the Kharijis' position as demanding that society abandon the idea of a 'state/caliphate' itself as a political system on the ground that

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goods, enter into partnerships, or create other important legal relationships without constantly worrying that someone who has more power that they do will step in and steal their profits when convenient FELDMAN, The Fall and Rise of the Islamic State:[New in Paper] 44. 2012.

[147] See for the contemporary Sunni analysis, MOHAMMED DHIA' AD-DEEN AL-RAYYES, AN-NADHAREYYAT ALSYASYYAH (Dar At-Turath 7th ed. n.d.). For the contemporary Shi'i analysis see, AHMED AL-KATIB, TATAWWUR AL-FIKR ALSHI'I AL-SYASI (Dar Al-Jadeed. 1998).

[148] See, ABDUL JAWAD YASEEN, AS-SULTAH FI AL-ISLAM 195-197 (Al-Markaz Al-Thaqafi Al-'arabi 2nd ed. 2000);Mohammed Al-Shinqeeti, *Al-Khilafat Alsyasyyah Bain Al-Sahabah*. Compare, Abdullah Al-Demeeji, *Al-Imamah Al-'udhma,* 1987, at 45-79.

[149] Anarchism is the closest current to Kharijis although there are differences but different wings of Kharijis. Howevr, we can find some fundamental similarities in the anarchist movement like the reluctance toward the idea of state's order and power, with different degrees and backgrounds between Kharijis and anarchists. For today's anarchism and development of the movement see, PAUL MCLAUGHLIN, ANARCHISM AND AUTHORITY: A PHILOSOPHICAL INTRODUCTION TO CLASSICAL ANARCHISM (Ashgate Publishing, Ltd. 2012);BAMYEH, Anarchy as Order: The History and Future of Civic Humanity. 2009.

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ruling is a solely divine practice.[150] Their slogan was "there is no arbitrator but God"[151] inspired by the established testimony of all Muslims "there is no god but God/Allah" and also referencing the Qur'anic verse "Legislation is not but for Allah."[152] Regardless of the authority that this claim carries, it indicates the structural relationship between religion and state, and the overlapping between religion and politics where there is no sphere but one sphere. At the same time, the narrative showed how the political claims employed a religious basis to appeal to people and their understanding of the authoritative resource of legitimation.

The Kharijis expressed their positions in the seventh century, using theological tools to delegitimize institutions of authority. The purpose of today's political theology is nearly the opposite—to build, that is, legitimacy in democratic institutions that currently lack it.[153]

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[150] Ismail ibnUmar Ibn Kathir, al-Bidayah wa al-Nihayah 11:649 (Dar 'alam Al-kutub 2003). AL-RAYYES, An-Nadhareyyat Alsyasyyah 66-68. n.d. Compare, Nasir Al-Sab'i, Al-Khawarij Wa Al-Haqiqah Al-Ghaybah 97 (1999);ZAKAREYYA AL-MAHRAMI, AL-SIRA' AL-ABADI 146-158 (Al-Ghubaira' 1st ed. 2006).

[151] The slogan can be translated according to the understanding and interpretation of the Khariji's stand. If we understand that Kharijis deny the whole idea of human involvement in judgment (or rule), the slogan will be translated as "there is no judgment/rule but God's." The word "*hukum*" can mean "arbitration," "judgment," or "rule," but "arbitration" is the minimum degree that this word may imply so that is why I used it in order to present their opinion in its fundamental agreeable meaning. For the Khariji (or rather Ibadhi) perspective in their own understanding see, Al-Sab'i, Al-Khawarij Wa Al-Haqiqah Al-Ghaybah. 1999;AL-MAHRAMI, Al-Sira' Al-Abadi 146-158. 2006.

[152] Qur'an (12:40).

[153] In the first half of the twentieth century in the Western experience, Carl Schmitt noticed that despite the modern state developments, these modern political theories were actually transferred from the field of theology but God has become the lawgiver in the state, and miracles (the exception of the theological natural law) has become the legal exceptions in modern state law theories. Moreover, theology has shaped the "systematic structure" of the modern state where the values and doctrine of a given society contribute in building this state and its institutions. This is what Schmitt describes as "political theology." Again here is Some Islamic Jurisprudential mechanisms for legitimation. CARL SCHMITT, POLITICAL THEOLOGY: FOUR CHAPTERS ON THE CONCEPT OF SOVEREIGNTY 36 (University of Chicago Press. 1985).

2.3.3 Some Islamic Jurisprudential mechanisms for legitimation[154]

Islamic Jurisprudence is always a significant part of the social and political structures, let alone the legal system. Islamic legal theorists laid down different mechanisms that establish legitimacy and others to maneuver or even strip political authority of any legitimacy. These tools may be implicit and indirect but all work within the space that the jurisprudence itself determines and locates.[155] Islamic jurisprudence in Muslim society has thus long been shown to be a rich significant source of values that can determine the public faith and confidence in a political system.[156]

2.3.3.1 The example of Jurisprudential Consensus (*Ijma'*)

Although Islamic jurisprudential consensus was introduced during severe political polarization and was surely influenced by it, it is a jurisprudential doctrine that is widely considered authoritative and genuine within the Sunni school.[157] The originality and authoritativeness of consensus as a jurisprudential tool in Muslim-majority society is what can inspire civil religion from within, and build an authoritative basis for Islamic legitimacy that goes along with other elements.[158]

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[154] It is not the intention of the dissertation to comprehend all political theoretical mechanism within Islamic Literature, but it is an attempt to highlight some mechanisms that significantly affect the "Islamic legitimacy" that we discuss here.

[155] ABDUL-MAJEED AL-SAGHEER, AL-FIKR AL-ASULI (Al-Mu'sasah Al-Jami'yyah 1st ed. 1994);FELDMAN, The Fall and Rise of the Islamic State:[New in Paper]. 2012.

[156] In Egypt, women and men are almost alike in favoring more role of *Shari'a* as a source of legislation in their country (82-87%). Gallup World, available at, "**http://www.gallup.com/poll/155324/Arab-Women-Men-Eye-Eye-Religion-Role-Law.aspx**".

[157] See, Weal B. Hallaq, *On the Authoritativeness of Sunni Consensus*, 18 INTERNATIONAL JOURNAL OF MIDDLE EAST STUDIES (1986).

[158] I do not intend here to discuss the concept of "consensus" (*ijma'*) and the details of its issues, authoritativeness, application etc. but I deal with it as long as legitimacy in the context is concerned. For discussions about the

Consensus in Islamic jurisprudence is produced in Sunni school for understandable reasons as they were in the Muslim society counted as majority confronted by different groups that disputed first and foremost the legitimacy of the system, the ruler, or the policies. At that time, consensus "existed primarily as a social and secular force."[159] Consensus, along with its jurisprudential incentives, was thus a sociopolitical project that could help stabilize society according to some leading Sunni jurists. Al-Jwaini is a good example of that. In his book *Ghyath Al-Umam* that was devoted to discuss Islamic political jurisprudence (*siyasah shar'iyyah*), he found it necessary to single out "consensus" of the jurisprudential resources, and spent pages to ensure its authoritativeness.[160] He justified his approach by saying that he did not find in the political sphere in Islam a more important mechanism than consensus.[161]

With the *Shafi'i* view that consensus is a sanctioning instrument rather than an Islamic resource of law,[162] consensus proves to be a more powerful sociopolitical force than its jurisprudential components. Al-Sagheer notes that consensus, like some other notions, is shared between the political and legal spheres.[163] He analyzes consensus as a political force that was used first by Al-Shafi'i to solidify the relaxed, general jurisprudential rules in favor of the jurists and to protect their domain against rulers.[164] Therefore, in this sense, consensus was used by the majority (Sunni mainstream) as a legitimation tool, and by the jurists as a mechanism to counterweight rulers.[165]

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concept, see e.g., ABULMA'ALI AL-JWAINI, AL-GHYATHI: GHYATH ALUMAM FI ELTYATH ALDHULAM 42-45 (Dar Al-Da'wah 1st ed. 1980);Hallaq, INTERNATIONAL JOURNAL OF MIDDLE EAST STUDIES, (1986);IBN HAZIM + IBN TAYMIYYAH, MARATIB AL-IJMA' + NAQD MARATIB AL-IJMA' (Maktabat Al-Qudsi. 1938).

[159] Hallaq, INTERNATIONAL JOURNAL OF MIDDLE EAST STUDIES, 427-8 (1986).

[160] AL-JWAINI, Al-Ghyathi: Ghyath AlUmam fi Eltyath AlDhulam 42-45. 1980.

[161] Id. at, 42. See, AL-SAGHEER, Al-Fikr Al-Asuli 214-9. 1994.

[162] Hallaq, INTERNATIONAL JOURNAL OF MIDDLE EAST STUDIES, 449 (1986).

[163] AL-SAGHEER, Al-Fikr Al-Asuli 158. 1994.

[164] Id. at, 156-7.

[165] We can think of the word consensus as a sociopolitical force in the testimony of Al-Dhahabi(d. 1338) for Ibn Taymiyyah(d. 1328) when the former describes the later as a jurist who could have been a "consensual ground"

An overlooked aspect of consensus is that the most cited authors who recorded the consensus cases in Islamic jurisprudence used "consensus/*ijma'*" word to mean the opinion of the overwhelming majority of scholars.[166] This notion of allowing a majority opinion to legally bind the society is the basis that was and is used to legitimize a system, a policy, or an office. Nonetheless, majority rule could turn into tyranny of the majority if the democratic safeguards are weakened.[167] Thus, Islamic jurists have developed a two-level consensus theory that distinguishes between "special consensus" (*ijma' al-khasah*) and "simple consensus" (*ijma' al''amma*). The former refers to the more universal natural-law-like rules of Islamic law which almost every Muslim agrees to while the later refer to the more scholastic jurisprudential consensus that most, mainly Sunni, jurists mean when they use it in a jurisprudential context.[168]

The theoretical richness of consensus in Islamic jurisprudence is not a democratized religious concept or a sacralized democratic mechanism of the Islamic jurisprudence but, along with its jurisprudential weight, is an ongoing attempt to pronounce legitimacy and to build a solid basis for legitimation that goes beyond legal and constitutional proceduralism.

2.3.3.2 Commanding Common Good (*Al-'mr bil Ma'ruuf*)

The other example of a proven, crucial tool for legitmation in Islamic jurisprudence is the concept of "*al-amr bil ma'ruuf wan-nahi 'an al-munkar*" .We can refer to the concept simply as

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(*kilmat ijma'*) had he been less offensive toward his opponents. Ali AlOmarn & Aziz Shams, Al-Jami' Li Sirat Ibn Taymiyyah 269 (Dar 'alam Al-Fawaed 2001).

[166] See, IBN AL-MUNTHER, AL-IJMA' (Maktabat AL-Furqan 2nd ed. 1999);TAYMIYYAH, Maratib Al-Ijma' + Naqd Maratib Al-Ijma'. 1938.(Ibn Taymiyyah notes that Ibn Hazim counted some opinions as consensus while citing some other opposing opinions) id. at, 16.

[167] About the idea "tyranny of the majority" see, Richard E Day, *Tyranny of the Majority*, 194-8 (2005).

[168] AL-KHATEEB AL-BAGHDADI, AL-FAQEEH WAL MUTAFAQQEH 434 § 1 (Maktabat AL-Taw'yah Al-Islameyyah. 2007). (Al-Baghdadi here gives examples of the special consensus that every Muslim follows of the Mecca as a *qiblah* (a direction to face for prayers), the general idea of the obligation to fast during Ramadhan, the obligation of *Hajj*.Id. at. See also, Hallaq, INTERNATIONAL JOURNAL OF MIDDLE EAST STUDIES, 431-2 (1986).

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ihtisab. Its literal meaning is "demanding *common* right and forbidding *common* wrong."[169] The word "common" is not just a descriptive word to better understanding of the two words "*mu'ruf*" and "*munkar*." Rather it is the word that really distinguishes these terms—*ma'ruf*, as common good, *munkar* as common wrong from the other two concepts popularly used in Islamic sources and texts, which are "khair" as a more general good and "sharr" as wrong or evil.[170] In a Qur'anic verse urging Muslims to exercise this ritual of "demanding the *common* right and forbidding the *common* wrong," the texts translates as "[a]nd there should be a group of you calling to the good, demanding the common good, and forbidding the common wrong…."[171] So here there is a clear distinction in the language of Quran between the two concepts.[172] Thus, the verse is asking Muslims to *call* for good and to *demand* common good.

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[169] For the concept "demanding the common right and forbidding the common wrong" from the medieval Islamic perspective see, ABU AL-HASAN AL-MAWARDI, AL-AHKAM AL-SULTANYYAH 315-339 (Dar Ibn Qutaibah 1st ed. 1989). AL-JWAINI, Al-Ghyathi: Ghyath AlUmam fi Eltyath AlDhulam 176. 1980. For a more analytical approach see, MICHAEL A COOK, COMMANDING RIGHT AND FORBIDDING WRONG IN ISLAMIC THOUGHT (Cambridge University Press. 2010). KRISTEN STILT, ISLAMIC LAW IN ACTION: AUTHORITY, DISCRETION, AND EVERYDAY EXPERIENCES IN MAMLUK EGYPT 38-71 (Oxford University Press. 2012). (Stilt applied more realistic approach according to Haider Hamoudi's review. Stilt studied *ihtisab* through cases (law in action) during the Mamluk era Haider Ala Hamoudi, *Book Review: Islamic Law in Action, Authority, Discretion and Everyday Experiences in Mamluk Egypt, by Kristen Stilt*, 28 JOURNAL OF LAW AND RELIGION, 101 (2013).). Selim Deringil also studied and analyzed *ihtisab* but within the Ottoman Empire specifically in the period (1876-1909). DERINGIL, The well-protected domains 68-93. 1998.

[170] In English-written literature dealing with the concept of what I can translate as "demanding *common* right and forbidding *common* wrong," there is a common translation (mistake, may be) between authors and researchers. They tend to omit the word "common" that I insistently use here. The references mentioned-above are among those translate the concept of *al-amr bil ma'ruuf wan-nahi 'an al-munkar* into "commanding right and forbidding wrong" without the word "common" in both "right" and "wrong." One clear requirement that Al-Mawardi provides for *ihtisab* is that a common good (and a common wrong) should be agreed upon to be considered for enforcement. AL-MAWARDI, Al-Ahkam Al-Sultanyyah 315-6. 1989. See, STILT, Islamic Law in Action: Authority, Discretion, and Everyday Experiences in Mamluk Egypt 42-7. 2012.

[171] (Qur'an 3:104). For exegesis, see e. g., Ibn Kathir Tafsir al-Qur'an al-'Azim 2:92-3. 2002.

[172] It is worth saying that translating *mu'ruuf* and *khair* as both to mean "good" will render some words redundant and, thus, will render an important word like "*ma'ruuf*" useless which goes against most rules of exegesis. Al-Suyuti (d. 1505) asserts that establishing a new meaning by a new word in Qur'an precedes the method of confirming the same meaning mentioned in a verse/text. JALAL AD-DEEN AL-SUYUTI, AL-'SHBAH WAL NADHA'IR 1:211-19 (Maktabat Nizar Al-Baz 2nd ed. 1997). (In this book, Al-Suyuti introduced, *inter alia*, two maxims that should govern the exegesis of Islamic texts and provide explanations and applications. Both conclude that new meaning for new word precedes the exegesis that renders some word just confirming or repeating the same meaning. Id. at, 211-19.)

The difference drawn between "good" and "common good" is very closely connected to the argument here that the objective good cannot be legally enforced unless it is widely common to be understood as such by Muslims. This interrelates to the intersubjective nature of legitimation which Ricoeur mentions.[173] This requirement of commonness is precisely what builds legitimacy and makes the mechanism of *ihtisab* a more functioning sociopolitical force. From this point, we can see the connection between this Islamic concept and the role of people in defining the widely accepted tradition (and good) as a way for legitimization of a given rule and its enforcement.[174]

2.3.3.3 Islamic Procedural Legitimacy

With the difference between legality and legitimacy that Schmitt emphasized,[175] a comparable conceptualization can be found in classical Islamic jurisprudence. Medieval jurists have developed a juristic doctrine that differentiates between "validity" and "permissibility" because each concept of the two tackles a separate distinguishable side of the same case. This is why the jurists termed the doctrine "*infikak al-jihah*" which means the (disentanglement of the sides).[176] Islamic jurists give a classical example of a person praying in land the person usurped from another. The jurists consider the prayer Islamically valid but as a wrongdoer, the person stealing should be punished.

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[173] See, Ricoeur, 200-202 (1986). Taylor, PAUL RICOEUR AND THE TASK OF POLITICAL PHILOSOPHY, 66-67 (2012).
[174] Al-Mawardi requires a certain criteria for a "common good" to be legally enforced as such. One clear requirement that al-Mawardi provides is that a common good (and a common wrong) should be agreed upon which again assures the importance of the word "common" and its role in involving society in crafting these supposedly universal rules. AL-MAWARDI, Al-Ahkam Al-Sultanyyah 315-6. 1989.
[175] SCHMITT, et al., Legality and legitimacy 23&137. 2004. See also, HABERMAS, Between naturalism and religion: Philosophical essays 104. 2008.
[176] See, AL-GHZALI, Al-Mustasfa 3:199-203. 1995; AL-SHINQEETI, Al-Mudhakkirah Fi Usul Al-Fiqh 27-31. 2001. The doctrine is not agreed upon by all schools but it has been used by different schools in different cases.

Islamic jurists developed the doctrine of disentanglement of the sides in response to cases that ideally do not fit the supposed line that jurists traditionally drew but instead where there is a combination of right and wrong, valid and invalid, and permissible and impermissible. The doctrine enables the jurists to rule on the same case with a complex holding that is fair to each aspect of the case.

Thus, in Islamic jurisprudential politics, jurists provided conditional legality (partial legitimacy) to systems and policies that are not ideally compliant to the principles they espoused. They dealt with circumstances "realistically" in order to facilitate people's transactions and meet their needs or to reduce the difficulty that the society faced.[177] This jurisprudential theorizing allowed jurists to maneuver and live under the control of a ruler that did not fulfill legitimacy requirements using a legality level similar to the one Schmitt described.[178] *De-facto* verses *de-jure* rule was taken into consideration as a scholastic tool to manage this.[179]

However, legitimacy remained the crucial element that went beyond the legality level to provide a long-term stability. Medieval Islamic jurists interacted with the situation of having two disentangled sides (*de facto* unprincipled ruler who can issue perfectly principled polices) and the need for legitimacy. "A ruler may get away with the occasional lapse. A sustained pattern of lawbreaking over time, however, would show those in the know that the ruler was not fulfilling

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[177] One of the five most important principles in Islamic jurisprudence according to Al-Suyuti is the principle that "*al-mashaqqah tajlib al-taiseer*" which means that (hardship [should] bring jurisprudential convenience and facilitation). AL-SUYUTI, Al-'shbah wal Nadha'ir 1:128-140. 1997.

[178] See, SCHMITT, et al., Legality and legitimacy 23&137. 2004.

[179] FELDMAN, The Fall and Rise of the Islamic State:[New in Paper] 37-9. 2012;Frank E Vogel, *Siyasa: in the sense of siyasa shar'iyya'*, 9 ENCYCLOPAEDIA OF ISLAM, 695 (1997). See, LOMBARDI, State Law as Islamic Law in Modern Egypt: The Incorporation of the Sharī'a Into Egyptian Constitutional Law 53. 2006. See also, Aharon Layish, *The Transformation of the Sharᵒ {a from Jurists' Law to Statutory Law in the Contemporary Muslim World" in*, 44 DIE WELT DES ISLAMS, 101 (2004). (Layish notes that the attitude of some ulema to justify codification was out of fear that it may go out of their supervision at all).

his function on earth."[180] So, the legitimacy is shaken in the eyes of the society which prepares at some point to restore legality that is in harmony with the supposed legitimacy.[181]

The lesson learned from this doctrine and experience of "disentanglement of the sides" is that Islamic jurists can tolerate temporary legality under an illegitimate situation but in the long run, they challenge it and work hard to restore the other side according to the principles. They do that through people and belief or disbelief in the system. Legality that works within the system is a matter that jurists can realistically get along with at least at times, but legitimacy is something more—something that operates from people's pre-legal standards and something whose absence is intolerable in the long run.[182]

2.3.4 The Legitimacy of the Legitimizers[183]

As far as Islamic legitimacy is concerned, jurists are considered the typical legitimizers although they do not serve in an official position.[184] Rather, they are legitimate specifically because they

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[180] FELDMAN, The Fall and Rise of the Islamic State:[New in Paper] 29. 2012.

[181] A modern example of this took place in Egypt in twentieth-century when the government was forced to accept the bargain that Al-Azhar (the most prominent Islamic institution in Egypt) offered and, therefore adopted Islamic reform to some extent as the government became increasingly dependent on Al-Azhar for religious legitimation. This shift happened in the aftermath of a series of events that were used by opponents to challenge the Islamic legitimacy of the government. Tamir Moustafa, *Conflict and cooperation between the state and religious institutions in contemporary Egypt*, 32 INTERNATIONAL JOURNAL MIDDLE EAST STUDIES, 3&4 (2000). In working to delegitimize the established order, Goldberg compares radical Islamic groups to Protestant movement. He found that both radical Islamic groups and Protestant movement attempted to undermine the legitimacy of the already recognized regime. Both also emerge from increasing rate of literacy in the society which allows them to transfer authority from official religious institutions to individualistic interpretation. Id. at, 20.

[182] SCHMITT, et al., Legality and legitimacy 23&137. 2004.

[183] The need for independence of jurists will be a whole separate issue. Another chapter is going to deal with this matter when discussing the positioning of jurists and religion institutions. However, this section is solely to highlight the role of independence in Islamic legitimization.

[184] See, STILT, Islamic Law in Action: Authority, Discretion, and Everyday Experiences in Mamluk Egypt 26. 2012;Mark David Welton, *Islam, the West, and the Rule of Law*, 19 PACE INT'L L. REV., 4 (2007).

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are not in an official position. The very legitimacy of legitimizers arise because they are not under the mercy of the regime that they are to legitimize.[185]

The jurists developed different approaches in dealing with rulers, citing many different texts and narrations that support their stand.[186] In social interaction, jurists have reached the conclusion that they are legitimate legitimizers if they are in the position their interests are not closely associated and linked to the system that they are legitimizing. Noah Feldman perfectly points out that "[t]he class of jurists can give legitimacy to the rulers when they're not rulers— when they check the balance of the rulers not become themselves a ruling class."[187]

The independence prerequisite for legitimizing jurists applies to different schools and cases of Islamic jurisprudence because it goes with the very nature of their social power that requires their role as guardians to be independent.[188]

Since the late twentieth century in Egypt, al-Azhar, as the main religious institution, has suffered from being subordinated to the government, which has created a legitimation crisis. The dilemma went beyond the reach of the legitimizers (jurists) this time because they were themselves part of the problem. The autonomy of the jurists was at stake, and thus, they lost the power that they could have used to heal the wounded state and revive the dead regime, which is a power that all legitimate heirs to the Prophet's legacy have. The government's control over Al-

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[185] Compare, LOMBARDI, State Law as Islamic Law in Modern Egypt: The Incorporation of the Sharīʿa Into Egyptian Constitutional Law 47. 2006. Lombardi here describe the works of Sunni thinkers at some point to be sort of self-legitimizing body that can legitimize the same regime that they depend on. However, this is true in the level of Islamic proceduralist legitimacy (or rather legality) but not in the normative long term legitimacy. Lombardi, on the other hand, seems to describe these two theories (legality and legitimacy) as one.

[186] See the comprehensive book of JALAL AL-DEEN AL-SUYUTI, MA RAWAH AL-ASATEEN FI 'ADAM AL-MAJEE' LI AL-SALATEEN 24 (Dar AL-Sahabah Li Al-Turath 1st ed. 1991). (In English the title is: Narrations from Prophets and his Followers Warning from Coming to the Sultan's Court and Place. In this book, Al-Suyuti cited countless narrations that warn jurist from getting close to rulers. Al-Suyuti started with the main narration in the issue—that the Prophet said, "Whoever comes to the door of the sultan will be tempted, and the closer someone gets to the sultan, the further he gets from Allah.") (Translation is mine).

[187] FELDMAN, The Fall and Rise of the Islamic State:[New in Paper] 136. 2012.

[188] José Casanova, *Civil society and religion: retrospective reflections on Catholicism and prospective reflections on Islam*, 68 SOCIAL RESEARCH, 4 (2001).

Azhar shook the faith of the public in the religious institution and with these authoritarian incentives, the regime could not seek refuge in the institution.[189] In Tamir Moustafa's account, there are three main interests for al-Azhar as the main Islamic institution: to maintain independence; to have the public confidence as an authoritative Islamic interpreter; and to spread the word of Islam.[190] Two of these interests seem to be closely linked to the need of confidence and faith from the public to represent their values.

The crisis of legitimation in al-Azhar as a religious institution has largely contributed in producing religious extremism in Egypt. Religious extremists when challenging the state's legitimacy, start with the premise that the Islamic institution (al-Azhar) itself is not legitimate and is completely corrupted by government control.[191] This is why when the government adopted programs to address Islamic militants, it asked unofficial jurists and Islamists to engage in the dialogue in order to weaken the grip of Islamic militancy.[192] The Islamic legitimacy issue is thus a matter that can threaten the system and it becomes more threatening when the body or class that is supposed to lend legitimacy is itself stripped from it.

2.3.5   The Legitimizing Fatwa

The word, fatwa, in Arabic refers to the ruling issued by an authoritative Muslim jurist regarding a matter brought before him or her. The rulings are mostly issued as responses to questions

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[189] Moustafa, INTERNATIONAL JOURNAL MIDDLE EAST STUDIES, 17&22 (2000).

[190] Id. at, 12.

[191] Id. at, 10.Moustafa here gives examples of the discourse of extremists prestned by Mohammed Faraj in his book Al-Faridah Al-ghayibah, Shukri Mustafa, and others;HIRSCHL, Constitutional theocracy 19. 2011.

[192] Moustafa, INTERNATIONAL JOURNAL MIDDLE EAST STUDIES, 11 (2000). It is an interesting comparison that this technique used by the Egyptian government has inspired the Saudi government to make its own televised dialogues with the influential extremists in prison. The administrator of the dialogues is an unofficial jurist who may be thought to have more legitimacy that some appointed ones. See also, HIRSCHL, Constitutional theocracy 19. 2011.

presented by ordinary Muslims on a regular basis. The fatwas range sometimes from social to ritual to financial or even political issues.[193]

Despite the catastrophic influence of al-Azhar's subordination to the government, it and Islamic jurists still hold the legitimizing tool through non-state channels, and the best evidence of this is the continuing salience of the fatwa which is nonbinding at its core. Fatwa could be compared to the Supreme Court decision except the fact that the Court has a formal legal power while the fatwa, depending on its issuer and authoritativeness, carry purely a social power that can prove to be very decisive.

Legitimizers in Muslim-majority societies exercise their legitimization work through a variety of different mechanisms, only some of which will be discussed here. The juristic ruling (fatwa) reflects the jurist's opinion and never occupies an official classification in Muslim state.[194] However, a fatwa works through the public faith that is proven to be crucially powerful. A fatwa can help to stabilize a system or to threaten it, but this is only when the legitimizer accumulates credibility and confidence from the public.[195]

It is even illustrating to see how the strict separationist approach that ended the Ottoman Empire and started the new Turkey needed a fatwa that is similar in background and reasoning to the one that was typically used in the Ottoman era! The Young Turks who led the movement that

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[193] To read a classical Sunni book in the literature of fatwa and its requirements and issues, see in Arabic, IBN ALQAYYEM ALJAWZEYYAH, I'LAM AL-MUQE'EEN (Dar Al-Kutub Al-'elmayyah. 1991). In studies about the influence of fatwa in different issues see, Judith Tucker, *'And God Knows Best': The Fatwa as a Source for the History of Gender in the Arab World*, BEYOND THE EXOTIC: WOMEN'S HISTORIES IN ISLAMIC SOCIETIES (1994);Mughees Shaukat, *General Preception of Fatwa and Its Role in Islamic Finance*, KUALA LUMPUR, INCEIF (2009);Hussein Ali Agrama, *Ethics, tradition, authority: Toward an anthropology of the fatwa*, 37 AMERICAN ETHNOLOGIST (2010);MEHDI MOZAFFARI, FATWA: VIOLENCE & DISCOURTESY (Aarhus Universitetsforlag. 1998).
[194] See in general, ALJAWZEYYAH, I'lam Al-Muqe'een. 1991. Ibn alQayyeem here beginning from his title describes the role and rules of opinion-givers of the jurists. He describes fatwa-givers as if they are "signing a ruling on behalf of the All-legislator, God". This is, however, does not invoke any godly nature of their rulings because it is an undisputed consensus that no jurist can represents the whole truth , and thus should be unconditionally followed except the prophet (PBUH).Id. at, 1:6.
[195] See, Hamoudi, JOURNAL OF LAW AND RELIGION, (2013). See also in general, Agrama, AMERICAN ETHNOLOGIST, (2010).

established today's secular Turkey needed a very traditional religious declaration, a fatwa, to depose Abdulhamid and replace him with a new system of power.[196] "The same fiqh school, Hanafi, that was used to legitimize the Ottoman state was used by the Kemalists, too, but to delegitimize the Ottoman Empire."[197]

Similar to the secular utilization of religious phenomenon like issuing fatwas to legitimize the system, Jamal Abdul Nasser in Egypt tried to control al-Azhar in order to legitimize his own political project and socialist approach.[198] Ironically, Egypt's Sadat used Al-Azhar's fatwas to legitimize his overturn of Nasser's land reforms and to legitimize the Peace Treaty with Israel.[199] Mubarak, in his turn, used a fatwa, too, to justify his participation in the second Gulf War.[200] During that war, another famous fatwa was issued by Ibn Baz, the grand mufti of Saudi Arabia, which legitimized the deployment of American troops in Saudi Arabia.[201] They are just examples of how powerful a fatwa is deemed to be, and how far it was utilized even by the strictest secularists in Arab world.

Fatwa is just a juristic opinion, with no formal legal effect. However, it gets its importance from the society that accredits the issuer and has faith on the fatwa-giver. A fatwa-giver as a legitimizer will be accredited and authoritative in the eyes of the public only as much as the legitimacy of his won is not widely disputed.

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[196] DERINGIL, The well-protected domains 173. 1998. The secular separationist, as opposed to accommodationist, is the secularist that defends a strict separation of religion and state and support a more religion-free politics. See, TED G JELEN, THE POLITICAL WORLD OF THE CLERGY 2 (Praeger Westport, CT. 1993).

[197] DERINGIL, The well-protected domains 174. 1998.

[198] Moustafa, INTERNATIONAL JOURNAL MIDDLE EAST STUDIES, 7 (2000).

[199] Id. at.

[200] Id. at.

[201] See, FELDMAN, The Fall and Rise of the Islamic State:[New in Paper] 97. 2012.

2.4   CONCLUSION

We have seen that Islamic religious institutions acquire their importance by being the body that carries the values and principles of the public. Achieving normative legitimacy, then, is to adapt the state to people's values as reflected in the religious institutions. This process of making the system complaint to social values needs initiatory legitimacy that legitimizes the primary cause of the very existence of the state while continuous legitimacy ensures that the state is living up to that cause. A regime may come into existence without responding to the expectation or imagination of the people, but it will lack long-term stability. A state that lacks popular faith is doomed to collapse and this is why even the most authoritarian regimes use popular signs and language as a way of achieving what has been described above as enunciative legitimacy.

This being said, Muslim-majority countries are even more sympathetic to religious discourses. As a result, Islamic legitimacy is a political requirement that can be exercised by the typical legitimizers, jurists, who can use acceptable juristic language and mechanisms to legitimize the system, or, on the other hand, to challenge it. Thus, the locus of power of the jurists and their interaction with the system is through societal channels by means of public faith, confidence, and support. Legitimacy is the tool that jurists use to influence politics, an exercise that needs to be independent of the control of the system in order to legitimize that same system and for that legitimization is to be credible. The nature of jurists' political exercise can be described as a soft indirect presence that sweeps like their fatwas do as long as they appeal to the public and speak the language that the people believe and support.

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3.0 CHAPTER TWO: RELIGIOUS INSTITUTIONS IN THE ARAB WORLD: THE META-CONSTITUTIONAL SPHERE

The debate about where religious, and particularly Islamic, jurisprudential work resides in today's Muslim state is related to the legitimacy debate. States whose legitimacy religious institutions participate in the making of continuously encounter debate respecting these religious institutions' work and sphere. The first chapter suggests that the legitimacy of the religious institutions themselves, as well as the legitimacy of the states, requires that these institutions be independent and autonomous. This chapter focuses on the space of Islamic institutions in Muslim countries, focusing specifically on Egypt as a case study.

Thus, this chapter contains four main sections. The first section discusses the meaning of "religious institutions" as imagined institutions in the Islamic context. This is because it is important that we first understand precisely what we mean by a "religious institution" in Sunni Islamic discourse before discussing its role in the state. Institutions in this context is a term that is interchangeable with "jurists," or "scholars" (ulama, to use the common Arabic term) for reasons explained in further detail in the first section. I can say in short here that religious institutions are imagined institutions that are represented by dispersed Muslim jurists. This is true in Islamic history, and to a larger extent in today's Muslim states.. The second section presents the different roles of these scholars historically. The third section deals with the conception of scholars and their very nature and sphere, describing it in modernity as being

"metaconstitutional." The fourth section discusses the idea that, although autonomy is crucial for Muslim religious institutions to operate in the meta-constitutional sphere, these institutions do not and should not acquire direct power as this goes against their very own nature, literature, and effective role. I will use history to show that this proposal is the position that the ulama historically occupied, and what they have always normatively theorized.

I will try to craft a role that fits the ulama's nature according to their very own literature and social dynamics. This role would stabilize society and its religious authority, as well as place them in position that is constitutionally possible and plausible.

3.1   THE MEANING OF INSTITUTIONS: FORMAL INSTITUTIONS, AND IMAGINED INSTITUTIONS:

This section is devoted to discussing the features of "religious institutions" in the Islamic context. As we will see, the religious institutions are more like "imagined institutions" similar to the "imagined communities" of Benedict Anderson.[202] They are called imagined institutions because most religious movements and productions do not exist within factual institutions and even if there happened to be real institutions, their existence is usually irrelevant to the religious work and the nature of religious intellectual activities *as a whole*. This brings the discussion to the existence of clergy in the Sunni Muslim experience, where hierarchy and institutionalization have rarely been operative. This section ends with the debate of whether ulama are a "corporate group." Different studies have different approaches to determining whether ulama and jurists

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[202] ANDERSON, Imagined communities: Reflections on the origin and spread of nationalism 1-9. 2006. See also, TAYLOR, Modern social imaginaries 23-31. 2004.

have established a solidarity that qualifies as a corporate group. I argue that, despite the existence of some corporate groups and guilds, the most important feature of the jurists as a class is the imagined sphere that governs both those in corporate groups and those outside of corporate groups. This sphere never gathers the different jurists, scholars, and institutions in one comprehensive corporate group.

Defining religious institutions and scholars (ulama) is important. My understanding of the term "religious institution" will affect my appraisal of their role, their nature, and my analysis of the decrease or increase in their presence and influence. Epistemological presuppositions about how "religious institutions" look has influenced the literature in a powerful, and negative, way.[203] Western writings have approached the issue of "religious institution" with presuppositions that reflect the Christian experience and its understanding of the religious sphere and operations rather than those present in Muslim culture.[204] This section seeks to correct some of those misconceptions.

3.1.1   Clergy in Islam, and the "Religious Institution"

The phrase "religious institutions" in Islamic history may prove to be misleading for two reasons. First, and most importantly, most of the works and literature have conducted by religious jurists and ulama took place in no formal "religious institution" as we know it today.

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[203] For the idea of epistemological conflict between two cultural narratives and their powerful influence on our understanding and consciousness see, Alisdair MacIntyre, *EPISTEMOLOGICAL CRISES, DRAMATIC NARRATIVE AND THE PHILOSOPHY OF SCIENCE*, 60 THE MONIST (1977).

[204] The researcher Hussein Agrama noted the predicament of the presuppositions of Western studies that analyze the Islamic thought as a "problem" to be explained and then solved. This predicament happened because the Western standards and narrative were so powerful, and then shaped the presupposition about how religion operates in society. I may add here that the Western narrative shaped how we (and they) understand Islamic works by reducing them to "religious institutions" that dominated Christian literature and experience. See, HUSSEIN ALI AGRAMA, QUESTIONING SECULARISM: ISLAM, SOVEREIGNTY, AND THE RULE OF LAW IN MODERN EGYPT 1-42 (University of Chicago Press. 2012).

Scholars have enriched the judicial and religious literature with their debates and discussions that are hardly linked to an actual institution that could be identified. The books, fatwas, and reactions of Islamic scholars are religious works, but the religious community is not a religious institution nor is it largely composed of religious institutions unless we use "religious institution" in an imagined, metaphorical sense.[205]

Second, to examine the term "religious institutions" from the point of view of the community described as such, we will encounter a large segment of the community having reservations about the existence of something called "religious institutions" *taking into consideration the deep Christian heritage associated with the phrase.* According to a number of influential contemporary Muslim scholars, the term "religious institution" itself has a connotation that relates to the Christian background in which it was used, and this contaminates its understanding in the Islamic context.[206] My view is that the term can be used without distortion, but to do so requires that it be explained, as this section attempts to do.

One may say that the vast majority of commentators and writers and scholars in Islamic studies[207], especially Sunni ones, rightly assert that there is no clergy in Islam, with the implication associated with the word "clergy" as being hierarchal and representative of the sacred.[208] Although in reality and at different points of history there were clerical flavors and

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[205] This nature of Islamic jurisprudence is going to be discussed from another aspect, the (lack of) corporate group.
[206] See e.g., YOUSEF AL-QARADAWI, AL-ISLAM WA AL-'ALMANYYAH WAJHAN LI WAJH 45 (Maktabat Wahbah. 1987);SAFAR AL-HAWALI, AL-'ALMANYYAH 65&108 (Dar al-Hijrah. 1982);MUHAMMAD IMARAH, AL-ISLAM WA AL-SYASAH 28-9&70 (Al-Shorouk International. 1992).(This book is important because it was first published by the Center of Research in al-Azhar, and is prefaced by then-al-Azhar's Grand Sheikh: Jad al-Haqq who asserts in his preface that there is no sacred religious instiutions in Islam)
[207] See for e. g., ABU AL-'ALA AL-MAWDUDI, NAẒARAYYAT AL-ISLAM AL-SYASYYAH 30 (Dar al-Fikr. 1967);AL-QARADAWI, Al-Islam wa al-'almanyyah wajhan li wajh 36. 1987;AL-HAWALI, Al-'almanyyah 65&108. 1982;IMARAH, Al-Islam wa Al-Syasah 28-9,50&123. 1992. See also, L Carl Brown, *Religion and State*, THE MUSLIM APPROACH TO POLITICS. NEW YORK, 32 (2000).(Brown clearly distinguishes between the Church-based system and clergy in Western experience on the one hand and Islamic State and governance on the other in the idea that Islam in its traditional approach does not separate religion from state but meanwhile does not have the (Christian) clergy in its history).
[208] See, Brown, THE MUSLIM APPROACH TO POLITICS. NEW YORK, 32 (2000).

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practices that sometimes were justified by different methods in Islamic jurisprudence and thought, these practices never formed a pattern or marked a divergence of the mainstream practice which was of a decidedly non-clerical nature.[209]

The "religious community" whose Western counterpart would be described as a "religious institution" presents itself in the Muslim world as, for example, "scholars" (ulama) and jurists (*fuqaha*) more than "institutions" or establishments. The self-presentation and self-image of this community in the Muslim world proves that they are scholars, jurists, authors, jurisconsults etc.[210] Therefore, the whole group of ulama as conceived by ulama themselves is comparable somewhat to the concept of "*ummah*" or "nation" in the sense that it is not a physically identified and distinguished one identity, institution, or group separate and classified.[211] Rather, the ulama, and "imagined institution", I would say, are a combination of factual institutions and religious scholars who may or may not be affiliated with such formal institutions. And even if the majority of scholars are attached to a factual institution at some point, they act as independent scholars who gain authority from their scholastic aptitude more than from their institutional affiliation. This is why, for example, they care about the imagined school of jurisprudence more than the formally established factual schools of their times.[212]

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[209] HATINA, 'Ulama', politics, and the public sphere: an Egyptian perspective 2. 2010;DAPHNA EPHRAT, A LEARNED SOCIETY IN A PERIOD OF TRANSITION: THE SUNNI _ULAMA_ OF ELEVENTH CENTURY BAGHDAD 96 (SUNY Press. 2000). For the Christian clergy in the West, see e.g., JELEN, The political world of the clergy 23. 1993.(Jelen here cited a clerk who specify thier job as to represent the sacred).

[210] KEDDIE, scholars, saints, and sufis: Muslim Religious Institutions in the Middle east since 1500 149. 1972;EPHRAT, A Learned Society in a Period of Transition: The Sunni _ulama_ of Eleventh Century Baghdad 10&14. 2000.

[211] See in general, ANDERSON, Imagined communities: Reflections on the origin and spread of nationalism. 2006;TAYLOR, Modern social imaginaries. 2004.

[212] Makdisi differentiated between the schools of law "madhab" and colleges of law "*madrasas*/institution." See, GEORGE MAKDISI, THE RISE OF COLLEGES. INSTITUTIONS OF LEARNING IN ISLAM AND THE WEST 1 (ERIC. 1981). It is noteworthy when Imarah in the book prefaced by the Sheikh of al-Azhar, and Abdul-razzaq al-Sanhouri, used the phrase "the Muslim nation with its *scholars and civil institutions.*" (Emphasis is mine). He distinguished between Muslim *scholars* and *civil* institutions instead of, say, "religious institutions" and "civil institutions." IMARAH, Al-Islam wa Al-Syasah 56. 1992.

Reducing the inquiry of religious authority to that provided in the literature of formal institutions misses the real rich historical debates and influence, thus, affects any possible realistic and normatively acceptable understanding of their proper role. This is not to say that formal institutions have not been established nor that they have not affected Islamic jurisprudence. However, these formal Islamic "institutions" were inherently more fluid, dispersed, and horizontal to such an extent that they, for the most part, could not even be called institutions. Jurists flow in and out of them, and they tend to act as individuals accountable to themselves, attached to the school of thought in an imagined sense more than having any sort of institutional loyalty or obligations to the actual institutions, if any, with which the jurist happens to be affiliated. Portraying official religious establishments as the monolithic representative of religious institutions in Islamic jurisprudence neglects the wide range of influential and, sometimes, more important segments of the religious community. As a result, the analysis of the decrease, or otherwise, of the influence of religious institutions in Muslim countries will depend on the approach toward the understanding of the term "religious institution."[213]

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[213] As examples of analyses that suffer from this reductionist approach in a way or another, thus, concluded that scholars' or religious institutions' influence in the Muslim world decreased, see, HAMILTON ALEXANDER ROSSKEEN GIBB & HAROLD BOWEN, ISLAMIC SOCIETY AND THE WEST: ISLAMIC SOCIETY IN THE EIGHTEENTH CENTURY. 2. V 112-3 § 1 (Oxford University Press. 1957). BERNARD LEWIS, ISLAM IN HISTORY 4 (Alcove Press. 1973);KEDDIE, scholars, saints, and sufis: Muslim Religious Institutions in the Middle east since 1500 149-167. 1972. Compare in general, Malika Zeghal, *Religion and politics in Egypt: The ulema of al-Azhar, radical Islam, and the state (1952– 94)*, 31 INTERNATIONAL JOURNAL OF MIDDLE EAST STUDIES, 371 (1999);MUHAMMAD QASIM ZAMAN, THE ULAMA IN CONTEMPORARY ISLAM: CUSTODIANS OF CHANGE: CUSTODIANS OF CHANGE 1-17 (Princeton University Press. 2010);HATINA, 'Ulama', politics, and the public sphere: an Egyptian perspective 9. 2010;Shadaab H Rahemtulla, Reconceptualizing the contemporary Ulama: Al-Azhar, Lay Islam, and the Egyptian state in the late twentieth century (2007) SIMON FRASER UNIVERSITY).

3.1.2 Ulama as Corporate Group

After discussing the term "religious institution" and "clergy," it is important to turn to the debate of "guilds" and "corporate groups." If indeed "clergy" and "religious institutions," as they are understood in the West, did not exist in the Islamic mainstream or were not that central to religious works as I concluded, then could guilds and corporate groups have existed and been influential? In this section, I will review some important ideas concerning this in the literature, and I will conclude that some corporate groups and guilds did exist in the Islamic context. The most important feature, however, is the sphere that governs both corporate and non-corporate groups. This sphere never gathers the different jurists, scholars, and institutions in *one comprehensive* corporate group nor does it establish a corporate relationship between *all* religious scholars.

Following Louis Massignon in valuing the importance of "guilds" in Islamic history,[214] George Makdisi took this one step further applying the concept not just to formal schools and associations of craftspeople in medieval Islam but also to jurisprudential schools (*madhab*s).[215] Sherman Jackson, in his turn, described the relationship of the jurist to the jurisprudential school (*madhab*) as a "corporate status" where "[e]ach school (*madhab*) acquires the ability to confer a measure of protection upon its members by virtue of their membership in that particular group."[216] Jackson, interestingly, likened the relationship between the individual jurist and the corporate group, the madhab here, to the relationship between the *rajih* (weighted opinion) and

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[214] According to Makdisi, Louis Massignon was the first who spoke of guilds in Islam in an article published in 1920. George Makdisi, *Guilds of Law in Medieval Legal History: An Inquiry into the Origins of the Inns of Court, The*, 34 CLEV. ST. L. REV., 4 (1985).

[215] Id. at, 4-6. See, SHERMAN A JACKSON, ISLAMIC LAW AND THE STATE: THE CONSTITUTIONAL JURISPRUDENCE OF SHIHĀB AL-DĪN AL-QARĀFĪ 103 § 1 (Brill. 1996).

[216] JACKSON, Islamic law and the state: the constitutional jurisprudence of Shihāb al-Dīn al-Qarāfī 72. 1996.

the *mashhur* (predominant opinion) in Islamic jurisprudence. Both individual jurist and weighted opinion could be more valuable in term of jurisprudence, but the predominant opinion and corporate group are usually more influential.[217] Daphna Ephrat studies the Sunni ulama of the eleventh-century Baghdad in her book, *A Learned Society in a Period of Transition*, concluding that affiliation with madhab, at some point, lost the sense of "solidarity group" and became formal.[218] Although a solidarity group was established, ulama, as a whole, never stuck to their group solidarity.[219]

In the work, *Scholars, Saints, and Sufis*, different academics discuss the religious institutions in Islam since the fifteenth century. One theme that appears throughout the book is the idea of reading ulama as a "corporate group." Unlike Massignon, Makdisi, and Jackson, the researchers Nikki Keddie (the editor),[220] Afaf Lutfi al-Sayyid Marsot,[221] Edmund Burke III,[222] Daniel Crecelius,[223] and Aziz Ahmed[224] emphasize the idea that the ulama do not consistently act as a "corporate group." [225] Marsot complains that the (high) ulama in the eighteenth century did not act as a corporate group and were not to handle specific functions in the state, and therefore, failed to be influential and more active.[226] But in Leon Carl Brown's account, in

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[217] Id. at, 83. Makdisi also presented the argument that schools were based on individuals so they did not establish "guilds". Makdisi, CLEV. ST. L. REV., 10 (1985).

[218] EPHRAT, A Learned Society in a Period of Transition: The Sunni _ulama_ of Eleventh Century Baghdad 143. 2000.

[219] Id. at, 96.

[220] KEDDIE, scholars, saints, and sufis: Muslim Religious Institutions in the Middle east since 1500. 1972.

[221] Id. at, 146-150.

[222] Id. at, 101-6.

[223] Id. at, 180-1.

[224] Id. at, 264.

[225] Compare in the same book the work of Leon Carl Brown, id. at, 73-4.

[226] Id. at, 146.

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nineteenth-century Tunisia, the ulama had a sense of their "corporate entity[227] separating themselves from the government" but this rather seems to be an exception more than the rule.[228]

To reinforce the rule again, Burke III notes that until 1900:

> Not only was there no religious institution, per se, in Morocco in the sense that there was no separate bureaucratic hierarchy of religious officials controlled from the top, it is even possible to say that ulama as an identifiable corporate group did not exist in Morocco.[229]

Aziz Ahmed in describing the ulama of Pakistan notes that in 1950s and 1960 their active role decreased dramatically because they were trying individually not collectively as a pressure group.[230] The researchers here presuppose that having ulama as a corporate group is what should have developed out of ulama's status, so, these researchers consequently criticize them of having lacked that quality.

In fact, the lack of corporate grouping in the ulama's functions and roles was due to the nature of their role as dispersed groups who do not form *overall* formal institutions or unified guilds.[231] This is why describing their operation as an imagined institution acting within a sphere is more accurate than describing their role as a corporate institution because, even when they formed guilds and corporate-like institutions, their power was associated with their being ulama in that imagined institution rather than being simply associated with the formal body of which they happened to be a member. Miriam Hoexter brilliantly states the case that

> Ulama were not acting as a concentrated group. They were hardly a "group" in the sociological meaning of the term. It was the

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[227] The use of the phrase "corporate entity" here looks to suggest "autonomy" more than real "corporate group."
[228] Leon Carl Brown, *The Religious Establishment in Husainid Tunisia*, in SCHOLARS, SAINTS, AND SUFIS: MUSLIM RELIGIOUS INSTITUTIONS IN THE MIDDLE EAST SINCE 1500 73-4, (Nikki R Keddie ed. 1972).
[229] Edmund Burke III, *The Moroccan Ulama, 1860-1912: An Introduction*, see id. at 101, (
[230] Aziz Ahmad, *Activism of the Ulama in Pakistan*, in SCHOLARS, SAINTS, AND SUFIS: MUSLIM RELIGIOUS INSTITUTIONS IN THE MIDDLE EAST SINCE 1500 264, (Nikki R Keddie ed. 1972).
[231] MIRIAM HOEXTER, et al., THE PUBLIC SPHERE IN MUSLIM SOCIETIES 21 (SUNY Press. 2002).

> expertise of the Sharia that gave them authority not their
> membership of a specific group[232]

Thus, as Ephrat explains, the fluid and flexible name of ulama is what guaranteed them the legitimate transition of knowledge despite the lack of official institutions and corporations .[233] Moreover, we should not be surprised when we see a fragmentation of authority among contemporary Sunni scholars because this comes from the nature of the religion itself, according to one commentator.[234] Wael Hallaq took the extreme position of denouncing the whole idea of corporate personhood as being immoral and against Islamic law.[235] What seems more accurate is that Islamic law does not contemplate or recognize an all-comprehensive kind of corporate group for Islamic scholars as a class, whose unifying function is the honorable one of interpreting Sharia. At the same time, the existence of guilds and corporate groups within the scholars as a class did help to perpetuate their work to the extent that they remained independent of state coercion.[236]

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[232] Id. at, 123.

[233] EPHRAT, A Learned Society in a Period of Transition: The Sunni _ulama_ of Eleventh Century Baghdad 6. 2000.

[234] D.F. EICKELMAN, et al., MUSLIM POLITICS 131 (Princeton University Press. 2004). Zeghal, INTERNATIONAL JOURNAL OF MIDDLE EAST STUDIES, 372 (1999).

[235] WAEL B HALLAQ, THE IMPOSSIBLE STATE: ISLAM, POLITICS, AND MODERNITY'S MORAL PREDICAMENT 153-4 (Columbia University Press. 2014).

[236] It is worth reading the analysis by Muhammad Zaman of the fragmentation of authority when he says, Throughout the Muslim-majority world, advancing levels of education, greater ease of travel, and the rise of new communications media have contributed to the emergence of a public sphere— some call it the "street"—in which large numbers of people, and not just an educated, political, and economic elite, want a say in political and religious issues. The result has been increasing challenges to authoritarianism and fragmentation of authority. ZAMAN, The Ulama in Contemporary Islam: Custodians of Change: Custodians of Change ix. 2010.

On the other hand, in Rahemtulla's estimation, the fragmentation of ulama left room for jihadists and extremists. In fact, it is the other way around. Fragmentation would protect the disagreements and diversity of opinions—the celebrated principles of jurisprudence. These fragmented individuals as a whole would dismiss the unidirectional discourse adopted by extremists and jihadists. Disagreements may allow for untraditional opinions or unorthodox discourse as well as a dangerous and extreme rhetoric but within the free sphere that by its nature dismiss the direct politics that is central to jihadists' discourse. Moreover, the fragmentation protects from state control as well meaning provides legitimacy. Formalization of ulama and associating them with the state official institutions strip them from legitimacy, which leaves room for jihadists and extremists. Furthermore, going against the very nature of scholars does not fight extremism; rather, it helps extremists gain ground and *free* them to develop social networks that the official scholars lack. Rahemtulla, Reconceptualizing the contemporary Ulama: Al-Azhar, Lay Islam, and the Egyptian state in the late twentieth century 34. 2007.

To summarize my position here, there are four points. *First*, the madhabs are very loosely connected institutions that do not meet the criteria of guilds or corporate groups. The relationship of scholar to madhab is much looser still and is more imagined than it is formal. *Second,* though there have been more formal bodies in the past (meaning not madhabs but more formal institutions within particular geographic regions that constituted independent establishments), they have not encompassed all jurists nor do they explain the locus of juristic authority.[237] *Third,* and perhaps most importantly, all this casting about to describe juristic authority as either corporate group via madhab or via some other formal institution seems to presuppose a need to have such a formality and organization to exert political influence, and that is just wrong, as the next section shows. *Fourth*, different madhabs and schools never constituted a one comprehensive corporate group that qualified for representing the community as a whole.

3.1.3   The Dispersed Influence

The issue that occupies the debate of "corporate group" is whether the fractured Islamic jurists and scholars could constitute organized and formal institutions—either through "guilds" or "corporate groups" or through their affiliation to the *madhab* or other corporate, solidarity or pressure groups. Similar to the debate on "religious institution," the discussion of corporate group seems to have been premised on the idea that a corporate group is what assures the existence, leverage, and powerful sociopolitical influence of the community of jurists. Even when scholars agree with the existence of guilds, they tend to either point out the lack of overall

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[237] Tunisia appears to be an example when al-Fasi and others popularly acted without being affiliated to the establishment or its institutions. He was dismissed from al-Zitouna, he resumed his teaching in the mosque. KEDDIE, scholars, saints, and sufis: Muslim Religious Institutions in the Middle east since 1500 77. 1972.

corporate organization or the incapacity of the religious institutions to act as a concentrated group, thereby diluting their influence and rendering them largely marginal or irrelevant.[238]

What really seems to be missing from the argument is whether the overall comprehensive corporate group idea does any good to scholars as a community. Discussion on this is not completely absent in the literature, but it is comparatively rare.[239]

Arguments concerning corporate groups (or the lack thereof) as formal institutions should be turned on their heads because most of these arguments fail to recognize the very nature of ulama. The ulama's basic principle of disagreement among themselves preserves the dispersed authority they represent.[240] This is not to say that guilds or corporate groups of different sorts did not influence society, jurisprudence, or politics. However, it is important to turn the focus to a more salient but less studied feature of scholars and jurists: fragmentation. This feature highlights their strengths and their freedom more than references to institutions or specific groups does. As I discuss in the third section, this sphere of influence encompasses guild members and non-guild scholars, jurists related to the state and those acting outside of it. The most important aspect is that the ulama regardless of their loose or firm affiliation with formal or imagined schools act at some point as individuals who are responsible only to themselves.

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[238] HOEXTER, et al., The public sphere in Muslim societies 123. 2002.

[239] See the brief discussion of some of the positive side non-corporate nature of ulama, Zeghal, INTERNATIONAL JOURNAL OF MIDDLE EAST STUDIES, 372 (1999);EPHRAT, A Learned Society in a Period of Transition: The Sunni _ulama_ of Eleventh Century Baghdad 6. 2000;Rahemtulla, Reconceptualizing the contemporary Ulama: Al-Azhar, Lay Islam, and the Egyptian state in the late twentieth century 17. 2007.

[240] I will devote the last section of this chapter for the idea of independence amongst scholars. For the concept of disagreement (*khilaf*) see e. g., IBN TAYMIYYAH, RAF' AL-MALAM 'AN AL-'AEMMAH AL-'A'LAM 8-35 (The General Presidency of Scholarly Research and Ifta. 1992);ALJAWZEYYAH, I'lam Al-Muqe'een 40-205. 1991.

3.2 FORMATIONS OF THE SCHOLAR: THE ROLE OF ULAMA

The first section of this chapter draws attention to the manner in which scholars and jurists operated as an imagined institution rather than a formal religious one. It also showed how scholars retained influence despite the absence of any all encompassing association or corporate group. In this section, I will present the role and basic functions of the scholars and jurists.[241] The scholars' roles and modes range from being cooperative with the state, to semi-independent, to resistant and oppositional. Considering the traditional roles and formations of the scholar, I will address their responses to the many calls for change in their traditional roles and conclude with what should be continued and respected.

3.2.1 The Weapon of Speech

The depiction of Islamic scholars as having the "weapon of speech" is common in Islamic jurisprudence.[242] This image implies that their strength is not tangible or coercive like their political counterparts but rather moral and intellectual.[243]

In fact, this weapon of tongue and pen alike is often deemed in Islamic discourse to be more important than the influence of political actors themselves. When Abdul-Rahman al-Jabarti, an Egyptian scholar from the eighteenth century, classified the categories of Muslim society, he placed the scholars in the second ranking right after the prophets and before the rulers

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[241] It is not my intention to lay down all roles and functions of scholars and jurists nor to cover Islamic history but to focus on roles and modes related to the issue of their relationship to the state, constitutional order, or the ruler in a way that adds and helps our understanding of the issue.

[242] In his long biographies of the scholars, al-Dhahabi narrated a story about Ibn Hazim, a famous jurist from Andalusia, likening his tongue to the sword of al-Hajjaj, a bloody ruler in Islamic history. The comparison invokes the soft power of knowledge vis-à-vis the hard power of force and direct politics. SHAMS AL-DEEN AL-DHAHABI, SEAR A'LAM AL-NUBLA' 199 § 18 (Al-Risalah Publisher. 2001).

[243] See, HATINA, 'Ulama', politics, and the public sphere: an Egyptian perspective 209. 2010.

and kings.[244] With this ranking, it is no wonder that the ulama say the pen is mightier than the sword.[245] As a result of this intangible weapon, they enjoyed privileges and exercised influence on different aspects of society, in a manner that could be more influential than those of political actors. This is demonstrated by the fact that, despite their own considerable funds from endowments and schools, they were exempted from taxation.[246]

3.2.2   The Essential Functions

It goes without saying that the most basic and central function and role of scholars is to bear, carry and interpret the principles of Islamic law. To teach the rules and principles of Islam and to call upon society to act according to them are essential functions of ulama as well. As a result of these roles, they are often called to administer Islamic law as well, which itself then becomes an additional, fundamental role.[247] The types of roles and functions of ulama and jurists conform to their typical interactions with people because Islamic law itself is the texts interpreted within the circumstances and environment of a given society at a given time.

In addition to their basic functions, or perhaps because of them, scholars are seen as "guardians of faith," "protectors of the religion," or "bearers of Islam."[248] Although this is,

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[244] ABDUL-RAHMAN AL-JABARTI, 'AJA'IB AL-AATHAR 14-5 § 1 (Abdul-Raaheem Abdul-Raheem ed., Dar al-Kutub al-Arabiyyah. 1998).

[245] KEDDIE, scholars, saints, and sufis: Muslim Religious Institutions in the Middle east since 1500 150. 1972. In his book, *al-Fikr al-Usuli* (the Jurisprudential Thought), Abdul-Majeed al-Sagheer brilliantly and somewhat overly presented the literature and acts of ulama as a production of the persistent and continuous conflict between scholars and rulers, or may be between religion and politics. AL-SAGHEER, Al-Fikr Al-Asuli 7-19. 1994. However, I interpret the same struggle as continuous attempts of scholars to protect the sphere that maintains their freedom of debate and interpretations and, most of the time, not over direct power.

[246] KEDDIE, scholars, saints, and sufis: Muslim Religious Institutions in the Middle east since 1500 133. 1972.

[247] See, ALJAWZEYYAH, I'lam Al-Muqe'een. 1991. AL-BAGHDADI, Al-Faqeeh Wal Mutafaqqeh. 2007. See also, KEDDIE, scholars, saints, and sufis: Muslim Religious Institutions in the Middle east since 1500 33-152. 1972; FELDMAN, (2008).

[248] KEDDIE, scholars, saints, and sufis: Muslim Religious Institutions in the Middle east since 1500 115. 1972.

relatively speaking, true, they have these roles due to their sociopolitical influence more than because the exercise of any sort of direct power. From this perspective, scholars are the bearers of knowledge and jurisprudence, as well as the protectors of the faith and religion of the people and the nation, or the *ummah*.

Scholars are therefore the most vocal demonstration of the nation's fundamental religious duties.[249] As Hoexter indicates:

> From the early Islamic times, the *ummah* (nation), not the ruler
> was bearer and interpreter of the norm and basic values of the
> proper Islamic social order. The ruler was responsible for the
> implementation of the rules[250]

Within the nation, scholars are the group most associated with the work of defending and protecting the Islamic doctrine that defines it.

3.2.3   The Authority Holders

As indicated above, because Islamic law is a jurist's law, jurists carry the authority that sustains it.[251] Exercising the authority is not facilitated through controlling Islamic texts and traditions, but by controlling the taxes and endowments. In this sense, scholars are the legitimacy givers who, in turn, lean on people for credibility and support.[252] I put emphasis on the jurists' role regarding authority because, in a later section, it will be shown that locating this authority takes on a greater importance in the course of deciding the sphere in which the ulama work.

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[249] See, FELDMAN, 10-14 (2008).

[250] HOEXTER, et al., The public sphere in Muslim societies 123. 2002.

[251] Wael B Hallaq, *Juristic authority vs. state power: the legal crises of modern Islam*, 19 JOURNAL OF LAW AND RELIGION, 245-7 (2004).

[252] Id. at, 248;KEDDIE, scholars, saints, and sufis: Muslim Religious Institutions in the Middle east since 1500 308. 1972.

If we to apply the claim-versus-belief formula developed by Ricoeur as the first chapter showed,[253] the self-proclaimed authoritativeness of ulama can be examined in people's reaction and support of the meta-constitutional authority that I will further explain later. Throughout Islamic history, the mere existence of ulama's meta-constitutionalism indicates the belief and trust of people in this authority. The following pages will try to review the main political modes of ulama, and how meta-constitutionalism existed in different forms.

3.2.4   The Political Modes of Ulama

The literature on scholars and their political presence fluctuates reductively between portraying them as bureaucratic religious officials and mediators, or presenting them as mass leaders and prominent figures of opposition.[254] In fact, the political influence of scholars was quite significant, and can be divided into five main types, as discussed below. These are activism, mediation, consultation, counterbalance and withdrawal.

The analysis that presents scholars as government officials or state institutions as well as mediators and brokers between people and the state seems self-contradictory. Mediators are presumed not to be officially members of one party; otherwise, their mediation would be entirely compromised. Some scholars address this problem by describing different types or modes of scholars. They conclude that ulama are divided into two groups. One group is an official

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[253]Taylor, PAUL RICOEUR AND THE TASK OF POLITICAL PHILOSOPHY, 66-67 (2012);Ricoeur, 202-203 (1986). For Weber's original idea about the claims of authority, see, WEBER, On charisma and institution building 46-47. 1968.
[254] Researchers do this sometimes in a contradictory way. Many researchers swing back and forth between describing the role ulama played either as part of the government or as mediators and brokers between the government and people. See e.g., KEDDIE, scholars, saints, and sufis: Muslim Religious Institutions in the Middle east since 1500 150,153&165-172. 1972;HATINA, 'Ulama', politics, and the public sphere: an Egyptian perspective 58-74. 2010;EPHRAT, A Learned Society in a Period of Transition: The Sunni _ulama_ of Eleventh Century Baghdad 113. 2000;JACKSON, Islamic law and the state: the constitutional jurisprudence of Shihāb al-Dīn al-Qarāfī 170. 1996;HOEXTER, et al., The public sphere in Muslim societies 23. 2002.

religious institution with members and functionaries, while the other is less reliant on the state and serves as a mediatory class that is always suspicious of the state.[255] Still others summarize responses of scholars toward political events as either being in total opposition or as passive withdrawal.[256]

All of these accounts fall short of presenting other possible responses and fail to include other influential groups of scholars that were not considered due to the reductionist approach in defining and dealing with Muslim scholars. Because ulama by their very nature are a dispersed authority, we should look at them as belonging to diverse groups in society, whether they were peripheral, madhab jurists as corporate group or otherwise, official state ulama or others unaffiliated with any formal institution. Due to their authority working mainly in a sphere that is (or at least in an ideal sense is supposed to be) uncontrollable even if they happen to work in the bureaucracy, ulama *may* resort to their own sphere if they are to issue fatwas or to work generally *qua* a scholar or jurisconsult (mufti).

I will present examples, focusing specifically on Egypt, of different modes of political engagement in order to prove the existence of a wider space available for different types of jurists and scholars—a space where they mainly acted as scholars but with vastly different capacities.

3.2.5   Outside Bureaucracy: Religious Activism

One prominent mode of scholars in regard to politics is their activism outside state institutions, or sometimes against them. I avoid simplifying their activism as "opposition" because in many

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[255] KEDDIE, scholars, saints, and sufis: Muslim Religious Institutions in the Middle east since 1500 72-3. 1972.
[256] Id. at, 176.

cases it is not. Opposition in the contemporary state system means being able or *willing* to replace the government, or it may mean the competition over direct political power. Other understandings of opposition presume the operation of a coherent group, which leads back to the debate about whether the scholars as a whole are a corporate or pressure group.[257] In all these situations, scholars cannot be described as simply a form of opposition. Therefore, I use "activism," following Aziz Ahmed and others, to generally describe the scholars' actions outside the state's official sphere.[258] The illustrations here are just examples of the long and diverse activism of scholars. I present them to help demonstrate the role of ulama in politics as independent moral watchdogs. Rebellion, public pressure and protests are examples of the forms that scholastic activism could take.[259]

In his book about the relationship between ulama and rulers, Abdul-Aziz al-Badri presents countless cases and names of scholars in Islamic history that "stood" in front of the rulers and challenged the government, and thus, they paid a toll with persecution, pressure, imprisonment or even execution.[260]

In Egypt, the case of the scholar al-'izz bin Abdul-Salam (d. 1262) is a striking one. In Islamic history, he was given the title the "Sultan of the Ulama" in appreciation of his bold moves in addition to his scholastic books on jurisprudence and jurisprudential politics. He was imprisoned and persecuted because of his activism and outspokenness. When Ibn Abdul-Salam noticed the influence the slaves of the Sultan Ayyub gained, he became alarmed and tended to

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[257] For the meaning of "opposition" in the contemporary context see, Jean Blondel, *Political opposition in the contemporary world*, 32 GOVERNMENT AND OPPOSITION (1997).

[258] KEDDIE, scholars, saints, and sufis: Muslim Religious Institutions in the Middle east since 1500 257. 1972.

[259] See, Rahemtulla, Reconceptualizing the contemporary Ulama: Al-Azhar, Lay Islam, and the Egyptian state in the late twentieth century 17. 2007.

[260] ABDUL-AZIZ AL-BADRI, AL-ISLAM BAIN AL-ULAMA AND AL-HUKKAM 129-244 (al-Maktabah al'ilmayyah.).(Ironically, the author himself ended up to be another case of these inquisitions of scholars; he was executed by Ahmed al-Bakr's regime in Iraq in 1969).

invalidate the transactions they would make, which angered them. The slaves, who would become rulers later, complained and drove a wedge between the Sultan and Ibn Abdul-Salam. This led to an extreme confrontation with the ruler, as a result of which Ibn Abdul-Salam packed and started leaving Cairo with people and nobles following him. This forced the ruler and ruling elites into a position where they had to accept his authority and judgment and urge him to stay in order to stabilize society.[261] This example helps to demonstrate the power of the ulama when they choose the path of activism. Despite the fact that this scholar did not have a formal position or political office, he could influence politics through societal and popular pressure.

Activism could take many other forms as well. Scholars engaged in public affairs based on their understanding of the moral obligations and religious principles that they promoted. They pressured rulers as they did in the example of "Salat al-Raghaib" during the Ayyubid period (from the twelfth to the thirteenth centuries). Salat al-Raghaib is the prayer performed on the first Friday of the month of Rajab. The scholars opposed the general practice of this prayer on the grounds that it is an innovative religious practice. The ruler responded to their demands accordingly.[262] During the eleventh century, jurists gathered to protest against drinking wine, charging interest, and allowing prostitution. This protest is an important sign of the relationship between these protesting jurists and the state.[263]

However, scholars did not just protest or challenge orders that threatened their own morals or interests, but they took the lead in defending the interests of the general public. In 1794, in Egypt after the Mamluk, the rulers of Egypt, introduced taxes on goods, the scholars

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[261] ALI AL-SALLABI, AL-'IZZ BIN ABDUL-SALAM 65-6 (AL-Maktabah al-'asriyyah.).
[262] HOEXTER, et al., The public sphere in Muslim societies 49. 2002.
[263] EPHRAT, A Learned Society in a Period of Transition: The Sunni _ulama_ of Eleventh Century Baghdad 92. 2000.

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fiercely opposed taxation. They led a general strike against the ruler to stop tax exploitation and, in the end, the rulers negotiated with the ulama and the taxes were repealed.[264]

Another kind of activism, and one that could mark the climax of ulama's influence, was challenging the authority of existing rulers. They could morally, in the form of a fatwa, delegitimize one ruler in favor of another, as they did many times throughout history when they perceived the public interest better served by the challenger.[265] In this context, Umar Makram (d. 1822) is an important name. He graduated from al-Azhar and rose among the nobles and scholars of Egypt during the French colonization (1798-1801). The ulama, under the leadership of Umar Makram, organized a popular mobilization and recognized the challenger Muhammad Ali as the legitimate ruler of Egypt over the existing Wali. It was a moment when Egyptians chose their own government in 1807.[266] Not long after that, Umar Makram told Muhammad Ali himself that the people had the right to remove any unfit ruler.[267]

Scholars' activism of this sort has become particularly intense in the modern era, in the context of resisting colonization and occupation. The jurist Rawaq, dubbed "the Sheikh of the Blind", led the first opposition against the French in Egypt. Beyond Rawaq, the ulama, in general, orchestrated the resistance movement.[268]

The Urabi movement (1879-1882) was a popular mobilization that ended up fighting the British intervention in Egypt. The Urabi movement in Egypt was named after Ahmed Urabi, a popular soldier who decided to reject the unpopular policies of Taufeeq, the ruler of Egypt. Scholars proved to be a critical component of the movement he inspired.

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[264] HATINA, 'Ulama', politics, and the public sphere: an Egyptian perspective 24. 2010.
[265] KEDDIE, scholars, saints, and sufis: Muslim Religious Institutions in the Middle east since 1500 105-6. 1972.
[266] Id. at, 176.
[267] Id. at, 178.
[268] Id. at, 162-3.

It is worth noting that the Urabi movement attracted diverse scholars from "both sides of the aisle," from those described as conservatives like Illysh to those who were reformists like Muhammad Abduh.[269] Illysh, Mansour al-Adawi, al-Haddad, and Salim al-Bishri were among the ulama who contributed to the Urabi revolution.[270] In 1879, al-Bakri with his friends and other scholars issued the "National Charter" to request a constitutional monarchy in 1879, but Khedive challenged the move and sent al-Bakri into exile.[271] Later, a popular fatwa by ulama, signed by 10,000 people, delegitimized Taufeeq and called for a fight against the British occupation.[272] Despite the official position of the Grand Mufti of al-Azhar, the majority of professors and students joined the revolutionaries against the Khedive Taufeeq, the contested ruler of Egypt who was supported by the British.[273] Scholars who supported the Urabi movement paid an expensive toll as some were dismissed from al-Azhar, some were imprisoned like Illysh who was 80 years old, and others faced exile like Abduh.[274]

The Urabi movement inspired similar activism on the part of ulama in Morocco who opposed the monopoly of tobacco by the government of Hasan I (1873-1894) and who wanted to defend public interests against the alliance of big merchants and ruling elites. The scholars issued an opinion condemning the monopoly, which came as a shock to the King. The King addressed the issue and tried to calm the public.[275]

After the Urabi movement, al-Azhar participated in the 1919 revolt in Egypt. This revolution was led by Saad Zaghlul (d. 1927) who graduated from al-Azhar and was one of

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[269] HATINA, 'Ulama', politics, and the public sphere: an Egyptian perspective 39-44. 2010.

[270] Id. at, 35;KEDDIE, scholars, saints, and sufis: Muslim Religious Institutions in the Middle east since 1500 163-4. 1972.

[271] KEDDIE, scholars, saints, and sufis: Muslim Religious Institutions in the Middle east since 1500 164. 1972.

[272] HATINA, 'Ulama', politics, and the public sphere: an Egyptian perspective 55. 2010.

[273] Id. at, 70.

[274] Id. at, 76-82.

[275] KEDDIE, scholars, saints, and sufis: Muslim Religious Institutions in the Middle east since 1500 101. 1972.

Muhammad Abduh's disciples. The movement broke out against the British occupation of Egypt and demanded national independence. The revolutionaries frequently met in the homes of the scholars.[276] The movement was organized by the collective efforts of the national activists like Zaghlul and the other members of al-Wafd as a national delegation.[277] The ulama generally contributed to the independence of Egypt by signing a petition to Britain that Egypt should be free and independent.[278]

The Activism of scholars was a traditional way in which ulama sought to challenge the status quo, and one that they embraced. Another manner in which they engaged the state was in the role of mediators and peace brokers, as the next section shows.

3.2.6   Mediation Role

It could be said that because jurists never occupied an official political position for their religiosity, they continued for a long time to mediate on behalf of the people with the political authorities in the state in order to voice the needs and interests of the people.[279] Ephrat thinks that ulama served as mediators because of the "heterogeneous character of their socioeconomic background and networks, and their close ties with the urban populace…."[280]

An interesting aspect of the scholars' role as mediators is that it serves a dual function. The first is defending the public and people's interests against the ruler's exploitation and overstep, and the second is being in charge of calming people down from the ruler's side.

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[276] HATINA, 'Ulama', politics, and the public sphere: an Egyptian perspective 142-3. 2010.
[277] For more about the 1919 Revolution and the mobilization of Zaghlul and the Wafd, see, SELMA BOTMAN, EGYPT FROM INDEPENDENCE TO REVOLUTION, 1919-1952 25-55 (Syracuse University Press. 1991).
[278] HATINA, 'Ulama', politics, and the public sphere: an Egyptian perspective 143. 2010.
[279] HALLAQ, The impossible state: Islam, politics, and modernity's moral predicament 56. 2014;EPHRAT, A Learned Society in a Period of Transition: The Sunni _ulama_ of Eleventh Century Baghdad 13. 2000.
[280] HOEXTER, et al., The public sphere in Muslim societies 32. 2002.

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"Ulama served a communication tool between the ruler and the ruled for the ruler to manipulate the public."[281] A perfect example of this occurred during the Urabi Revolution when the Khedive Taufeeq singled out ulama as responsible for public order and for ensuring the obedience of the people while these ulama and others were carrying the people's demands to him.[282]

Even at times of occupation and colonization, some ulama tended to work with the de facto rulers so they carried on in their role of representing people but to the colonizing forces this time. During the French occupation in Egypt, some ulama represented the public before the French, while other ulama represented the public against the French. [283]

In order for ulama to resume their mediatory task, they need to be independent of the state's bureaucracy, as they cannot mediate if they work for one side and part (of the state); otherwise, they will lose the confidence of the public as faithful mediators.

3.2.7   The Consultation Role

One of the most famous judges (*qadis*) in Islamic history is the noted early Hanafi jurist Abu Yusuf (d. 798). His book about the land tax, *al-Kharaj*, is a jurisprudential hallmark. He started the book by saying, the "caliph instructed me to write a book for him to *study and act upon*."[284] The book, in other words, grew out of Abu Yusuf's role of consultant and enabled the Caliph to act upon the rules that Abu Yusuf set. The famous political jurisprudence theorist, al-Mawardi (d. 1058) is another example of a jurist who played the role of consultant when he wrote *al-Ahkam al-Shar'iyyah*, which has proved to be one of the hallmarks in political jurisprudence.

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[281] KEDDIE, scholars, saints, and sufis: Muslim Religious Institutions in the Middle east since 1500 53. 1972.

[282] HATINA, 'Ulama', politics, and the public sphere: an Egyptian perspective 53. 2010.

[283] KEDDIE, scholars, saints, and sufis: Muslim Religious Institutions in the Middle east since 1500 173. 1972.

[284] AL-QADI ABU YUSUF, AL-KHARAJ 3 (Dar al-Ma'rifah. 1979).(italics is mine, and translation is Nimrod Hurvitz') See, HOEXTER, et al., The public sphere in Muslim societies 20. 2002.

This work was prepared under the instruction of the ruler al-Qadir Billah (d. 1031) in order for him to "study and act upon" it.[285] Al-Juwaini (d. 1085),[286] and his student, al-Ghazali (d. 1111),[287] produced similar books to instruct future rulers on how to follow Islamic principles.

The custom of the ruler consulting scholars and scholars writing books or rulings of jurisprudence in response demonstrates how the consultation function worked between some scholars and rulers in Islamic history. The practice of consultation was not just a tradition established in the ulama's practice and literature, it was also a custom and principle on the rulers' part. Rulers like Nizam al-Mulk, a Seljuk ruler (d. 1092), advised rulers to consult learned scholars especially the experienced ones.[288] The objectives of scholars in their services as advisors were to maintain the cooperation and understanding of rulers, and thereby have influence in the implementation of Islamic principles that would in their judgment maximize the interests of the public while furthering their own longer-term interests and influence as well.[289]

With the Ottoman Empire in the sixteenth century, scholars and sultans reached an important level of cooperation and consultation where ulama who played a large part in bringing what one scholar regards as "a major achievement of the Empire, namely the endowment of Islamic law, in its *Hanafi* form."[290] This role of consultant continued even during the codification when the traditional role of scholars within the state was at stake. The ulama who justified the change and facilitated the codification feared that if the change was adopted without

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[285] AL-MAWARDI, Al-Ahkam Al-Sultanyyah 1. 1989.

[286] AL-JWAINI, Al-Ghyathi: Ghyath AlUmam fi Eltyath AlDhulam 1. 1980.

[287] ABU HAMID AL-GHAZALI, SIRR AL-'ALMEEN 1.(It is worth noting that this book's author is highly disputed whether was al-Ghazali or not).

[288] AL-MULK NIẒĀM & HUBERT DARKE, THE BOOK OF GOVERNMENT; OR, RULES FOR KINGS 95 (Yale University Press. 1960).Nizam al-Mulk says, "Holding consultations on affairs is a sign of sound judgment, high intelligence and foresight." See also, EPHRAT, A Learned Society in a Period of Transition: The Sunni _ulama_ of Eleventh Century Baghdad 63. 2000.

[289] KEDDIE, scholars, saints, and sufis: Muslim Religious Institutions in the Middle east since 1500 177. 1972.

[290] Id. at, 29.

their presence, it might have worsened their position as scholars. The attitude of some ulama to justify codification was, therefore, based on the fear that the entire process would take place without their input at all if they did not participate.[291] The effort in the end, however, delegitimized not just some of the scholars involved in the codification process but the state as well. The effort was seen as justifying late Ottoman tyranny and monopoly of power rather than as an effort to implement Islamic law.

Consultation worked in cases where the ulama consulted were associated in one way or another with the ruler, sultan, or government, such that the scholar acquired the confidence of the ruler. In the absence of such trust, it is unlikely that a jurist could have played this role effectively.

3.2.8   The Official Counterbalance

Despite partial subordination of ruler-friendly ulama to the people in power, these ulama are still able to function as an official counterbalance. According to Feldman, the compromise was that jurists offer legitimacy to the order as a realistic compromise for the acceptance of the status quo as a means of then exercising influence and using pressure to ensure Sharia compliance in society.[292] Feldman presents al-Ghazali and al-Mawardi as examples.[293] The move

> may be read, then, not as a scholarly concession to power, but as a
> brilliant maneuver that successfully preserved the law and the

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[291] Layish, DIE WELT DES ISLAMS, 89-101 (2004).

[292] FELDMAN, 50-1, 38-9 (2008).

[293] I do not agree with fact that al-Ghazali has a similar move to al-Mawardi because al-Ghazali's authorship of the book, *Sirr al-'almeen*, is really disputed and I believe it is not his. See, AL-DHAHABI, Sear A'lam al-Nubla' 19/328. 2001. In addition, this approach of being ruler-friendly does not fit the whole works and moves of al-Ghazali like his criticism of the association with sultans in his infamous book, ABU HAMID AL-GHAZALI, IHYA' 'ULUM AL-DEEN 66-8 § 1 (Kiriata Futra.).

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scholars in their constitutional position even after the caliphate had
failed in its assigned task of preserving orderly government.[294]

Samuel Eisenstadt described this relationship as a "tacit bargaining" that the *public* sphere is for

the public, and that ulama are always free to operate in this arena.[295] Ottoman ulama and modern

Islamic scholars in the official counterbalance mode use their pressure to fight what they see as

social and economic injustices.[296] Official Ottoman ulama could even issue rulings that

circumvented the Sultan's will and order.[297] When a university of sciences was open at the order

of the Sultan Abdulmecid II in 1870s, Sheikh al-Islam Hasan Fehmi Efendi saw it as a rival to

the traditional madrsa system so he issued a fatwa and campaigned against it and succeeded in

closing it.[298]

Because the rulers decided to engage ulama in their legitimation process, the rulers paid

the toll of bending to the wind created by ulama and the society they represented. In this mutual-

interest relationship, scholars developed their own jurisdiction and sphere and the state protected

its own domain. So, the dispute sometimes seems to be over "whose jurisdiction should govern?"

or "whose sphere is at stake?"

The role of scholars as a counterbalance is sometimes vague due to the fact that the

degree of "legitimacy" the ulama offer is often unclear and therefore perceived to be

unconditional. It seems that al-Mawardi and the others would occasionally offer a temporary de

facto solution to a political crisis by approving a ruler, but that solution could introduce a worse

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[294] FELDMAN, 39 (2008).

[295] HOEXTER, et al., The public sphere in Muslim societies 6&151. 2002. Compare the interesting analysis of Haider Hamoudi about different bargains that, sometimes, involved al-Najaf, religious institutions and scholars in the Iraqi constitutional context, HAIDER ALA HAMOUDI, NEGOTIATING IN CIVIL CONFLICT: CONSTITUTIONAL CONSTRUCTION AND IMPERFECT BARGAINING IN IRAQ 82,87,120,137-141 (University of Chicago Press. 2013).

[296] HATINA, 'Ulama', politics, and the public sphere: an Egyptian perspective 18-9. 2010. See, ZAMAN, The Ulama in Contemporary Islam: Custodians of Change: Custodians of Change 108. 2010.

[297] KEDDIE, scholars, saints, and sufis: Muslim Religious Institutions in the Middle east since 1500 33. 1972.

[298] Id. at, 41.

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crisis when it is later used to justify forever de facto rule. Moreover, the "compromise" that brings scholars under the umbrella of the government ends up stripping them from real influence including counterbalance, and costs them their own legitimacy in the eyes of the public whom they should represent.[299]

3.2.9 The Time of Withdrawal?

A salient phenomenon that repeatedly appears when ulama react to political developments is what some describe as "withdrawal." Interestingly, analysts' definitions of withdrawal differ dramatically from complete silence, to denial of participation in the discussion, to denial of participation in official governance.[300] In this section, I tend to revisit the analysis of withdrawal in light of the fact that scholars are characterized by fragmentation, and they each have their own space of influence.

Some analysts like Jackson and Hatina tend to describe ulama's response to politics as quietist. Quietism describes the wide range of methods that defer direct political questions or disputes over direct power to politicians or ruling elites that are directly involved in politics.[301] In this sense, quietism means abandoning (direct) politics in order scholars to devote the time and effort to the religious or jurisprudential work and debates.

Some analysts who present some ulama as quietists do not take into consideration the factor of whether these scholars are official, government-friendly ulama or non-official.

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[299] HATINA, 'Ulama', politics, and the public sphere: an Egyptian perspective 134. 2010.

[300] Compare the following materials, JACKSON, Islamic law and the state: the constitutional jurisprudence of Shihāb al-Dīn al-Qarāfī 70. 1996;KEDDIE, scholars, saints, and sufis: Muslim Religious Institutions in the Middle east since 1500 117. 1972;HATINA, 'Ulama', politics, and the public sphere: an Egyptian perspective 18&58-9. 2010.

[301] JACKSON, Islamic law and the state: the constitutional jurisprudence of Shihāb al-Dīn al-Qarāfī 70. 1996. HATINA, 'Ulama', politics, and the public sphere: an Egyptian perspective 18&58-9. 2010.

Quietism does certainly exist in scholarly response to politics, but the point here is that the scholars' quietism could be interpreted differently according to the locus that the scholar traditionally occupied.[302]

If the literature that speaks of withdrawal does not interpret this move by ulama as a quietist approach toward public discussion, it will describe it as a method of avoiding troubles and adopting a passive reaction toward the serious issues in society.[303] However, although passive withdrawal happens, most of what is described as "withdrawal" seems to be a part of the scholars' typical role of operating in their own sphere and refusing to give that up for direct political involvement. Unlike common conception of non-political moves as simply passive withdrawal, the non-political attitude of the ulama can be powerful due to the nature of their arena, networks and authority.

It could be part of the confusing analysis of withdrawal as quietism is that it presupposes the modern state's setting where real influence is primarily through direct politics and the state's institutions.[304] Because the analysis seems to reduce influence to the one of state institutions in the modern context, they assume the same setting when analyzing medieval Islamic scholars.

Sherman Jackson, for instance, notes that medieval Islamic jurists ignored the question of the proper substantive political authority and dealt with procedural validity instead.[305] He gives the example of Ibn Taymiyyah who "shifted the focus from the top to the bottom, people, and

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[302] As an example of the analysis that does not make this differentiation see, JACKSON, Islamic law and the state: the constitutional jurisprudence of Shihāb al-Dīn al-Qarāfī 70. 1996. Compare the Shiʿi Semi-Quietism and Quietism in Hamoudi's work, Haider Ala Hamoudi, *Between realism and resistance: Shiʿi Islam and the contemporary liberal state*, 11 JOURNAL OF ISLAMIC LAW AND CULTURE, 111-8 (2009).

[303] JACKSON, Islamic law and the state: the constitutional jurisprudence of Shihāb al-Dīn al-Qarāfī 70. 1996;KEDDIE, scholars, saints, and sufis: Muslim Religious Institutions in the Middle east since 1500 117. 1972;HATINA, 'Ulama', politics, and the public sphere: an Egyptian perspective 18&58-9. 2010.

[304] See, HALLAQ, The impossible state: Islam, politics, and modernity's moral predicament 50-7. 2014.

[305] JACKSON, Islamic law and the state: the constitutional jurisprudence of Shihāb al-Dīn al-Qarāfī XX. 1996.

their relationship to the divine law."[306] This was the shift from the issue "who should rule" to "how should they rule."[307] In studying al-Qarafi, Jackson points to the fact that "while Qarafi was conspicuously silent about the chaos and mayhem between the Ayyubids and the Mamluks, he finds time to address indiscretions that occur at a slighter lower level."[308]

With respect to al-Qarafi's method in constitutional debates, his approach emphasizes that, although Islamic law should govern some conflicts, these conflicts reside outside the ulama's own "jurisdiction." As a result, the ulama exercise restraint in regards to matters that might provoke political forces to invade matters normally within their arena. In addition, they developed a realist technique of "procedural validity" that has allowed them to serve people's and society's needs even when essential legitimacy of the state is at stake.

Therefore, when scholars exercise restraint from becoming involved in politics, this is not always passive withdrawal and quietism, but it could be to a means of protecting their legal domain, or protesting the current setting as well. The line between these positions is not always fixed, but it is important to analyze the motives of scholars by looking at their literature to include all these possible factors in the analysis.

Daniel Crecelius reads the ulama's refusal to rule during colonization as the typical submissive role of ulama to engage with government and direct decision-making.[309] This evaluation reduces the "active role" to being one that exists only by means of direct political governance and rule in the state as we know it today. In my opinion, the ulama's refusal to rule was a remarkably smart one because they resumed their typical role of representing people in

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[306] Id. at, XXii&70.
[307] Id. at, 71. It is worth comparing the analysis of Carl Popper of the modern democratic shift of political question from "who rule" to "how". KARL RAIMUND POPPER & GIANCARLO BOSETTI, THE LESSON OF THIS CENTURY: WITH TWO TALKS ON FREEDOM AND THE DEMOCRATIC STATE 9 (Psychology Press. 2000).
[308] JACKSON, Islamic law and the state: the constitutional jurisprudence of Shihāb al-Dīn al-Qarāfī XXii. 1996.
[309] KEDDIE, scholars, saints, and sufis: Muslim Religious Institutions in the Middle east since 1500 174-6. 1972.

refusing to participate in forces that occupied their land, culture and political life. Ulama stripped the system of the French of its legitimacy and retained the legitimacy for themselves by proving to be independent and uninterested in power. Ulama, actually, put the French in a difficult situation because the French needed someone local to rule so they (the French) could indirectly rule but ulama refused this deal.[310]

There may be some element of passive withdrawal and quietism on the part of some ulama in certain contexts. However, Jackson ignores the fact that ulama can protest by withdrawal, which is powerful in light of the tools of legitimacy that they have.

Thus, in the end, refusing to serve in politics is not merely withdrawal; it could also signal a powerful active reaction of protesting the status quo. In the case of scholars, it is even stronger when we know that the public could see their absence from the state as an attempt at delegitimization of the state. In addition, "withdrawal" could be a stand itself as it builds a space that is stronger and more attached to the people—an entirely different authority that the state does not control.[311] It is fair to suggest that the way and the kind of withdrawal must be analyzed to interpret this move.

In wars between two or more powers, scholars' refraining from engagement is not always withdrawal as some may suggest,[312] but rather a means of maintaining their role no matter which

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[310] Id. at, 174. It is fair to say that there are times and many cases of ulama's legitimizing absolute tyranny with no return for the public interests but this is mostly considered a corrupt move more than a typical pattern acceptable of ulama.

[311] This explains why the Saudi government, for example, takes popularity of "peripheral" ulama and jurists very seriously and may even imprison a popular scholar for being popular or prevent him from having regular learning circles. This is because this popularity builds a bigger space for a sphere that widens the scope of the influence of this out-of-the-state authority. In the course of building this authority, jurists could use an Islamic maxim of "multiplying the number of Muslims." By this, jurists mean that even those who are not dedicated to a specific moral Islamic task (not jurists or dedicated students) can come and listen. The exercise of multiplying the numbers of people surrounding the learning circle and ulama functions to build a social support in the space where these jurists reside and exercise their influence.

[312] HATINA, 'Ulama', politics, and the public sphere: an Egyptian perspective 24. 2010.

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wins. For example, in the war between Ottomans and Mamluks, the scholar Arusi argued that his goal was the welfare of Muslim subjects, not the victory of either the Ottomans or the Mamluk.[313]

When some scholars resort to their very locus to exercise influence, some commentators interpret this move as a kind of withdrawal. In explaining what some regard as a quietist approach, Hallaq hints at the separation of the legal and the political in medieval Islam.[314] It is actually more of a revealing feature of the locus that the jurists and scholars work in rather than passively accepting the status quo.

At any rate, whether withdrawal existed as much as some claim or not, this mode of withdrawal is one mode that scholars assume while they can and do assume other modes at other times. Sometimes, even when some ulama adopt one mode toward politics, other ulama adopt another mode. This is why, for example, we saw these different reactions toward one issue, one party, or government.

In the following section, I will discuss the issue of westernization that threatens the traditional role of scholars, and how they have reacted to it.

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[313] Id. at.
[314] Hallaq, JOURNAL OF LAW AND RELIGION, 251 (2004).

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3.3   THE MODERN MODE: IN THE COURSE OF "CHANGE": BETWEEN REFORM AND WESTERNIZATION

3.3.1   The Ulama and Legal Change

When we discuss the roles of scholars and how these roles have shaped their domain, the response to change is fundamental. It becomes even more important when we see that the change could enhance the functions of scholars, and could, on the other hand, marginalize their influence and role.

There are different approaches toward evaluating the importance of the role of scholars in the course of change in Muslim societies. One approach assumes that meaningful change comes from the westernized elites. Under this approach, scholars are not just less relevant but somehow a potential obstacle toward a useful change that an Islamic society might need.[315] Some authors complain that the orientalist scholarship on ulama portrays them as foreign, if not opposed, to change and reform and that the "premodern Islamic legal tradition is a highly rigid structure, defined in opposition to the social and political institutions of society."[316] Another approach interprets the response of scholars as dependent on their interests and social position rather than their values and public interests. Therefore, scholars could pose a threat or lend support

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[315] See, KEDDIE, scholars, saints, and sufis: Muslim Religious Institutions in the Middle east since 1500 136-9&145. 1972;HATINA, 'Ulama', politics, and the public sphere: an Egyptian perspective 33,83&138. 2010. Compare, KEDDIE, scholars, saints, and sufis: Muslim Religious Institutions in the Middle east since 1500 14. 1972.
[316] ZAMAN, The Ulama in Contemporary Islam: Custodians of Change: Custodians of Change 17. 2010.

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depending on how their interests as a group are protected.[317] A third approach tends to portray ulama as "custodians of change" as long as public interests and values are not at stake.[318]

This chapter takes the position that, although scholars vary and assume different modes, they maintain a very significant role in advocating for change that appeals to the public. If they cannot enhance the common good, they at least work to lessen the inevitable wrongs. They call for some change while they struggle against others.

In his book of the rules of jurisconsult and ifta', Ibn al-Qayyem (d. 1350), following a settled rule in Islamic jurisprudence, asserts that fatwas change according to the time, place, circumstances and customs.[319] This at least recognizes the possibilities of legal change. Other jurists have reached largely similar conclusions. Ibn Aabideen (d. 1836) authored a book that focuses on jurisprudential changes according to circumstances and environment.[320] Therefore, jurists respond to people of their time in order to reach the best implementation possible of Islamic law. This is why, for example, Ebussuud Efendi (d. 1574), one of the most important scholars in the sixteenth century, relaxed a fatwa on endowments in order to respond to people's needs.[321]

With the modernization of our culture, we find reservations from scholars not on the principle of change, but rather on certain kinds of change, change that jeopardizes the values of people or threatens to invade the very free channels between people and scholars. This kind of

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[317] See, KEDDIE, scholars, saints, and sufis: Muslim Religious Institutions in the Middle east since 1500 107&191. 1972.
[318] ZAMAN, The Ulama in Contemporary Islam: Custodians of Change: Custodians of Change 17-9. 2010. See, HATINA, 'Ulama', politics, and the public sphere: an Egyptian perspective 134. 2010;Rahemtulla, Reconceptualizing the contemporary Ulama: Al-Azhar, Lay Islam, and the Egyptian state in the late twentieth century 84. 2007.
[319] ALJAWZEYYAH, I'lam Al-Muqe'een 255 § 3 1991.
[320] IBN AABIDEEN, NASHR AL-'URF FI BINA' AL-AHKAM 'ALA AL-'URF 114-48 § 2 (Sayyed 'illysh.). See, ZAMAN, The Ulama in Contemporary Islam: Custodians of Change: Custodians of Change 19. 2010.
[321] HOEXTER, et al., The public sphere in Muslim societies 73. 2002.

change is commonly described as "westernization."[322] At the same time, scholars have embraced

changes that elevated the quality of living and allowed for free interaction between people and

scholars. "Some ulama did not encounter problems with dealings with modernity as they applied

to public interest rule."[323] Therefore, reforms that fulfilled the requirements of serving public

interest, the ulama would support and adopt, but those that stood against public interest, they

were committed to opposing.

Some debate revolves around whether certain aspects of modernization could be implicit

mechanisms of colonization. This applies to ways of living, dress code, languages, cultures, and

related matters. Thus, some scholars warned against Western-style brimmed hats, jackets, and

trousers[324] while others allowed them.[325] Similar reactions were narrated about fatwas against

coffee,[326] tea[327] and cigarettes[328] when they were attached to certain westernizing influences. The

fatwas and rulings were relaxed on these issues when the ulama began to consider other aspects

of those activities.

Yet scholars were not opposed to other changes. For example, while they initially

expressed reservations about the modern press because it was thought to have threatened the

sacred texts,[329] they started to embrace it once there arose the phenomenon of a "media mufti"

who could use modern press to disseminate Islamic messaging.[330] Their position seems to be

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[322] For example, Ulama of Morocco supported local reforms but opposed the Protectorate. Only reforms that attempted to limit the influence of ulama in Morocco attracted the opposition of scholars. KEDDIE, scholars, saints, and sufis: Muslim Religious Institutions in the Middle east since 1500 106-7. 1972.

[323] HATINA, 'Ulama', politics, and the public sphere: an Egyptian perspective 134. 2010.

[324] Id. at, 83-6.

[325] Id. at, 106.

[326] KEDDIE, scholars, saints, and sufis: Muslim Religious Institutions in the Middle east since 1500 288. 1972.

[327] Id. at, 116.

[328] Id. at, 288.

[329] HATINA, 'Ulama', politics, and the public sphere: an Egyptian perspective 33. 2010.

[330] See, Brinkley Messick, *Media muftis: Radio fatwas in Yemen*, ISLAMIC LEGAL INTERPRETATION: MUFTIS AND THEIR FATWAS, 310-20 (1996). See also, ZAMAN, The Ulama in Contemporary Islam: Custodians of Change: Custodians of Change 58. 2010.

that, while technology is a blessing, using it in religious matters should be done carefully to protect against the distorting of the message of Islam.[331] As Daniel Crecelius puts it: "The transformation of Islamic society under the impact of the modernization has been the major concern of scholars interested in the modern history of Islam."[332]

In understanding the modern ulama's responses to changes brought about by colonization and westernization, and the reasons for the strong opposition of the ulama to them, the Ottoman era "Tanzimat" reforms prove a particularly salient example. The Tanzimat represent a turning point in modern Muslim history when the Ottoman Empire adopted reforms that were broadly viewed as severely limiting the role of scholars. In reality, however, as the next section shows, the Tanzimat induced scholars to return to their original role and their traditional sphere— resorting to the people and operating in an independent and autonomous space. Between 1839 and 1876, the Sultans of the Ottoman Empire introduced a package of political, administrative, legal and social reforms known as the Tanzimat.[333] In this section, I will discuss these reforms and their aftermath in the Muslim and Arab world, with a particular focus on Egypt, to show how these reforms affected scholars and their role.

3.3.2 The Tanzimat and its Aftermath

After a long period during which the ulama enjoyed autonomy, the ulama were placed pursuant to the Tanzimat under the control of the Sultan when he introduced the office of chief mufti (Sheikh al-Islam). Religious activities then came under the control of the state appointed mufti.

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[331] HATINA, 'Ulama', politics, and the public sphere: an Egyptian perspective 138. 2010.
[332] KEDDIE, scholars, saints, and sufis: Muslim Religious Institutions in the Middle east since 1500 167. 1972.
[333] See, RICHARD L CHAMBERS, THE OTTOMAN ULEMA AND THE TANZIMAT 33-46 (1972).

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Sultan Mahmud II (d. 1839) further made a distinction between the affairs of the state and the affairs of the ulama, a step that was followed by subordinating the affairs of the ulama to those of the state.[334] The lesson of the Tanzimat is that these reforms jeopardized and actually infringed on scholars' autonomy, and the autonomy of people they represented. It was not surprising to see scholars opposing not only the Tanzimat themselves, but other changes as well that resembled the Tanzimat throughout the Muslim world.[335]

A notable response to the Tanzimat came from a conservative base of scholars. The stance of these ulama was depicted as a passive and indifferent response in that they saw these reforms as "worldly matters."[336] Again, as we saw from the analysis of "withdrawal," this stand can also be seen as an active one, building social authority away from state affairs.

The boldest moves of the Tanzimat involved the intervention of executive authorities in law making. Sultan Mahmud provided the concept of "*adalat*/justice" to be a resource of law along with Sharia and administrative ordinances, frequently referred to as *Kanun* (ordinances).[337] A new council was formed so that the secular elites could make laws instead of Islamic jurists. In 1855, mixed courts were introduced. Within a few years (1840-1858), the Panel and then Land Codes were promulgated as well.[338]

The culmination of these efforts was the creation of an Islamic Civil Code known as the Mejelle. Between 1869-76, a commission led by Ahmed Cevdet Pasha produced this massive 16-volume work, meant to be an Islamic equivalent of the Western Civil Code. The grand mufti

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[334] Id. at, 35-7.
[335] Id. at, 37.
[336] Id. at, 41.
[337] Id. at, 42. The "*adalat*" rule here resembles the English concept of "equity" with similar consequences. For the concept of equity in English and American law, see in general, Wesley Newcomb Hohfeld, *The Relations Between Equity and Law*, MICHIGAN LAW REVIEW (1913);RALPH ABRAHAM NEWMAN, EQUITY AND LAW: A COMPARATIVE STUDY (Oceana Publications. 1961).
[338] CHAMBERS, The Ottoman ulema and the Tanzimat 42-4. 1972.

firmly opposed this move, arguing that deciding Islamic law should be deferred to his office not a secular committee. Nonetheless, the official scholars did not oppose the Tanzimat in the hope that they could serve in the legal process.[339] By the end of Tanzimat period, ulama did not actually lend legitimacy to the state but slowly and gradually stripped themselves, and perhaps the state, of legitimacy by subordinating religious institutions to the government. One commentator describes the attempts of reform during the Tanzimat to be "on the right track until the removal of effective law-making scholars to the advantage of the codes."[340]

The experience of Tanzimat inspired the "reformist" ruler in Egypt Muhammad Ali, and the year 1872 marked the beginning of modernization for ulama and for al-Azhar. The impact of "modernization" in Egypt led to centralizing the government and threatening people's values. Muhammad Ali did not challenge ulama in their religious institutions but, rather, he created another order that existed alongside and gradually changed the locus of focus and influence. It is not surprising that modernization for ulama meant a retreat not just from political influence but also from social prominence. Although neglected during later period of Muhammad Ali's rule, ulama still played an active role, however, through blocking some reformative projects. All major "reforms" proposed by Muhammad Ali were undermined by the absolute refusal of the ulama and students to support them. They even used space that was allowed by the reform to block further reforms.[341] Daniel Crecelius rightly notes that, although sheikhs and students truly desired reforms, each reform proposed was associated with government interference, and thus they were committed to opposing those proposed by Muhammad Ali.[342]

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[339] Id. at, 44.
[340] FELDMAN, 7 (2008).
[341] KEDDIE, scholars, saints, and sufis: Muslim Religious Institutions in the Middle east since 1500 183-204. 1972.
[342] Id. at, 204.

To conclude, ulama could be guardians of change, but only to the extent that such change does not threaten their principles and public interests as they view them. If they did see the change as threatening, as in the case of "Westernization," they would not hesitate to fight it vigorously.

In this section, I presented the different roles and modes of scholars to reemphasize the different forms of engagement that scholars can assume. These were all possible because they transcend the traditional rigid positioning of religious institutions in the modern state. Ulama appeal to people and form their positions according to what they think are the best interests of the public, as well as the tradition they carry and seek to protect. This leads to the discussion of the next section, which is a discussion of the meta-constitutional sphere in which the jurists operate.

3.4   THE META-CONSTITUTIONAL SPHERE OF RELIGIOUS INSTITUTIONS AND SCHOLARS

Having examined the meaning of "religious institutions" in the Islamic context in the first section, and having explored the roles of these institutions and scholars in the second section lead us to the central issue: what is the arena that the role that religious institutions can fulfill in the setting of today's Muslim state and society taking into consideration the inspiring setting of scholars in their past and literature? I argue that scholars and religious institutions occupy a sphere that I describe as "meta-constitutional" where they preexist the constitutional setting and survive its upheavals, and, because they do not possess the official power of a state institution, they act independently and out of the state's control and dictation. I will revisit traditional

narrative of scholars in order to prove that my proposal fits the traditional setting of scholars in history and literature.

The following subsections will explain this idea by starting with proposals about the role scholars play or the sphere they occupy. The next six subsections defend the proposal of a meta-constitutional sphere and rationalize its features according to the self-presentation of scholars and to the literature on the issue. The final two subsections will shed light on the role of crisis in shaping our understanding of this sphere, ending with the Inquisition, the story of Ibn Hanbal's persecution, as an example.

3.4.1   Public Sphere

In analyzing the arena of jurists and scholars in Islamic history, some academics suggest that the concept of public sphere could provide an explanation for the nature of Muslim scholars' involvement and works.[343] The interesting point is that the works and debates of jurists are described as neither private nor official, emphasizing the fact that ulama are not part of state institutions or bureaucracy, but are nonetheless part of public and not private affairs.

To discuss the public sphere in Islamic history, it is important to revisit the idea of "oriental despotism" that appears in discussing politics in medieval Islam. The idea by definition dismisses the wide influence and existence of spheres outside the Sultan or the ruler's tight grip.

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[343] HATINA, 'Ulama', politics, and the public sphere: an Egyptian perspective 10-11. 2010. For the discussions on the concept "public sphere" in general see, Jürgen Habermas, et al., *The public sphere: an encyclopedia article (1964)*, NEW GERMAN CRITIQUE, 50 (1974).(Habermas says that the concept arose for the first time in the eighteenth century);JÜRGEN HABERMAS, THE STRUCTURAL TRANSFORMATION OF THE PUBLIC SPHERE: AN INQUIRY INTO A CATEGORY OF BOURGEOIS SOCIETY 33 (MIT press. 1991);Shmuel N. Eisenstadt & Wolfgang Schluchter, *Introduction: Paths to Early Modernities: A Comparative View*, 127 DAEDALUS, 10 (1998).(The authors describe the public sphere as a place that is not private nor official, a place of voice rather than loyalty).

So, a discussion of the public sphere in Islamic history basically questions the dominant presupposition of oriental despotism in analyzing medieval Islam.

The assumption that the Islamic political context is part of oriental despotism is examined by recent studies and seems to be very general if not totally inaccurate.[344] In asserting the early existence of the public sphere, these studies deny the conception that the political situation in Islamic history was completely controlled by the government.[345]

On the other hand, because jurists portray themselves in fluid and dispersed ways as we saw previously, they cannot be simply described as "civil society *institutions*." This is because the word "institutions" would suggest more focus on the corporate nature that the ulama, in fact, lacked.[346] In addition, some suggest that civil society institutions exist when society is structured with institutions that took place outside the state's tutelage, which is not the case with the scholars' actions.[347]

Some researchers try to approach the existence of the public sphere and the contribution of jurists by studying the different forms of legal interaction of scholars with the society. Rightly, while Hatina compares the jurists' arena to the press in the modern state,[348] Hoexter takes the public discussions held in Islamic history as evidence of the early existence of the public sphere.[349] These researchers take the work of the fatwa as proof of this public sphere to the extent that fatwas could be considered as "popular literature".[350]

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[344] HOEXTER, et al., The public sphere in Muslim societies 119. 2002.

[345] HATINA, 'Ulama', politics, and the public sphere: an Egyptian perspective 11. 2010;HOEXTER, et al., The public sphere in Muslim societies 3. 2002.

[346] See, HOEXTER, et al., The public sphere in Muslim societies 140-2. 2002. Compare, Casanova, SOCIAL RESEARCH, 1051 (2001). About the idea of civil society institutions in general see, JEAN L COHEN & ANDREW ARATO, CIVIL SOCIETY AND POLITICAL THEORY 29-83 (Mit Press. 1994).

[347] HOEXTER, et al., The public sphere in Muslim societies 83. 2002.

[348] HATINA, 'Ulama', politics, and the public sphere: an Egyptian perspective 11. 2010.

[349] HOEXTER, et al., The public sphere in Muslim societies 3. 2002.

[350] HATINA, 'Ulama', politics, and the public sphere: an Egyptian perspective 97-8. 2010.

The idea of the public sphere rightly portrays the works and debates of the jurists as a "sphere." Describing it as a "public sphere", however, disregards the essential nature of their debate and popular authority. The nature of the sphere and authority of the jurists is not just "public," and because of this, I argue against applying the concept of public sphere to Islamic legal discussions. Jurisprudential works and fatwas, for example, are not just "public debates;" they form a unique relationship with people that can be private as well as public, political or non-political, and what is considered traditionally "religious" in the modern secular sense or not. These elements constitute the meta-constitutional sphere that although it is a "sphere" and can be held in "public," its operation can be popularly decisive and more authoritative than the "public sphere" due to its the nature and structural appeal to values.[351] Moreover, the public sphere describes an arena that jurists share with public activists while jurists, in fact, have a more profound appeal to society to the extent that their positions could affect the course of a Muslim state. Another proposal will be the issue of the next subsection.

3.4.2 The Proposal of a "Fourth Branch"

In locating jurists in Muslim society historically, some, as we previously saw, employ the already developed concept of civil society institutions, while others employ something closer to the spirit of scholars and jurists who are dispersed and focus on the sphere rather than the institutions. Here, I discuss another proposal in regard to the scholars' role and locus in the modern world in order to reach the idea of meta-constitutional sphere that I propose.

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[351] I'm not saying that public sphere does not appeal to values, but it is not structurally built around values unlike the jurists' sphere.

According to Intisar Rabb, jurists function as the "Fourth Branch."[352] Her work on the subject is more focused on Shi'ism with its history and approach toward jurists. In the case of An-Najaf, as an example of the Shi'i school, there is what can be called a stiff or firm authority "*marji'yyah*," as opposed to the flexible or dispersed authority that is generally seen in the Sunni case as we discussed earlier.[353] Aside from this difference, Rabb's proposal of the Fourth Branch is interesting. She presents jurists, the historical interpreters of Islamic law, as the Fourth Branch of traditional government's three branches. She points out that jurists can play a "formal institutional role" which diverges from the modern liberal democratic project of "We the People" to promote the traditional Islamic legal norms of "We the Jurists".[354] Nonetheless, she warns, "the Fourth Branch does not suggest a formal branch of government. Rather, the reference is to a non-government entity that influences the constitutionally defined legislative, executive, and judicial branches" like the role of the press in the United States.[355]

My reservation on the Fourth Branch proposal is that it again shifts the focus from the free-floating space that typifies the scholars in Sunni thought, to "institutionalized" authority. As we saw earlier, Sunni scholars did not "fail" to constitute a hierarchy, or overall institution; rather, they always intended not to establish such an institution, as this would undermine their literature and established practice. Moreover, the label "branch" in Rabb's proposal reflects a setting that is suggested by the modern state's arrangement more than the literature of the jurists

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[352] Rabb, UNIVERSITY OF PENNSYLVANIA JOURNAL OF CONSTITUTIONAL LAW, 1 (2008).

[353] On this issue of authority in Shia and Sunni schools, see in general, CHIBLI MALLAT, THE RENEWAL OF ISLAMIC LAW: MUHAMMAD BAQER AS-SADR, NAJAF AND THE SHI'I INTERNATIONAL 28-59 § 29 (Cambridge University Press. 2003);WAEL B HALLAQ, AUTHORITY, CONTINUITY AND CHANGE IN ISLAMIC LAW 24-57 (Cambridge University Press. 2001);KEDDIE, scholars, saints, and sufis: Muslim Religious Institutions in the Middle east since 1500 211-231. 1972.

[354] Rabb, UNIVERSITY OF PENNSYLVANIA JOURNAL OF CONSTITUTIONAL LAW, 2 (2008).

[355] Id. at, 21.

themselves. The proposal would look at the jurists as an "outside" setting that does not reflect their own thought and paradigm.

Although I will explain my reservation, it would make more sense if we compare the scholars to the Fourth Estate, instead of Rabb's Fourth Branch. [356] Unlike the European (specifically British) Estates of realm in the Middle Ages that produced clergy as the first estate, the medieval Islamic world had different sets of estates but never produced clergy like Europe.[357] Therefore, if we were to compare the domain of scholars and religious institutions in the medieval and even contemporary Islamic world to one of the estates of the realm known in medieval Europe, then it would be the latter introduced the Fourth Estate, which was primarily a description of the unofficial power of the press.[358] Similarly, religious leaders and scholars were described as unofficial, unrecognized, and non-governmental.[359] Jurists play within the unofficial, sometimes unrecognized and unconscious, sphere of the society influencing political power through their meta-constitutional power.[360] However, religious institutions and scholars in the medieval Islamic mind were not the First Estate in politics and cannot now be described as the Fourth since the first (which was supposed to be clergy) is no longer a political force. Moreover, the scholars are distinguished by their structural attachment to the popular values, which makes their space more than a press-like arena. In any event, Muslim scholars cannot be an estate or a branch due to their anti-institutionalizing nature. Although the press in many cases is not an institution, it does not seem to have this resistance to the institutionalization per se.

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[356] The Estates of the realm that formed the other three estates were sociopolitical production of the European premodern hierarchy of the society. In these estates, the first was clergy, the second was nobility, and third is commoners. See generally, De Tocqueville, The Old Regime and The Revolution, trans. John Bonner 126. 1856.
[357] Brown, THE MUSLIM APPROACH TO POLITICS. NEW YORK, 32 (2000).
[358] Compare, Rabb, UNIVERSITY OF PENNSYLVANIA JOURNAL OF CONSTITUTIONAL LAW, 10 (2008).
[359] Compare, ORAHAN JANIWLAT, QWANEEN AL-DAWLAH AL-'UTHMANYYAH 121-87 (The International Institute of Islamic Thought 2012).
[360] For the conscious versus unconscious, and reflective versus reflexive, see LAKOFF, The political mind: why you can't understand 21st-century politics with an 18th-century brain 9-15. 2008.

Therefore, with these characteristics and elements of scholars in mind, I propose that the sphere both precedes the constitutional arrangement and falls short of attaining an official or politically binding power or authority.

In the next section, I will argue and defend my proposal of the meta-constitutionalism.

3.4.3 Why Meta-Constitutional Sphere?

This meta-constitutional sphere emphasizes that there is no binding authority like a state institution, but the scholars can define and redefine cultural vocabulary in its own sphere. In the end, this cultural vocabulary affects the state and the constitutional setting. So, it is not a political apparatus but rather a spirit that runs through people's minds as culture does. Because ulama traditionally tend to play the role of representing society and its values through rulings and "advisory opinions," they would give up their popular advisory role if they became a part of the state. Interestingly, their "advisory opinions" are not usually presented solely to political institutions or government branches but mostly to society as a whole.[361]

Religious discourse was and is addressed to people as a whole, and it contributes and affects politics by people in society not by religious institutions as a political body. This is the reason why it runs through the free meta-constitutional sphere and not as a government branch, a social estate, or an official institution.

It is "meta-constitutional" to imply that the sphere is not established by constitutional power, does not need official recognition of its existence,[362] and does not have direct

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[361] About the "advisory" nature of the fatwas see, KEDDIE, scholars, saints, and sufis: Muslim Religious Institutions in the Middle east since 1500 49. 1972.

[362] A good example is the story of the scholar al-Fasi when the Bey, the ruler of Tunisia then, dismissed him from the academic college of al-Zitouna in Tunisia. In response to this, al-Fasi said the "Bey may dismiss me from al-Zitouna but he cannot do that to me from teaching in the mosque". Id. at, 77.

constitutional power. It preexists constitutions in a way that any possible constitutional structure would definitely need support from the residents of this sphere in order for this structure to take place and the sphere as a whole is more important to the people than a constitution. Because of these conditions, it may even get affected in negative way if it is integrated into the official sphere.[363] Another aspect of meta-constitutionality is that the sphere survives constitutional crises because it can never be part of a direct constitutional structure. This explains why the scholars acquired more importance during crises and did not collapse as state institutions did. To illustrate the long-term survival of scholars, mufti Muhammad Rafi' Uthmani, the president of Dar al-Ulum of Karachi (an Islamic *madrasa*), considered this Islamic institution a safe haven from crises and upheavals. The sheikh said, "[t]his is a secure fortress. There might be curfew imposed outside, there might be strikes and riots out there. But one doesn't even get to know about it here in the Dar al-'Ulum, until one reads in the next day's papers that there was a riot next door."[364]

In this sphere, ulama exist to determine the norms that govern their sphere and build their networks and bonds according to their own standards as long as the rulings and fatwas they render are not constitutionally binding. Nonetheless, these non-binding rulings and debates can be socially very powerful to such an extent that the state needs to take them into consideration.[365] According to one observation, even after secularizing some Muslim states, ulama "continued to make their presence through the masses."[366] Through speaking to the public, the jurists

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[363] See, EPHRAT, A Learned Society in a Period of Transition: The Sunni _ulama_ of Eleventh Century Baghdad 44. 2000.

[364] ZAMAN, The Ulama in Contemporary Islam: Custodians of Change: Custodians of Change 87. 2010.

[365] HOEXTER, et al., The public sphere in Muslim societies 11-3. 2002.

[366] KEDDIE, scholars, saints, and sufis: Muslim Religious Institutions in the Middle east since 1500 46. 1972.

profoundly influence the daily life of the average Muslim, which makes up the arena that the jurists find themselves in.[367]

Different works attempt to locate jurists' arena in Muslim society. I reviewed these proposals and concluded suggesting the meta-constitutional sphere as a location for ulama. In the following subsection I will locate the authority of the jurists to further defend this theme.

3.4.4   The Locus of Authority

In the section about the roles of scholars, one role discussed was that of authority holders in the sense that they administer some religious matters by rendering rulings about them. This subsection attempts to locate this authority.

The jurists' task of articulating what could be considered law is a force that falls within the meta-constitutional sphere. In this sphere, ulama claim to have authority that goes beyond state control but at the same time, refuse to control or establish a state or semi-state power.[368] Islamic law is acquired not by the state but informally by way of social recognition and then by an individual's authorization. This "process takes place totally outside of the apparatus of the state."[369]

The law that Muslim jurists articulate is a body of rulings, jurisprudence, and texts along with their interpretations. Despite being law, it is established and developed in the meta-constitutional sphere, away from the political sphere within which modern states promulgate their laws. So, it is possible to say that in Muslim society there can be two sets of laws, one

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[367] Id. at, 51.
[368] See, JACKSON, Islamic law and the state: the constitutional jurisprudence of Shihāb al-Dīn al-Qarāfī 114. 1996.
[369] Id. at, XV.

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where its authority is located outside the political sphere but powerfully affects it—this is Islamic law, while the other is a politically-binding law in its sphere and enforced by the state apparatuses. Sherman Jackson studies the differentiation that al-Qarafi made between the "*fatwa*" and "*hukm*". The difference seems to resemble the differentiation here between the effect of the two laws.[370] According to al-Qarafi, the fatwa is non-binding while *hukm* is binding.[371] Otherwise stated, for purposes of this dissertation, the *fatwa* is a ruling in the meta-constitutional sphere while *hokum* is a ruling in the political sphere that runs through the state apparatuses and promulgated as official decision. The meta-constitutional could be the arena that one describes in Muslim society as the "parallel Islamic sector,"[372] the same arena that another describes as the "ulama's sphere."[373]

In order for the political law to be stable, socially legitimate, or even to work, it needs to conform to a part of the former, the Islamic law as the scholars articulate it.[374] In Hallaq's account, in traditional Islamic history, "it was rare for a judge to disregard a fatwa unless it is for a higher ranking scholar."[375] It is important to consider the mechanism as to how this came to be.

One possibility lies in the example of Roman law when the jurist's opinion was not binding until the Empire incorporated it into civil law and licensed it. However, Muslim jurists can articulate laws in the meta-constitutional sphere that addresses society and individuals without need for the state to authorize it.[376] The Roman process of licensing an opinion has two

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[370] Id. at, 145.

[371] Id. at, 173.

[372] CARRIE ROSEFSKY WICKHAM, MOBILIZING ISLAM: RELIGION, ACTIVISM AND POLITICAL CHANGE IN EGYPT 97 (Columbia University Press. 2002). See, ZAMAN, The Ulama in Contemporary Islam: Custodians of Change: Custodians of Change 148. 2010.

[373] ZAMAN, The Ulama in Contemporary Islam: Custodians of Change: Custodians of Change 87. 2010.

[374] See, Hallaq, JOURNAL OF LAW AND RELIGION, 243 (2004).

[375] HALLAQ, The impossible state: Islam, politics, and modernity's moral predicament 54. 2014.

[376] See, FELDMAN, 22 (2008);HALLAQ, The impossible state: Islam, politics, and modernity's moral predicament 57. 2014. Hallaq asserts that in typical Islamic thought, a mufti is responsible to the society not to the ruler and his interests. Id. at, 53.

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aspects: one is self-licensed and addresses individuals; the other is the state's license. In Islamic law, the state does not have the exclusive authority to determine what is law and what is not because the locus of authority in Islamic law is outside the sphere of the state.

The Islamic system instead traditionally recognizes a set of rules developed by Muslim scholars outside the state's control, though these rules do not have the same effect as the law promulgated by the state. Islamic law developed by the jurists and jurisconsults leans on the individual Muslim's discretion to apply it to his, or her life while the political law of the state is enforced by its ability to coercively implement it. However, in the eye of Muslim society, the law prescribed by the scholars can be more authoritative and reliable, which puts a burden on the state to conform to the principles of this law.[377] This picture of authority and its locus shows how the authority of scholars resides outside the state's offices and operates through people and the nation. It is self-rendered, self-licensed, and self-recognized but through its own channels and networks that work through its relationship to Muslim society.

It is almost impossible to monopolize and manipulate an arena that defers its authority to resources for which the *Ummah* (Islamic nation), represented by its scholars as a whole, is responsible. The attempts by states to control this authority through institutionalizing religious groups and jurists have not worked. These attempts do nothing more than push the religious society to produce alternatives beyond state control as it always does. In so doing, the society gives these alternatives more credibility and then shakes the status quo and complicates it instead of stabilizing it. Ulama, in general, are more exposed to non-state knowledge, and derive their

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[377] JACKSON, Islamic law and the state: the constitutional jurisprudence of Shihāb al-Dīn al-Qarāfī XV. 1996;Hallaq, JOURNAL OF LAW AND RELIGION, 243-4 (2004). See, ZAMAN, The Ulama in Contemporary Islam: Custodians of Change: Custodians of Change 86. 2010.

authority from resources that are absolutely beyond the state and its capacity, so they are able to develop their own networks.

Therefore, even if state officials control religious institutions, ulama can emerge out of society beyond these institutions and have a more authoritative weight, which jeopardizes the relationship between religion and state in a way these ulama can be more popular and develop a more hostile discourse to the state and its system altogether. This is why attempts to control religious authority are counterproductive whenever attempted.[378] On the other hand, the fears of possible extreme discourses can be addressed by pointing out that this space is free of force and coercion, and is open in a fashion that corrects itself with the check of the people and their role.

Having located the authority in the meta-constitutional sphere, the following two subsections will present two distinguished characteristics of this sphere. One is its anti-monolithic feature and the other is the informality of the sphere.

3.4.5 The Anti-Monolithic Quality

In the Islamic context, there is no one jurist, individual, or group that should or could represent religion or exercise monopoly on its interpretation.[379] In practice "Ulama have historically been far from being monolithic"[380] and the Islamic "*madrasas* [were] far from being monopolized…."[381]

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[378] See, EPHRAT, A Learned Society in a Period of Transition: The Sunni _ulama_ of Eleventh Century Baghdad 6-8. 2000.

[379] Id. at, 8;Rahemtulla, Reconceptualizing the contemporary Ulama: Al-Azhar, Lay Islam, and the Egyptian state in the late twentieth century 13. 2007.

[380] Rahemtulla, Reconceptualizing the contemporary Ulama: Al-Azhar, Lay Islam, and the Egyptian state in the late twentieth century 13. 2007.

[381] EPHRAT, A Learned Society in a Period of Transition: The Sunni _ulama_ of Eleventh Century Baghdad 8. 2000.

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Jurists in the metaconstitutional sphere are representatives of the people not of religion. They may act out of religious principles, but they do so for the people, not claiming or representing absolute religious truth. What needs to be emphasized here is the idea that Islamic jurisprudence is non-monopolistic by nature, and because of this, taking the course of monopolizing religious discourse cannot control the interpretation of Islamic texts and jurisprudence.

The anti-monolithic quality of meta-constitutionalism means that entitling *only* specific institution or institutions to interpretation is at odds with the typical understanding and features of scholars as interpreters. However, meta-constitutionalism provides a free space that dismisses monopoly by nature of its free space and anti-monolithic operation.

After a long time of adopting official madras and institutions, Islamic learning and jurisprudence continued in learning circles (*halaqas*) outside the state framework.[382] The lesson here is that having different "official institutions" or "official *madrasas*" does not prevent the fluidity of the Islamic authority to work mainly in the metaconstitutional sphere where it has always worked and finds itself today.

3.4.6   The Informal Nature of Meta-Constitutional Sphere (the Resistance to Institutionalization)

The feature of informality seems to be a central feature of the Muslim understanding of Islamic law, at least in the Sunni experience. This feature keeps religion from being completely monopolized by one group, state or body. The fact that ulama traditionally resist the

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[382] Id. at.

comprehensive project of institutionalization is not a modern response to the call for reforms or "Westernization"; it is actually a genuine characteristic of Muslim scholars. They are blessed with this informality just as they are with a non-corporate nature. Both are essential qualities of the meta-constitutional sphere they maintain. To emphasize the role of informality is not to deny the existence of formal learning and semi-hierarchal schools in Islamic history, but to focus on the quality that distinguishes the kind of Muslim learning that helps establish the meta-constitutional sphere.

This process took place informally by social recognition and reputation, and then by individual's authorization.[383] Historians acknowledge the fact that comprehensive institutionalization has not occurred in Islamic history.[384] What they have missed is that institutionalization neither happened, or never succeeded, due to the authentic feature of informality in Islamic jurisprudence. This informality is not a way to resist the existence of institutions themselves but to resist the overall institutionalization that usually paves the way for a state's control over the work of jurisprudence.

The centrality of the mosque in Islamic history is an example of the informality of meta-constitutionalism. The activities are informal in the way that they are essentially attached to the uncontrollable mosques (houses of Allah), thus, are not institutionally organized.[385] The centrality of the mosques is derived from the notion that the house of Allah is not just for prayer; it is to deal with all different aspects of life.[386] The call for prayer itself is used, for instance, as a

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[383] JACKSON, Islamic law and the state: the constitutional jurisprudence of Shihāb al-Dīn al-Qarāfī XV. 1996.
[384] EPHRAT, A Learned Society in a Period of Transition: The Sunni _ulama_ of Eleventh Century Baghdad 6. 2000.
[385] The Quran is clear that the only owner of mosques is Allah, "And the places of worship are only for Allah, so pray not unto anyone along with Allah." (Quran 72:18)(translation is M. M. Pickthall's). See also, KEDDIE, scholars, saints, and sufis: Muslim Religious Institutions in the Middle east since 1500 33. 1972.
[386] EPHRAT, A Learned Society in a Period of Transition: The Sunni _ulama_ of Eleventh Century Baghdad 7. 2000.

battle cry for wars just as it is for prayer.[387] One important aspect of the mosque is the education and jurisprudence that take place in it today and throughout Islamic history.

According to some commentators, Islamic education has remained, for the most part, informal and associated with individuals instead of institutions.[388] The vital individualistic nature of Islamic learning can be seen in a phenomenon developed by the scholars that helped to facilitate it. Scholars care about their teachers and masters more than about their institutions, and this is evidenced by the fact they rarely make any mention of an institution. Students' attention evolves around the teacher who then forms a learning circle (*halaqah*) in which they administer the learning process.[389] Companionship (*suhbah*) is highly valued as an effective method in this informal learning. The admission process of this informal learning is absent and there are no requirements for "applications" if anything can even be called as such.[390] The selection of scholars teaching in learning circles and informal *madrasa* is informal as well in the sense that it operates through the mechanism of social reputation and through an individual's recommendations.[391] As it is today, the "journey of knowledge" in medieval Islam was never structured, standardized, or stationary.[392] The importance of studying under sheiks builds into the

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[387] John Esposito analyzes the call for prayer as a wedding conviction between politics and Islam, *Allahu Akbar*! (God is Most Great). This declaration precedes the *muezzin*'s call to prayer five times daily; it is the traditional Islamic battle cry. *Allahu Akbar*! Summarizes the centrality of God and the wedding of personal religious conviction and political life in Islam. The source and foundation of all life is Allah (God)—the One and All Powerful, Creator and Sustainer and Master of the Universe, the Merciful and Compassionate, but also the Just Judge who will reward and punish all His creatures in the Last Day JOHN L ESPOSITO, ISLAM AND POLITICS (Syracuse University Press. 1998).

[388] A. L. Tibawi, *Origin and Character of "al-madrasah"*, 25 BULLETIN OF THE SCHOOL OF ORIENTAL AND AFRICAN STUDIES, UNIVERSITY OF LONDON, 230-2 (1962);EPHRAT, A Learned Society in a Period of Transition: The Sunni _ulama_ of Eleventh Century Baghdad 8. 2000. Compare, MAKDISI, The Rise of Colleges. Institutions of Learning in Islam and the West 9. 1981.

[389] EPHRAT, A Learned Society in a Period of Transition: The Sunni _ulama_ of Eleventh Century Baghdad 59&75-8. 2000.

[390] Id. at, 80-102.

[391] KEDDIE, scholars, saints, and sufis: Muslim Religious Institutions in the Middle east since 1500 147. 1972.

[392] Rahemtulla, Reconceptualizing the contemporary Ulama: Al-Azhar, Lay Islam, and the Egyptian state in the late twentieth century 20. 2007.

individuality feature of learning, which overlaps with the lack of comprehensive corporatehood discussed earlier.[393] After all, the "*madrasa* was but a glorified *halaqah*".[394]

While Hoexter notes that informality characterizes the pre-eighteenth century,[395] there is evidence this informality extends to the centuries after that.[396] Some think that it is just a feature of medieval times and that modern Islamic thought should assume the more formal features of its Western counterparts. In fact, it is this feature of informality that seems to be a fundamental feature of the Muslim understanding of studying religion—a quality that preserves religion from being used or monopolized by one group, state or body. This free-floating authority is what always succeeded in achieving two goals: one is ensuring the non-theocratic nature of Islamic authority (a civil demand), and the other is to protect Islam from being distorted or misinterpreted (a religious demand).[397]Informality in the latter is a way to protect the principles while in the former it helps keep scholars away from coercive power.

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[393] See, EPHRAT, A Learned Society in a Period of Transition: The Sunni _ulama_ of Eleventh Century Baghdad 68-70. 2000.

[394] Id. at, 78. On the other hand, Hallaq appraises today's Sharia as "institutionally defunct." HALLAQ, The impossible state: Islam, politics, and modernity's moral predicament 13. 2014. However, I think Sharia was never meant to place its functionality solely in the hand of institutions he refers to, thus, we do not have to worry about it at this point. Moreover, the meta-constitutional sphere should allow for the proliferation of scholars, jurists, and institutions that can operate outside the state's control and administration. These Islamic institutions are in charge of religious and moral references that can powerfully affect the state through social networking and relations. However, these same institutions are powerless in terms of the direct political involvement. In the end, Sharia was never meant to be institutionalized.

[395] HOEXTER, et al., The public sphere in Muslim societies 134. 2002.

[396] KEDDIE, scholars, saints, and sufis: Muslim Religious Institutions in the Middle east since 1500 17. 1972;Rahemtulla, Reconceptualizing the contemporary Ulama: Al-Azhar, Lay Islam, and the Egyptian state in the late twentieth century 20-2. 2007.

[397] See, HATINA, 'Ulama', politics, and the public sphere: an Egyptian perspective 2-3. 2010;HOEXTER, et al., The public sphere in Muslim societies 4. 2002. There is always a concern that a free space may allow for extreme discourse, and make it difficult to dismiss it as unIslamic. However, the free space dismisses the very basic extremist argument that fighting extremism is the work of state's puppets that lack credibility. Moreover, dismissing freedom of space out of fear of terrorists' exploiting it seems like dismissing freedom of speech out of the same fear.

3.4.7   Ulama of Crisis

A striking feature of Muslim scholars is that, while they do not just remain a popular force during crises and upheavals, they tend to play a more important role during extraordinary times. This role and phenomenon just asserts the quality of their operation as a work beyond the constitutional arrangement. Scholars do not collapse as political or constitutional systems do, but instead grow in importance at such times. This is due to the scholars' nature, their relationship to society, and to their ever-lasting meta-constitutional sphere.

Muslim scholars' authority precedes political arrangements because it is established by principles and values that the public observes and follows. Preexisting morals and rules are by and large shaped by the scholars and their interaction with the people and texts.[398] It is, then, fairly common to see the popular values that are typically represented by ulama prevail during times of tension or even mayhem, as it seems that their responsibility grows as much as problems do. Crises like invasions, conflicts, civil wars, and transitions remind us of the importance of jurists and their relationship to people. This could also explain the nature of scholarly "retreat" from politics at times when an issue is merely and purely political.[399]

Despite the jurisprudential differences, "[d]uring clashes and near anarchy, jurists were determined to maintain a unified Islamic community by blurring the lines between their intellectual traditions."[400] This saved shared values from being jeopardized. At the same time, this attitude introduced scholars as having the basic quality needed in order to be brokers, mediators, and peacemakers between rivals or between ruler and the ruled.[401]

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[398] See in general, TAYLOR, Modern social imaginaries 52. 2004.
[399] KEDDIE, scholars, saints, and sufis: Muslim Religious Institutions in the Middle east since 1500 121. 1972.
[400] EPHRAT, A Learned Society in a Period of Transition: The Sunni _ulama_ of Eleventh Century Baghdad 4. 2000.
[401] HATINA, 'Ulama', politics, and the public sphere: an Egyptian perspective 159. 2010.

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Ulama acquired a more active role in politics during the wars between the Ottomans and Mamluk due to the fact that both sides wanted to align with the scholars to appeal to the public and their morals. Nonetheless, the scholars' role fell short of exercising direct involvement and, at times, they reinforced their position of neutrality and mediation.[402] This active role grew even more pronounced with the onset of colonization. Hence, the status of the scholars was essential after the Hispano-Moroccan war when ulama burst on the scene as a powerful political and social force.[403] During the foreign influence and occupation, ulama took the lead and inspired the public as they did in Morocco in regards to the French influence.[404] During and after the French occupation of Egypt (1798-1801), the ulama rose as popular representatives. One commentator described this phase as the "golden age of the ulama."[405]

The role of Ulama seems to increase dramatically with crises because they reside in a sphere that is not political but, nevertheless, all political forces seek their support. While political players seek support from these meta-constitutionalists, society, in its turn, resorts to them to guard its interests and values. The following section will look at the example of Inquisition.

3.4.8 The Meta-Constitutional Sphere (the Case of Inquisition "*Mihna*")

In this subsection, a famous case in Islamic history about the relationship between the ruler and the jurists can explain the fight over the sphere that seemed meta-constitutional for the jurists but not for the ruler. This alarmed the ulama, represented by Ibn Hanbal, and caused them to fight for their own sphere and protect the domain that essentially carries and interprets Sharia. The

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[402] Id. at, 24.
[403] KEDDIE, scholars, saints, and sufis: Muslim Religious Institutions in the Middle east since 1500 98-9. 1972.
[404] Id. at, 121.
[405] Id. at, 173.

case of Inquisition tells the story of always-persisting domain of ulama. It explains why modern ulama are always inspired by Ibn Hanbal's boldness and steadfastness to do whatever it takes to protect their meta-constitutionalism.

The basic facts of the Inquisition are that al-Mamun, an Abbasid caliph (d. 833), with the help of some Mu'tazili[406] *qadi*s officially adopted the notion that the Quran was created by God. By this move, the caliph diverged from the mainstream theological understanding that the Quran was an eternal attribute of God revealed and brought down at the time of the Prophet Muhammad. The caliph decided that he would force the jurists to approve his belief. Al-Mamun's decision led to the Inquisition that introduced Ahmed bin Hanbal as the theological voice of dissent who, for the cause, paid a steep price in loss of freedom and corporal punishment. The Inquisition lasted a long time and involved two caliphs after al-Mamun.[407]

The analysis of the Inquisition is beyond the scope of this dissertation but the case of the Inquisition helps us understand the meta-constitutional sphere. As far as our issue of the social and political dimensions of the Inquisition is concerned, I can deduce three approaches to understanding the dispute.

At first glance, the events could be seen as a conflict between the political and the religious. This analysis tends to portray the Inquisition as a dispute over power and presence—a

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[406] The Mu'tazili school is presented as the Islamic rationalists in the medieval Islam or the defenders of reason, see, GEORGE FADLO HOURANI, ISLAMIC RATIONALISM: THE ETHICS OF 'ABD AL-JABBĀR 1-17 (Oxford University Press. 1971);RICHARD C MARTIN, et al., DEFENDERS OF REASON IN ISLAM: MU'TAZILISM FROM MEDIEVAL SCHOOL TO MODERN SYMBOL 10 (Oneworld Publications Limited. 1997).

[407] For more about Ahmed bin Hanbal and the Inquisition (Mihna), see, Fahmi Jadan, Al-Mihna: bahth fi jadaliyat al-dini wa al-siyasi fi al-islam (The Ordeal: a study of the dialect between religion and politics in Islam) 135-233 (Amman: Dar al-shuruq li al-nashr wa al-tawzi 1989);MUHAMMED 'ABID AL-JABRI, AL-MUTHAQQAFUN FI AL-HADHARAH AL-'ARABYYAH 65-110 (Center for Arab Unity Studies. 1995). CHRISTOPHER MELCHERT, AHMAD IBN HANBAL 38 (Oneworld. 2006);HOEXTER, et al., The public sphere in Muslim societies 17-29. 2002.

political conflict that used theological debates to cover them.[408] The second approach interprets the Inquisition as a dispute between two sets of scholars. One commentator describes it as a struggle between "philosophical theology" and "juridical theology."[409] Someone who adopts this approach finds that the Inquisition was an attempt by the Caliph and his allies within the ulama to use power to adopt an official version of Islamic theology. This then provoked a fierce defense from the residents of the public sphere that the jurists and Ibn Hanbal occupied against such outside intervention.[410]

The third approach, and the best way to understand the debate, is that, despite the theological nature of the conflict, the conflict was not merely between two sets of ulama but between two different spheres. The crisis arose when the political sphere decided to infringe on the other sphere using the scholars of the political realm.[411] It is not a clash between two groups competing for power but rather a struggle in which one sphere was fighting for its independence and the other sought to dominate it. The meta-constitutional sphere that works as a free space for scholars to conduct their debates and develop their jurisprudence outside the control and manipulation of the political was threatened. As a result, the scholars that Ibn Hanbal represented were alarmed, so they acted to protect Sharia and its rulings by preventing political intervention. This move worked perfectly and a lesson was learned for centuries to come. Then, the modern tale of the scholars toward the state's infringement of the scholars' own domain is not a fight between statesmen and "clergy" nor is it between the profane and the sacred or merely between

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[408] Jadan and al-Jabri are examples. See, Jadan, Al-Mihna: bahth fi jadaliyat al-dini wa al-siyasi fi al-islam (The Ordeal: a study of the dialect between religion and politics in Islam) 363-448. 1989;AL-JABRI, Al-Muthaqqafun Fi al-hadharah al-'arabyyah 97-107. 1995.

[409] MAKDISI, The Rise of Colleges. Institutions of Learning in Islam and the West 6. 1981.

[410] HOEXTER, et al., The public sphere in Muslim societies 3&19. 2002.

[411] While Horvitz considers himself as closer to the second approach of analyzing the issue as a conflict between two sets of ulama, he inspired my proposal by hinting to the idea that the conflict involves the religious domain that the caliph infringed. Id. at, 27.

two political rivalries.[412] Rather, it is probably a struggle of the scholars to protect their meta-constitutional sphere as they always do.

3.4.9   The Domain of the Political

Explaining how the meta-constitutional sphere works, especially in the case of the Inquisition, brings us to the issue of the scope of this sphere. In this section, I argue that the issue of enforcement and execution of the law go beyond the scope of this sphere.

One historian notes that from 1190-1350 the religiously active Damascus witnessed innumerable religious and theological disputes none of which saw the ruler step in. However, the ruler did intervene if public peace and security was seriously threatened.[413] The medieval political mechanism in Islamic history was never to articulate a doctrine or establish a jurisprudence but would interfere only to protect society from public disturbances or to prevent the supporters of schools and madhabs from using force or turning the theological and jurisprudential conflicts into violent ones.[414]

In the time of Muhammad Ali, scholars ceased participating directly in the government.[415] Later, they refused to choose a leader to rule among themselves despite the lack of an alternative.[416] Nikki Keddie asserts that Sunni ulama may occasionally decide to depose rulers legally, but "they never acquired an independent [political] power."[417] This is evidence of

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[412] Compare, Jadan, Al-Mihna: bahth fi jadaliyat al-dini wa al-siyasi fi al-islam (The Ordeal: a study of the dialect between religion and politics in Islam) 135-233. 1989;AL-JABRI, Al-Muthaqqafun Fi al-hadharah al-'arabyyah 65-110. 1995;AL-SAGHEER, Al-Fikr Al-Asuli 125. 1994.
[413] MICHAEL CHAMBERLAIN, KNOWLEDGE AND SOCIAL PRACTICE IN MEDIEVAL DAMASCUS, 1190-1350 167-172 (Cambridge University Press. 2002). See, HOEXTER, et al., The public sphere in Muslim societies 50. 2002.
[414] HOEXTER, et al., The public sphere in Muslim societies 4,13-4&42. 2002.
[415] KEDDIE, scholars, saints, and sufis: Muslim Religious Institutions in the Middle east since 1500 163. 1972.
[416] Id. at, 176.
[417] Id. at, 212.

why the ulama do not just fit better in the meta-constitutional sphere but also why they typically do what they do and why they refuse to go beyond.

It seems that the jurists refuse to be a part of the government because they know that rulers and political leaders can collapse and be substituted—a situation that does not align itself well with the position that jurists and scholars want for Islamic law and its role.

To conclude, the meta-constitutional sphere from its very early existence was never an executive or coercive power. It relegated the implementation of the rules and laws agreed upon with the body in charge whether it was the ruler, the political or the executive power, as we know it today.

In this section, I attempted to present the proposal of the meta-constitutional sphere that conforms to the traditions of the scholars and is possible in today's society. The following and final section is devoted to the concept of autonomy among ulama.

3.5 AUTONOMY, NOT POWER

In the previous three sections, I situated the religious institutions in the Islamic context focusing on their metaphorical meaning. Then, I discussed the roles of the scholars and those "religious institutions," emphasizing their positions as non-bureaucratic groups and individuals. The third section introduced the idea of the meta-constitutional sphere as a normative and descriptive locus of authority and operations of the scholars and jurists in modern times. In this fourth and final section of this chapter, I consider the concept of the autonomy of the scholars, asserting its importance in the scholarly context if the scholars' metaconstitutional role is to be maintained

and concluding that the autonomy that they seek is by no means a quest for power in the political sense.

This section thus first focuses on the notion of autonomy among scholars, then turns to the ulama's inherited practice in said autonomy. Then, the following subsections deal with the autonomy of schools and their economic independence. The case of al-Azhar in Egypt explains why autonomy matters. The final point made in this section is discussed in the "not power" subsection and stresses the necessity of the power-free feature in the meta-constitutional sphere that allows ulama to work freely and autonomously.

3.5.1   Traditional Literature Against Dependence on Rulers

The famous Islamic jurist Al-Suyuti (d. 1505) authored an inclusive book that can be translated as "*Narrations from Prophets and his Followers Warning Against Coming to the Sultan's Court and Place.*" In this book, Al-Suyuti cited about forty narrations of the prophet warning against the practice of coming to the ruler or being associated with the power.[418] One authenticated narration reads, "Whoever comes to the door of the sultan will be tempted, and the closer someone gets to the sultan, the farther he gets from Allah."[419] A number of sayings attributed to the prophet warn against *ulama al-sultan* (the government's scholars).[420] One saying asserts, "the most hateful in the sight of Allah are the [Quran] reciters who visit the rulers"; another describes the scholars who visit the rulers as "thieves."[421] This narration values the scholars but makes an important exception for scholars who "mix with the sultans" describing them as "betraying the

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[418] AL-SUYUTI, Ma Rawah Al-Asateen Fi 'adam Al-Majee' li Al-Salateen 19-38. 1991. These narrations may vary in their authentication and some prove to be stronger than the others in their authority.
[419] Id. at, 24.(translation is mine)
[420] Id. at, 23-32.
[421] Id. at, 25.

Prophets."[422] There are another sixty narrations that are attributed to the prophet's companions and followers denouncing similar associations with the rulers.[423]

After citing countless narrations and stories advising against *ulama al-su'* (the scholars of evil), al-Ghazali divides scholars into three types according to their relation to the rulers: those who come to the sultans, those whom the sultans come to, and those who distance themselves from the sultans altogether. He classified the first as "scholars of evil," the second as "less evil," and the third are the safest.[424]

Interestingly, in his book devoted to uncovering the tricks of the Devil, Ibn al-Jawzi (d. 1201) considered going to the rulers, even for "good reasons," as a trick of the Devil because establishing this type of relationship with the rulers would jeopardize the piety, honesty, and neutrality of the scholar.[425] Although Al-Subki (d. 1369), in his turn, followed this tradition and spent pages warning against mixing with the rulers, he allowed it only to "correct the wrong, to defend the right, or to denounce injustice".[426]

Scholars who were associated with governments are historically criticized, while those who were independent are praised for living up to principles.[427] Even when rulers received ulama in their assemblies to show respect for the scholars and be patrons of their scholarships, ulama were strongly discouraged from participating in such visits.[428]

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[422] Id. at, 29.

[423] Id. at, 39-59.

[424] AL-GHAZALI, Ihya' 'Ulum al-Deen 66-8. See, AL-SUYUTI, Ma Rawah Al-Asateen Fi 'adam Al-Majee' li Al-Salateen 58. 1991. See, EPHRAT, A Learned Society in a Period of Transition: The Sunni _ulama_ of Eleventh Century Baghdad 134-5. 2000.

[425] ABU AL-FARAJ ABD AL-RAHMAN IBN AL-JAWZI, TALBEES IBLEES 121-2 (Ibn Khaldun.). See, MAKDISI, The Rise of Colleges. Institutions of Learning in Islam and the West 40. 1981.

[426] TAJ AL-DEEN AL-SUBKI, MU'EED AL-NI'AM 67-77 (Dar al-Kitab al-'Arabi 1st ed. 1948). See, MAKDISI, The Rise of Colleges. Institutions of Learning in Islam and the West 43. 1981.

[427] KEDDIE, scholars, saints, and sufis: Muslim Religious Institutions in the Middle east since 1500 30&154. 1972.

[428] EPHRAT, A Learned Society in a Period of Transition: The Sunni _ulama_ of Eleventh Century Baghdad 113&139. 2000.

In conclusion, jurists avoided what was historically portrayed as "the sultan's court or assembly", *Balaṭ al-Sulṭan*, where the ruler sits, runs the state, and decides its matters. This avoidance was able to keep the autonomy of these jurists away from the ruler's dominance.[429]

3.5.2 Islamic Institutions Paradigm

There is not only a collection of theoretical literature against religious dependence but this was also a long-standing actual practice of the ulama. The majority of scholars followed the tradition of not being associated with the political by distancing themselves from power.[430] Independence does not mean that there was not pressure from the state or officials; it just meant they had autonomy to conduct their scholarly works and juristic debates away from the state's control.[431]

Some commentators observed that some jurists could be considered part of the state but only in the sense that they produce the law that somehow governs the polity even though they never worked in a state apparatus.[432] This blessing of not being affiliated with the state is considered a curse in the eye of Kenneth Brown who sees the ulama's remarkable characteristic of not occupying an official position a failure and a passive nature toward real and direct politics.[433] On the other hand, Leon Brown attributes the tendencies of independence among some ulama in Tunisia to their native Arabic-speaking culture as a way to resist non-Arabian influence.[434] However, both analyses overlook the long traditional role scholars played as

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[429] See, AL-SUYUTI, Ma Rawah Al-Asateen Fi 'adam Al-Majee' li Al-Salateen 23-5. 1991. See. HOEXTER, et al., The public sphere in Muslim societies 36. 2002.

[430] HOEXTER, et al., The public sphere in Muslim societies 36. 2002.

[431] JACKSON, Islamic law and the state: the constitutional jurisprudence of Shihāb al-Dīn al-Qarāfī 142. 1996.

[432] Id. at, 69.

[433] Kenneth Brown, *Profile of a Nineteenth-Century Moroccan Scholar*, *in* SCHOLARS, SAINTS, AND SUFIS: MUSLIM RELIGIOUS INSTITUTIONS IN THE MIDDLE EAST SINCE 1500 146, (Nikki R Keddie ed. 1972).

[434] Leon Carl Brown, *The Religious Establishment in Husainid Tunisia*, see id. at 73, (

separate independent groups. This independence is what presents Islamic law as a structure established and developed outside the political control.[435]

According to Hallaq, state intervention in medieval Islamic society is the exception, not the rule.[436] Unlike the European nation-state setting, Islamic governance "remained largely aloof from the affairs of society."[437] The autonomy of the jurists marks the cornerstone of this society although autonomy was not interpreted the same by all ulama and depended on their assessments of the conditions and "public interests." For example, some ulama would tolerate relationships with the state to some degree while others were keen to warn against any kind of communication with it.[438]

Scholars always narrate with pride the stories of fellow scholars standing against a ruler's overstepping.[439] Some tell stories of a scholar refusing to kiss a ruler's hand, take a gift, or rise for the ruler's entrance. The continuous denial of association with the rulers is told with a sense of honor that distinguishes the scholars as independent and free.[440]

3.5.3   The Ability to Dissent: The Independence of Mufti

When we speak of the independence of ulama and muftis, we are referring to the fact that they do not have to protest against government or be part of dissenting groups in order to be qualified as independent. Rather, their ability to dissent and their way of showing their capability is,

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[435] Hallaq, JOURNAL OF LAW AND RELIGION, 250 (2004).
[436] HALLAQ, The impossible state: Islam, politics, and modernity's moral predicament 50. 2014.
[437] Hallaq, JOURNAL OF LAW AND RELIGION, (2004).
[438] HOEXTER, et al., The public sphere in Muslim societies 26. 2002.
[439] Id. at, 35.
[440] KEDDIE, scholars, saints, and sufis: Muslim Religious Institutions in the Middle east since 1500 78-9. 1972.

sometimes, enough for sustaining independence especially within the space the jurists occupy and protect.

In order for an individual to be a mufti, he or she needed to have the required knowledge and acquired the qualities for *ijtihad*. This knowledge was provided by a privately endowed system of education which makes the jurists indebted to none but to their own education and principles.[441] Consequently, muftis acted outside the government and its control.

In the eleventh to the thirteenth centuries, there were jurisprudential works on politics by al-Mawardi (d. 1058), Abu Ya'la (d. 1065), and Ibn Juma'ah (d. 1241). Jackson labels these three jurists as "establishment ulama" who worked in the government to legitimize the state.[442] These jurists and others are examples of the phenomenon that happens regularly in Islamic history where ulama served in government but not *qua* ulama. Although against the paradigm, this did not prevent the establishment of an even wider space outside the government for these jurists to work along with other ulama outside of state influence entirely, in a meta-constitutional sphere, where they debated issues of an Islamic nature.

The autonomy of the jurists was a matter that was always contested by political authorities. Tireless attempts of the rulers to control jurisprudence never stopped. Between the years 1150 to1260, the ruling elite in Syria heavily contributed to supporting public institutions. This facilitated more influence on the institutions but never marked a transformation toward politically controlled jurists thanks to the leverage the scholars had on the rules and jurisprudential principles. Unlike Talmon-Heller who sees rulers' contribution in establishing schools as a transition toward controlled institutions, the ruling elite's having institutions named

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[441] MAKDISI, The Rise of Colleges. Institutions of Learning in Islam and the West 197-9. 1981.
[442] JACKSON, Islamic law and the state: the constitutional jurisprudence of Shihāb al-Dīn al-Qarāfī 70. 1996. Compare with Feldman's work when he analyzes the Ghazali and Mawardi moves as a juristic maneuver in order to maintain the rule of Sharia, FELDMAN, 38 (2008).

after them and their contribution to the support of these institutions were not enough to constitute dominant governmental control of these institutions.[443]

Another aspect of the political attempts to control jurisprudence was the appointment of the post of mufti from the thirteenth century onward, but this did not mark a transition toward the dominance of state-affiliated religious establishments. Before that, there was, actually, no such thing as a "mufti post," for example.[444] Even when the first post of mufti was introduced in Damascus with the creation of Dar al-'adl, or the House of Justice, in the fourteenth century, the move was trivial and left no traces in Syria.[445] This appointment had not been that significant in the issue of ulama's independence because the whole separate sphere of religious and juristic debates was still dominant and paradigmatic. The Seljuks were active in founding schools that trained scholars and officials.[446] Later, the post of mufti was adopted by the Ottoman state.[447] Between 1570-1622, nine of the ten muftis of Istanbul taught in official schools and *madrasas*, and received a salary in return. Judges in the sixteenth to the eighteenth centuries were then raised and trained in learning schools adopted by the state.[448] Still, jurists retained an important measure of autonomy throughout this period despite the rise in state involvement in juristic activities.

The turning point was during the nineteenth century Tanzimat, when the chief mufti, *Sheikh al-Islam* (in Turkish, *Seyhulislam*) became part of the state and its bureaucracy. At the point, there then existed the official ulama that were appointed by the state or at least appointed

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[443] HOEXTER, et al., The public sphere in Muslim societies 49-64. 2002.

[444] EPHRAT, A Learned Society in a Period of Transition: The Sunni _ulama_ of Eleventh Century Baghdad 112. 2000.

[445] MAKDISI, The Rise of Colleges. Institutions of Learning in Islam and the West 199. 1981.

[446] EPHRAT, A Learned Society in a Period of Transition: The Sunni _ulama_ of Eleventh Century Baghdad 112-3. 2000.

[447] MAKDISI, The Rise of Colleges. Institutions of Learning in Islam and the West 199. 1981.

[448] KEDDIE, scholars, saints, and sufis: Muslim Religious Institutions in the Middle east since 1500 20-2. 1972.

to act as a part of it. Those ulama that accepted the deal of the government justified their positions by the claim that they were trying to bring about Islamic achievements. In response to this implied bargaining, they were harshly criticized for their softness toward the sultans and the state.[449] According to one researcher, the relationship between the rulers and this kind of ulama was a "patron-client relationship."[450] While rulers showed respect and recognition toward these scholars, the scholars provided legitimacy and cooperation. This arrangement maintained harmony between the state and these particular scholars. The official ulama in Libya, Egypt, Tunisia and Algeria had similar roles and shared a similar mentality.[451]

This phenomenon of official ulama raises concern that Islamic law fell into the hands of the state instead of independent jurists. Notwithstanding their official nature, even these ulama that were incorporated in the political sphere tried, sometimes, to act on social and religious issues independent from the political sphere.[452] The idea here is that even official ulama could serve in the meta-constitutional sphere as scholars rather than officials. In any event, having official ulama does not prevent the community of scholars from producing other factions that are never official, and at times, more popular.

The phenomenon of official ulama leaves them being less legitimate, because of their association with the state, compared to the more popular ulama outside the state, who pushed the former faction to act independently to affirm their autonomy. In the end, attempts at making

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[449] MAKDISI, The Rise of Colleges. Institutions of Learning in Islam and the West 30. 1981.
[450] KEDDIE, scholars, saints, and sufis: Muslim Religious Institutions in the Middle east since 1500 168. 1972. See, Rahemtulla, Reconceptualizing the contemporary Ulama: Al-Azhar, Lay Islam, and the Egyptian state in the late twentieth century 17. 2007.
[451] KEDDIE, scholars, saints, and sufis: Muslim Religious Institutions in the Middle east since 1500 73&163-171. 1972. See, Hallaq, JOURNAL OF LAW AND RELIGION, 252-4 (2004).
[452] HOEXTER, et al., The public sphere in Muslim societies 44. 2002. Compare, Hallaq, JOURNAL OF LAW AND RELIGION, 258 (2004).

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ulama official carry contradicting elements because they go against the nature of the role and duties of Muslim scholars.

3.5.4   The Power of Appointments

One key indicator of the independence of scholars is the power of appointment. If the government controls appointments and is able to set posts for jurisconsults, influence their functions and control their pay, the independence of jurists is absolutely at question.

While the appointment of *qadi* is a very old and necessary practice if the state is to adjudicate disputes and administer criminal punishment, the mere existence of the post of mufti, let alone the appointment of the mufti, is at odds with traditions and practice in Islamic history and jurisprudence. One historian describes the issue of appointing judges as a formality and a confirmation of already existing leadership and juristic authority more than establishing or influencing it. Similarly, the appointment of a scholar in a *madrasa* is more like a procedure that confirms already qualified candidates because of their academic works. In some schools that enjoyed more independence in respect to their procedures and curricula, the whole process was exercised within the school itself. The ruling elite would attempt to expand their influence from mere formalities and procedures to real power and control, but they were rarely successful.[453]

In the course of appointing religious posts that expanded from judges to teachers in schools, the most threatening move consisted of late Ottoman attempts to appoint jurisconsults, jurists, and scholars. These attempts introduced an overlap between religious and government posts, with more ulama assuming official positions and being exposed to the direct influence and

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[453] HOEXTER, et al., The public sphere in Muslim societies 33-4. 2002;EPHRAT, A Learned Society in a Period of Transition: The Sunni _ulama_ of Eleventh Century Baghdad 118-26. 2000.

control of the government. The ulama's response to the appointment of scholars and jurists in public positions was typically negative due to traditions that respected their hostility to political influence as explained above. Some historians note that scholars, in accepting public offices, stipulated that they would maintain their independence and freedom.[454]

In Richard Repp's account, by the sixteenth century, "mufti" became an office and was the highest position of the learning ranks. The mufti was able to fulfill different tasks inside and outside the government. While the law of the Ottoman Empire (*Kanunname*) gives attention to religious rules and posts, it does not provide specifics on how to establish a scholar or a jurist. The chief mufti Abussauud Efendi (d. 1574) provided a rule for a scholar to be appointed to a school. The rule required that the candidate acquire a recommendation and the support of high-ranking scholars. Thus, the sultan would appoint only the chief mufti, and this would allow the government to influence the official religious jurisconsults, and later the government could appoint more scholars with the consultation from this chief mufti.[455]

From the mid sixteenth century onward, corruption in posts for teachers became an issue, particularly with the unqualified sons of teachers being appointed to the same posts their fathers had had. The government tried to coerce official ulama into more government offices by appointing some ulama as ministers, but some refused the proposal because it would undermine the remaining elements of their independence. The struggle for independence continued among the ulama for centuries. In other Islamic, especially Arab, territories, the eighteenth-century ulama exercised what some call a "de-facto autonomy" although the ruler could overstep and use

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[454] EPHRAT, A Learned Society in a Period of Transition: The Sunni _ulama_ of Eleventh Century Baghdad 132-5. 2000.
[455] KEDDIE, scholars, saints, and sufis: Muslim Religious Institutions in the Middle east since 1500 23-36. 1972.(The term "high-ranking scholars" seems vague given the fact that it could mean the official appointed ulama or the general learned community dominated by independent scholars and jurists).

his influence through appointment. The rulers varied in respecting the independence of scholars as some would be more willing to appoint scholars, muftis, imams etc. while others were reluctant to jeopardize their relationship with the learning ranks by using political influence.[456]

In light of the long experience of scholars and the relentless attempts of the government to make them state officials subject to state authority, the power of appointment of figures in religious institutions had two dimensions. One was to include scholars and jurists in public offices and government ministries, while the other was to establish official governmental posts for religious functionaries like jurists, scholars, and jurisconsults.

Was it just an expected evolution when religious learning became official and linked to an official appointment that gave "ulama" their names? Or was it just a path some religious institutions took, while other ulama and scholars stayed true to tradition and operated outside official appointment and government? In this context, it is important to note that the power of appointment was but a tool of the political machine to challenge the independence of the scholars. Thus, while the post somehow became an important political appointment, the scholars tended to distance themselves from it and thus limit the effectiveness of the tool.

An important example of the jurist tendency to avoid official posts is their refusal of the post of *qadi*. The long-established reservation of ulama toward political appointment is reflected in their historic refusal to accept the post of *qadi*. Al-Suyuti, who wrote warning against the "scholars of the devil" who are associated with the government, also wrote another book warning against accepting the post of judge, citing traditions and stories that upheld his position.[457] Then, he mentioned further reports about scholars and jurists refusing to take the post of judge as part

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[456] Id. at, 18,31-3,74&100-1.
[457] JALAL AL-DEEN AL-SUYUTI, DHAMM AL-QADHA' WA TAQALLUD AL-AHKAM 71-80 (Dar AL-Sahabah Li Al-Turath 1st ed. 1991).

of the scholars' tradition and a sense of piety, honor, and independence. The most trusted jurists

in Islamic jurisprudential history adopted this tradition and refused *qadiship*.[458] Hallaq notes:

> The Islamic legal literature is replete with references to the
> precarious and dubious role of *qadis* as agents of corrupted
> politics. The *qadi,* until the Ottoman era, was the only legal
> functionary that was exclusively appointed, paid and dismissed by
> government agencies.[459]

The refusal of the post of judge was a juristic challenge to the government's taking over juristic

work. It demonstrated the weight that scholars give to support the sphere they reside in and the

struggle they are willing to go through in order to protect their domain and keep it free and

independent from political influence.

The following subsection will deal with the issue of the independence of juristic and

religious schools (*madrasas*).

3.5.5   Independence of Schools

When we speak of independence of any institution from the influence of power, an important

element is the control or lack of control of education. "Learning was usually, if not always, put to

the service of the powerful."[460] In regards to this previous quote, Muslim scholars and jurists

struggled, and still struggle, to keep their authority over learning out of the control of the

powerful. From different parts of Islamic history, scholars of high repute have fought against

political authorization or control of Islamic learning procedures, curricula, and staff. The

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[458] Id. at, 89-94. See, EPHRAT, A Learned Society in a Period of Transition: The Sunni _ulama_ of Eleventh Century
Baghdad 111. 2000;MAKDISI, The Rise of Colleges. Institutions of Learning in Islam and the West 200. 1981.
[459] Hallaq, JOURNAL OF LAW AND RELIGION, 249 (2004).
[460] KEDDIE, scholars, saints, and sufis: Muslim Religious Institutions in the Middle east since 1500 143. 1972.

consensus of ulama and their jurisprudence on different issues of Islamic teaching was a leading force in deciding staff, teachers, and candidates.[461]

In different parts of the Islamic world, *madrasas* (schools), or their equivalent as learning institutions, are a premier way by which the scholars can defend their authority.[462] If Ulama are stripped from their independent Islamic learning institutions, they resort to mosques, *halaqas* (learning circles) and private sermons to continue their education beyond state control. *Halaqas* in the mosques are harder to control because mosques belonged to God. Thus, the government could maneuver only minimally so as to not provoke the Islamic public.

The informality that we emphasized earlier was one method to keep the schools and other religious facilities from the direct influence of the powerful. *Ijazah* (authorization) is a mechanism taking advantage of informality whereby the scholars make sure that the legacy of Islamic learning reaches potential scholars and future generations of jurists without government influence. *Ijazah* is an informal document issued by senior scholars to younger and less authorized ones in order to differentiate between individuals authorized by the community and others who are formally appointed by non-scholastic, mostly political, bodies. Throughout history, political authorities rarely intervened in such processes because any effort by the ruler to politicize them would be disastrous to the Islamic learning community, as it would seem an attempt to distort Islamic heritage and would shake the political authorities as well.[463]

Makdisi made a remarkable comparison of the process of the authorization to teach in the Islamic experience and that of the West. He notes that the authorization to teach in the West emerged two centuries after it first appeared in the Islamic world. While in medieval Islam this

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[461] MAKDISI, The Rise of Colleges. Institutions of Learning in Islam and the West 10-18&170. 1981.

[462] ZAMAN, The Ulama in Contemporary Islam: Custodians of Change: Custodians of Change 60. 2010.

[463] MAKDISI, The Rise of Colleges. Institutions of Learning in Islam and the West 270-2. 1981.

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authorization was in the hands of scholars and the learning community and was independent of politics, in the West, it was solely in the hands of the pope, the king, and the emperor. "It was too long before the practice of issuing authorization independently became universal- may be 1229." The process of authorization was religious and independent in Islamic history, but in the West, it became independent as it became more secular.[464]

At the beginning of the Ottoman influence in the Muslim world, a number of qadis and *madrasa* teachers were not even official school graduates. Later, the Ottomans tried to restrict *official* religious positions to official schools graduate.[465] While most *madhabs* in response gradually adopted formal, official schools for education, the Hanbalis refrained. They had their reservations and feared that the ruler could later control these schools.[466]

The Ottomans worked hard in other ways as well to institutionalize schools and *madrasas*, and promulgated codes to organize these learning institutions.[467] According to one researcher, the learning places in Islam developed from the masjid to the masjid-inn complex, to the *madrasa* and other institutions. In any event, the *madrasa* lived actively and contributed to the formation of religious learning but *halaqas* and informal religious education are still dominant and administered in an individualistic fashion. This was the first phase of *madrasa* in Egypt when it tended to be more independent and centered around scholars despite the existence of institutionalized madrsas.

Efforts to increase political control over religious institutions of learning increased during the period of Muhammad Ali Pasha (d. 1849). The project of marginalizing the religious

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[464] Id. at, 272-9.
[465] EPHRAT, A Learned Society in a Period of Transition: The Sunni _ulama_ of Eleventh Century Baghdad 113-6. 2000.
[466] Id. at, 27.
[467] KEDDIE, scholars, saints, and sufis: Muslim Religious Institutions in the Middle east since 1500 113-6. 1972.

madrasas and producing modern-style schools in Egypt started in fact in earnest with Muhammad Ali Pasha. Parallel to his efforts, the most prestigious Islamic schools, like al-Qarawiyyin in Morocco and al-Zaytuna in Tunisia, were likewise targeted by relevant government authorities for "reforms" that intended to place the secular government in charge of Islamic education through moves a government had never before dared in Islamic history.

The third phase of *madrsa* transformation occurred during large transformation in Muslim society toward formal education that was undertaken in the twentieth century especially, after the 1950s.[468] European governments, and later national states, in Muslim countries decided to employ the term "useful learning" to redefine education according to the state building officials and authorities after long being in the hands of the Islamic professors, teachers and scholars. The scholars own criteria of "useful knowledge" were replaced by standards set by the state emulating the Western-style of education. Religious *madrasas* were brought under the surveillance of the state at the same time.[469]

The next subsection will deal with the economic aspect of independence represented by the Islamic jurisprudential concept of *waqf* (endowment).

3.5.6 Economic Independence (*Waqf*)

A *waqf* is established by a Muslim individual to contribute to maintaining the public welfare and creating a sphere outside political control.[470] Muslim scholars were fortunate to have *waqf* (endowment) as a mechanism to protect their economic autonomy. They developed

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[468] Rahemtulla, Reconceptualizing the contemporary Ulama: Al-Azhar, Lay Islam, and the Egyptian state in the late twentieth century 32-3. 2007.
[469] ZAMAN, The Ulama in Contemporary Islam: Custodians of Change: Custodians of Change 66-77. 2010.
[470] HOEXTER, et al., The public sphere in Muslim societies 75&119-21. 2002;KEDDIE, scholars, saints, and sufis: Muslim Religious Institutions in the Middle east since 1500 35-6. 1972.

jurisprudence for the waqf according to Islamic rules and principles and laid out details for organizing the work of endowments throughout history.

A central theme that appears in Islamic jurisprudence in regard to endowments is the principle of *shart al-waqif* (the terms of the endower). With this agreed-upon principle, jurists firmly declared that endowments must be run according to the terms of the endower, not the terms of the rulers, jurists, nobles, or anyone else.[471] With the laws and rules of endowment set by the scholars, ulama operated as a check on these endowments. The facilities introduced by the *waqf* served the public and stayed true to the reasons of their foundation. Once an endowment is announced, it becomes independent from any person, body or state including the endower.[472] Even endowments that were meant to politically influence the religious community failed to be political tools of the governments because of the conditions and rules of waqf set by the jurists.

Another important theme that is shared in the different schools of Islamic jurisprudence is that the endowed object, land, or service could never return to the endower, and that the endower could not derive any special benefit from the endowment he or she establishes.[473] This is a result of a jurisprudential consensus that beneficiaries should get their portions in full according to the original terms.[474]

Thanks to the system of *waqf*, the endowments of schools, libraries, and public facilities in general proliferated and made up an economically independent sphere that protected them from state interference. Numerous *madrasas*, libraries, hostels, public houses, and mosques that

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[471] However, jurists excluded cases where the terms were partially or totally against the clear principles of Islam. See, IBN QUDAMAH AL-MAKDISI, AL-MUGHNI [IN COMPARATIVE ISLAMIC JURISPRUDENCE] 348 § 5 (Dar 'Ihya' al-Turath al-'Arabi 1st ed. 1985). See also, MAKDISI, The Rise of Colleges. Institutions of Learning in Islam and the West 36. 1981;YAHYA SA'ATI, AL-WAQF WA BUNYAT AL-MAKTABAH AL-'ARABYYAH 31 (King Faisal Center 2nd ed. 1996).
[472] HOEXTER, et al., The public sphere in Muslim societies 75. 2002.
[473] AL-MAKDISI, al-Mughni [in Comparative Islamic Jurisprudence] 352. 1985.
[474] MAKDISI, The Rise of Colleges. Institutions of Learning in Islam and the West 60. 1981.

are endowments by definition in Islam, existed and funded the very meta-constitutional sphere they functioned within.[475] According to Makdisi, the reasons given in the West to establish incorporated colleges/universities are all found in the *waqf* or charitable trust: inviolability and perpetuity.[476]

The administrator of any endowment cannot be appointed politically but only by the founder of the endowment, and scholars supervise the process while judges enforce it.[477] The chief judge may be entitled to administer endowments that do not have a specified administrator designated by the endower, but the endowments themselves are kept away from political influence.[478] Compensation for professors, hostels, and funds that pay the schools' and institutions' expenses come from the endowments and sometimes from fees paid by participants in their activities, including students.[479]

After centuries of prosperity through endowments and their role in constituting the independence of scholars, the rulers established big endowments in order to stipulate their terms over education. However, the endowments still served the public interests stipulated in the Islamic jurisprudence. One historian confirms that in some cities before the sixteenth century some *waqfs* from ruling elites served 80% of public purposes, indicating that they were largely not for the ruling elites' own interests.[480]

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[475] See, SA'ATI, al-Waqf Wa Bunyat al-Maktabah al-'Arabyyah 31-4. 1996;EPHRAT, A Learned Society in a Period of Transition: The Sunni _ulama_ of Eleventh Century Baghdad 1. 2000. For the point that mosques are endowments by definition, the Quran is clear that the only owner of mosques is Allah, "And the places of worship are only for Allah, so pray not unto anyone along with Allah." (Quran 72:18)(translation is M. M. Pickthall's). See also, KEDDIE, scholars, saints, and sufis: Muslim Religious Institutions in the Middle east since 1500 33. 1972.
[476] MAKDISI, The Rise of Colleges. Institutions of Learning in Islam and the West 233. 1981.
[477] SA'ATI, al-Waqf Wa Bunyat al-Maktabah al-'Arabyyah 146-53. 1996;MAKDISI, The Rise of Colleges. Institutions of Learning in Islam and the West 47-55. 1981;HOEXTER, et al., The public sphere in Muslim societies 72. 2002.
[478] HOEXTER, et al., The public sphere in Muslim societies 35. 2002;EPHRAT, A Learned Society in a Period of Transition: The Sunni _ulama_ of Eleventh Century Baghdad 11. 2000.
[479] MAKDISI, The Rise of Colleges. Institutions of Learning in Islam and the West 159. 1981;HOEXTER, et al., The public sphere in Muslim societies 54. 2002;KEDDIE, scholars, saints, and sufis: Muslim Religious Institutions in the Middle east since 1500 2. 1972.
[480] HOEXTER, et al., The public sphere in Muslim societies 76. 2002.

In the medieval Islamic world in an extreme case where the ruler decided to infringe on the basic process and principles of *waqf* and intervene, the public represented by the vocal ulama and general scholars took to the "street" and mosques in protest and take back the economic resource of their sphere.[481]

In the beginning of modern times, one of the calamities of the state "reforms" in the Muslim and Arab world was the appropriation of charitable *waqf*s and independent institutions. This rich resource that used to finance knowledge, jurisprudence and public services was taken by the state to feed the people of power. According to Rahemtulla, this move by the state had a "devastating impact on al-Azhar," one of the most prestigious Islamic institutions in the Muslim and Arab world, "as these endowments constituted almost one-fifth of all cultivated lands in Egypt."[482]

The effort to change the *waqf*s' supervision provoked the official grand mufti of al-Azhar who confronted Ismail Khedive, the ruler of Egypt at the time (d. 1895), when the latter was trying to put *waqf*s under government control.[483]

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[481] Id. at, 133.

[482] Rahemtulla, Reconceptualizing the contemporary Ulama: Al-Azhar, Lay Islam, and the Egyptian state in the late twentieth century 18. 2007;KEDDIE, scholars, saints, and sufis: Muslim Religious Institutions in the Middle east since 1500 182. 1972.

[483] HATINA, 'Ulama', politics, and the public sphere: an Egyptian perspective 32. 2010. Timur Kuran provides an almost completely opposite narrative of the waqf system and its institutions in the early modern Middle East. He argues that the Middle Eastern underdevelopment was because of, *inter alia*, the stagnation of the institutions *beyond the state control*. The institutions were not reformed enough to adapt to the modern development that Europe underwent long time ago. His account seems to suppose that reforms failed because they were slow and not profound enough. In regard to waqf, while the essence of the concept is charitable, he chose to compare it to the profitable corporations in the West assuming that the non-profitability held back its institutions. TIMUR KURAN, THE LONG DIVERGENCE: HOW ISLAMIC LAW HELD BACK THE MIDDLE EAST 5-6,115,130,140&279 (Princeton University Press. 2012). However, my approach is to revisit the idea of "reforms" and criticize it on the ground that it was a way to take over non-state sectors and destroy the sphere outside its power. Problems arose specifically because of state attempts to destroy the very system of waqf and thus threaten the spheres that could have counterbalanced the government and sustained its stability.

Infringement on the economic independence of al-Azhar was just the beginning of a series of violations and interferences in al-Azhar's independence. The following subsection will discuss the issue of independence in the case of al-Azhar.

3.5.7 Al-Azhar, the Issue of Independence

Al-Azhar was first established and completed in 972 during the Fatimid rule in Egypt. The Fatimid ruler who founded it was al-Mu'izz li-Din Allah al-Fatimi (d. 975). The Fatimid rule attributed their dynasty to the daughter of the Prophet (Fatimah), and this is why they called the Mosque, and later the institution, "al-Azhar" deriving from "*al-Zahra'*," the title used to describe Fatimah in Islamic literature. After decades of being dedicated to the Isma'ili, a Shia sect, al-Azhar was embraced by the majority of Sunni in Egypt and became a jurisprudential stop for students in the Islamic world. The mosque that included different learning circles developed into an institution of learning associated with the mosque and linked to its scholars and teachers.[484]

After centuries of independence in funds, process, and administration, the Ottomans' rule of Egypt in the sixteenth century began to provide more support to al-Azhar.[485] The *mujawir*, students dedicated to knowledge, were a self-arranged study group of young scholars to seeking knowledge from leading scholars. In al-Azhar, the self-arranged study of *mujawir* became an organized system in the style that is currently used. This transformation occurred as a result of the centralized administration and the increasing role of the state and its involvement.[486]

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[484] KHAFAJI, Al-Azhar Khilal Alf 'Am [Al-Azhar during a Thousand Years] 11-172. 1988;HATINA, 'Ulama', politics, and the public sphere: an Egyptian perspective 19. 2010.

[485] Rahemtulla, Reconceptualizing the contemporary Ulama: Al-Azhar, Lay Islam, and the Egyptian state in the late twentieth century 12-3. 2007.

[486] Zeghal, INTERNATIONAL JOURNAL OF MIDDLE EAST STUDIES, 376 (1999).

Al-Azhar's affiliates, from time to time, have the honor of acting independently of anyone's influence. They rely on God alone and His support, as they would say. Al-Azhar's square and campus were once considered parliament-like sites where the matters of people and the interests of the public were discussed and debated. From al-Azhar, wars were declared, protests took place, decisive decisions were made, and, above all, jurisprudence and Islamic sciences were taught.[487] Every rival sought the support of al-Azhar as a way to gain legitimacy and the trust of the public. Despite al-Azhar's active involvement, its scholars rejected proposals that announced them as a political class because political decision-making was "outside their jurisdiction doctrinally and historically."[488] It was actually against the rules of their meta-constitutional sphere they occupy.

The independence of al-Azhar had been a target of the Egyptian state since the time of Muhammad Ali Pasha when the positions of ulama were curtailed despite the role of ulama in bringing him to office. Public figures started to disagree on how much al-Azhar could participate in public issues, and this was an alarming signal of the change carried out by the state to try to control al-Azhar.[489]

A package of "reforms" contained the introduction of the position of the head of al-Azhar. The "Mufti of Egypt," a post different from the Head of al-Azhar, was also introduced at a later time, and it became the highest *office* authorized to deal with Islamic issues. Article 153 of the (1923) Constitution of Egypt entitles the King to supervise, appoint officials and decide the budget for religious institutions. After these reforms became law, Al-Mahdi (d. 1897), then the head of al-Azhar, was the first to be the mufti of the state, and he was seen as pro-

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[487] See, HATINA, 'Ulama', politics, and the public sphere: an Egyptian perspective 26-30. 2010;KHAFAJI, Al-Azhar Khilal Alf 'Am [Al-Azhar during a Thousand Years] 173-222. 1988.
[488] HATINA, 'Ulama', politics, and the public sphere: an Egyptian perspective 26&46. 2010.
[489] Id. at, 28,132&202.

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government. During the Urabi revolution, the dismissal of al-Mahdi was considered a victory for the revolutionaries.[490]

After the 1952 Revolution, the state adopted the project of trying to undertake the "nationalization of al-Azhar" meaning bringing it entirely under the state's control. The project started by trying to portray al-Azhar as the only institution and body authorized to publicly deal with religious issues and issue fatwas in order to monopolize religious interpretation in a state-controlled institution. The ulama attempted to obstruct this change and succeeded by blocking the 1961 law that was supposed to officially "nationalize" al-Azhar.[491] Many al-Azhar affiliates protested the state's attempts and supported the ulama in their efforts.[492] However, in the same year, the state was nonetheless able to place al-Azhar under the Ministry of Endowment, and the office of sheikh al-Azhar became an official state one, whose leader was appointed by, and could be dismissed by, the government. The different *madrasas* and schools were brought under the centralized Azhar's administration, and in turn controlled by the state as well.[493] To buy the ulama's silence, the state provided al-Azhar with financial support. The Sheikh of al-Azhar became associated with state's policies, and was described by critics as the "state's puppet" who served the government interests and justified its policies.[494]

To claim some autonomy, the state allowed a relatively active role for al-Azhar but within limits decided by the state and its law.[495] In Mustafa's account, the Egyptian government

[490] Id. at, 37-45.
[491] Id. at, 207-8.
[492] Rahemtulla, Reconceptualizing the contemporary Ulama: Al-Azhar, Lay Islam, and the Egyptian state in the late twentieth century 51-2. 2007.
[493] ZAMAN, The Ulama in Contemporary Islam: Custodians of Change: Custodians of Change 60. 2010;Rahemtulla, Reconceptualizing the contemporary Ulama: Al-Azhar, Lay Islam, and the Egyptian state in the late twentieth century 26&50. 2007.
[494] Rahemtulla, Reconceptualizing the contemporary Ulama: Al-Azhar, Lay Islam, and the Egyptian state in the late twentieth century 52&97-8. 2007.
[495] ZAMAN, The Ulama in Contemporary Islam: Custodians of Change: Custodians of Change 148. 2010.

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was forced to accept the bargain of allowing Al-Azhar to exercise a more active role but imposed moderate Islamic reform as the government became increasingly dependent on Al-Azhar for religious legitimation.[496] Ironically, the legitimacy of the official Azhar itself was at stake. Continuous government control had shaken the absolute trust al-Azhar had, and, according to some, had indirectly contributed to the emergence of Islamic militants.[497]

One commentator notes that the project of "nationalizing" and controlling al-Azhar brought it under the government and produced new political behavior among ulama. The response was not submission or containment, but rather the development of a more diverse community of ulama that ranged from submissive to resistant. While bringing al-Azhar into state's supervision gave it an official platform for expression, it provoked the independent tendencies of people by controlling both the official Azhar and the state.[498] This new phenomenon is the subject of the next subsection.

3.5.8   From the Non-establishment to the Peripheral Ulama

In examining official religiosity and the state-affiliated ulama, we come across the extraordinary phenomenon that whenever there are state scholars, there is the rise of other scholars who are more vocal and resistant to the state and its discourse.

In pre-modern history, Jackson talks about what he calls the "non-establishment ulama." Ibn Taymiyyah seems to be an example of such a scholar as he refused to compromise on even minor jurisprudential opinions with rulers despite pressure, threats, and imprisonment.[499] At the

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[496] Moustafa, INTERNATIONAL JOURNAL MIDDLE EAST STUDIES, 3-4 (2000).
[497] Id. at, 9-10.
[498] Zeghal, INTERNATIONAL JOURNAL OF MIDDLE EAST STUDIES, 371-2 (1999);HATINA, 'Ulama', politics, and the public sphere: an Egyptian perspective 82. 2010.
[499] JACKSON, Islamic law and the state: the constitutional jurisprudence of Shihāb al-Dīn al-Qarāfī XXXiii. 1996.

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beginning of modern times, al-Jabarti, another one of the non-establishment ulama, criticized some of the ulama of his time for being associated with the ruler and accepting rewards and gifts from him.[500] Haim Gerber differentiates between two sets of ulama: one was close to the central government and graduated from state-adopted schools, while the other ulama enjoyed fewer privileges but maintained more independence.[501] A more striking classification is the differentiation made between the official ulama and the knowledgeable ones, connoting that officializing ulama never created their authority or popularity.[502]

The more the government attacks the autonomy of scholars and religious institutions, the more the community of scholars needs to prove its independence by producing dissent and resistance. The project of "nationalization" and "reforms" of al-Azhar produced what some label the "generation of rejectionists" and the rise of neo-ulama who attempted to protect autonomy through scholarly dissent.[503] The dissenting voices among ulama in Egypt grew during the 1950s and the 1970s, and the criticism of the state gained momentum.[504]

Zeghal describes these dissenting voices among the modern community of scholars as "peripheral ulama," as opposed to official ulama.[505] Abd al-Hamid Kishk (d. 1996) is an example of one of these peripheral scholars. Kishk protested the regime's proposals to control al-Azhar and was jailed for it. He went beyond criticizing the government to criticizing al-Azhar for being governmental and serving state interests instead of Islamic ones.[506]

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[500] HATINA, 'Ulama', politics, and the public sphere: an Egyptian perspective 22. 2010.
[501] HOEXTER, et al., The public sphere in Muslim societies 74. 2002.
[502] See, KEDDIE, scholars, saints, and sufis: Muslim Religious Institutions in the Middle east since 1500 34. 1972.
[503] GENEIVE ABDO, NO GOD BUT GOD: EGYPT AND THE TRIUMPH OF ISLAM: EGYPT AND THE TRIUMPH OF ISLAM 50 (Oxford University Press, USA. 2000). See also, Rahemtulla, Reconceptualizing the contemporary Ulama: Al-Azhar, Lay Islam, and the Egyptian state in the late twentieth century 52. 2007.
[504] Rahemtulla, Reconceptualizing the contemporary Ulama: Al-Azhar, Lay Islam, and the Egyptian state in the late twentieth century 90. 2007.
[505] Zeghal, INTERNATIONAL JOURNAL OF MIDDLE EAST STUDIES, 387 (1999).
[506] Rahemtulla, Reconceptualizing the contemporary Ulama: Al-Azhar, Lay Islam, and the Egyptian state in the late twentieth century 52,62-5&97. 2007.

In 1992, the Ulama Front emerged as a response to the passivity of the official Azhar in the face of what they saw as government atrocities. The Ulama Front acted as a protesting entity in the community of scholars.[507] The rise of this neo-ulama group was intended to restore some of the public trust and legitimacy that was challenged by the Islamists in general.[508]

When the Egyptian government decided to undertake a plan to rehabilitate the radical Islamists, the scholars and figures that administered the dialogue and assumed this task were those peripheral ones whose legitimacy and trust were not an issue or at least less debated.[509] In other words, the mediation needed autonomous scholars to work, even for a state that always attacked the autonomy of the scholars. The lesson here is if the autonomy of the jurists is compromised, it takes on a protesting and rebellious form which can only be managed by the presence of autonomous jurists.

The previous subsections try to focus on the concept of independence in the Islamic jurisprudence by discourse and tradition. They also assert the idea that the independence of scholars does not mean a direct political power or clerical rule of society whatsoever. The "no-power" part of the scholars' role means not having clergy as the head of the state, as this ruling clergy contradicts the basic understanding of Muslim scholars, their traditional work, and their established literature.

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[507] ZAMAN, The Ulama in Contemporary Islam: Custodians of Change: Custodians of Change 147. 2010;Rahemtulla, Reconceptualizing the contemporary Ulama: Al-Azhar, Lay Islam, and the Egyptian state in the late twentieth century 103-4. 2007.

[508] Zeghal, INTERNATIONAL JOURNAL OF MIDDLE EAST STUDIES, 386-7 (1999);Moustafa, INTERNATIONAL JOURNAL MIDDLE EAST STUDIES, 17 (2000).

[509] Zeghal, INTERNATIONAL JOURNAL OF MIDDLE EAST STUDIES, 388 (1999);Moustafa, INTERNATIONAL JOURNAL MIDDLE EAST STUDIES, 11 (2000). Similarly, when the Saudi government decided to convince people and make a televised dialogue with militants in order to destruct the radical discourse, they chose a peripheral scholar that never assumed a religious governmental office.

3.6   CONCLUSION

In this chapter, I have aimed to craft a role that historically, and normatively fits the ulama's nature according to their own literature and social dynamics in order to stabilize society and its religious authority. At the same time, it is an attempt to place the ulama in a locus that is constitutionally possible and plausible in today's society.

I have divided this chapter into four sections. I started by examining the concept of a "religious institution" in the Islamic context, and concluded that it is more important to look at religious institutions as imagined, rather than formal brick and mortar institutions. The fact that there is no comprehensive religious body leaves us with a dispersed authority within Sunni jurisprudence.

The second section explains the different roles and modes of scholars and ulama focusing on their relationship to the political authorities especially in pre-modern times.

The third section is devoted to the proposal that the meta-constitutional sphere is the locus of authority for scholars taking into account their modern dynamics. This sphere is not political but also not merely public. The case of the Islamic Inquisition (mihna) is discussed as a historical example to avoid in the Sunni subconscious.

The fourth and final section discusses the concept of independence among these imagined and formal institutions of scholars and jurists. The ability to dissent that characterizes the medieval and modern jurists demonstrates the extent and importance of their autonomy intellectually and economically. The case of al-Azhar in Egypt was given special attention to show that infringing on scholars' independence, as occurred in Egypt, produces the phenomenon of peripheral ulama that are even more independent and resistant. I, then, emphasized the idea that the independence of scholars is central to their nature, but this independence and the

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autonomy of these Islamic institutions and scholars never means that they have power or political control.

4.0   CHAPTER THREE: THE OVERLAPPING JURISDICTIONS

The issue of the modern constitutional setting and the role of Muslim scholars in the Muslim-majority states is a way to test the traditional locus of these scholars—a forum explained in the previous chapter and described as the meta-constitutional sphere. The different constitutional experiments in the Muslim world provide different examples of how the Islamic elements and Islamic scholars are treated. Egypt is given special attention as a case study while other countries that share similar features, such as Pakistan, are included in some sections.[510]

    This chapter contains four main sections. The first section explores the current constitutional context in the Muslim and Arab world, and the different early phases of Islamic constitutionalism. The second section explains the role of Islamic scholars in the constitutional orders and in constitution-making. The scholars' role is examined in two areas: law-making, and judicial adjudication. The third section discusses Islamic constitutional articles with special emphasis on Article 2 of the Egyptian constitutions. Then it will turn to the issue of authority of

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[510] There are countries that share the same geographic line as Egypt like Libya and Tunisia which also were part of the Arab Spring phenomenon, though with different outcomes. Pakistan also is mentioned a lot in this chapter because there are notable similarities with Egypt beside its being Muslim and Sunni-majority state. Both Egypt and Pakistan share similar constitutional structures and semi-independent constitutional judiciaries. They also have strong diverse ulama and very active Islamists. The third feature common in both countries is the strong army that controlled politics and staged different coup d'états. Fourth, Egypt and Pakistan underwent similar Islamization and codification projects, and share some similar Islamic articles in their constitutions. See, Ilse Lichtenstadter, *The Muslim Woman in Transition Based on observations in Egypt and Pakistan*, SOCIOLOGUS, 23-5 (1957).

interpretation and conclude with the judicial application of Islamic law in Egypt. The fourth and final section examines my two-prong proposal in the overlapping jurisdictions.

The two-prong proposal is to recognize the traditionally established sphere that has dealt with Islamic jurisprudence and continue to strongly retain their space as a forum for Islamic jurisprudential debates and discussions. At the same time, in the state level, the legislature should be the main interpreter that poses a plausible solution constitutionally and Islamically.

4.1 THE CURRENT CONSTITUTIONAL ORDER

This section attempts to introduce the early modern constitutional context of Muslim and Arabic countries. These early constitutional experiments witnessed an indisputable influence and presence of Islamic texts and jurisprudence. The following pages discuss the constitutional setting and the role of Islam in Islamic countries, as well as how the early constitutional experiments inspired the current position of Islam in these countries. The Egyptian case is going to be the focus of the second half of the section, taking into account prior development in the Ottoman Empire and the influence of various factors in the making of the current Egyptian constitutional order.

4.1.1 The Constitutional Context

During the Tanzimat Period, namely in 1839, the Ottoman Empire introduced an early constitutional document, *Khatt-i Sherif* (the Noble Rescript), to guarantee religious freedom and

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equality throughout the region it ruled.[511] About two decades later, namely in 1857, Tunisia

followed in the Ottoman footsteps and introduced a similar document that served as a civil rights

charter and was called *'Ahd al-Aman* (Pledge of Security). The charter was supposed to be a

response to the call of Tunisian reformists who still demanded a more fundamental form of

limited rule instead of absolute rule.[512]

The Tunisian Pledge of Security increased the appetite of reformists to pressure the Bey

government for participatory politics, which, in fact, led in 1861 to Qanun al-Dawlah (the Law of

the State), the "first modern constitution in an Arabic country…[to] provide for a constitutional

monarchy…."[513] The constitution established a Grand Council that shared some responsibilities

with the king of Tunisia, and provided some accountability. However, this constitutional

experiment was short-lived (1861-64).[514]

The Tunisian theorist Khayr al-Din Pasha (d. 1890), who was the father of the Tunisian

Constitution of 1861, supported the limited-rule approach by citing Islamic texts and concluded

that only participatory politics and political delegation could meet the Islamic requirement for

governance.[515]

Another influential drafter of that constitution is Ibn Abi al-Diyaf (d. 1874). In his

writings, he rejected absolute rule whether religious or Sultanic, and presented the participatory

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[511] Tilmann Roder, *The Separation of Powers in Muslim Countries: Historical and Comparative Perspectives*, *in* CONSTITUTIONALISM IN ISLAMIC COUNTRIES: BETWEEN UPHEAVAL AND CONTINUITY 325, (Rainer Grote & Tilmann Roder eds., 2011).See, ABDUL-KARIM RAFEQ, *A Different Balance of Power*, A COMPANION TO THE HISTORY OF THE MIDDLE EAST, 11. For the Tanzimat, see the second chapter.

[512] Roder, The Separation of Powers in Muslim Countries: Historical and Comparative Perspectives 325. 2011.
[513] Id. at, 325.

[514] BROWN, Constitutions in a nonconstitutional world: Arab basic laws and the prospects for accountable government 16-9. 2002.

[515] KHAYR AL-DIN AL-TUNISI, AQWAM AL-MASALIK LI MU'RIFAT AHWAL AL-MAMALIK 15-8 (State's Publisher in Tunisia 1st ed. 1868). See, BROWN, Constitutions in a nonconstitutional world: Arab basic laws and the prospects for accountable government 19-20. 2002.(Brown likens Khayr al-Din's book to the Federalist Papers in role and theory);Saïd Amir Arjomand, *Islamic Constitutionalism*, 3 ANNUAL REVIEW OF LAW AND SOCIAL SCIENCE, 116 (2007).

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government as Islamic, supporting his argument with Islamic texts and reasoning. In Ibn Abi al-Diyaf's account, the ruler is accountable to God (His Law, Islamic law), and to the ummah that witnesses and signs the "promise" (contract) between them and the ruler.[516] Ibn Abi al-Diyaf concluded, "[i]f the Sultan breaks his promise, the people then assemble at the tomb of [the ruler], and [this] meeting is a precursor to removing him from the throne."[517]

In the central Ottoman Empire, similar ambitions to those of the Tunisians raised the issue of constitution-building in the state. Subsequently, a committee of elites, composed of military, political, and religious leaders, was appointed by the sultan to draft the Constitution that was promulgated in 1876 and called *Kanun-e Esasi* (the Fundamental Law). Similar to the Tunisian case, this constitution was in force for only two years. Nonetheless, the Ottoman Constitution of 1876 "served as the basis for most Arab constitution writing in the twentieth century."[518]

Similar to Khayr al-Din Pasha and Ibn Abi al-Diyaf, Namik Kemal (d. 1888), who was one of the main drafters of the Ottoman Constitution in 1876, advocated a limited-government with some sort of separation of powers and supported his argument with Islamic texts and reasoning. Kemal defended the Constitution of 1876 and argued that it was fully compatible with Sharia.[519]

This period may mark what Said Arjomand considers the first phase of Islamic constitutionalism—Islam as a limitation to government and legislation.[520] There was no

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[516] A Bin Diyaf, Consult them in the Matter: A Nineteenth-century Islamic Argument for Constitutional Government 15-66 (LC Brown, Trans.). Fayetteville, AR: The University of Arkansas Press.(Original manuscript written 1872) 2005. See, Arjomand, ANNUAL REVIEW OF LAW AND SOCIAL SCIENCE, 116 (2007).

[517] Bin Diyaf, Consult them in the Matter: A Nineteenth-century Islamic Argument for Constitutional Government 66. 2005. See, Arjomand, ANNUAL REVIEW OF LAW AND SOCIAL SCIENCE, 116 (2007).

[518] BROWN, Constitutions in a nonconstitutional world: Arab basic laws and the prospects for accountable government 20-6. 2002.

[519] Arjomand, ANNUAL REVIEW OF LAW AND SOCIAL SCIENCE, 116 (2007).

[520] Id. at, 115.

assumption to reconstruct the system into a "Sharia-compliant" order. This never meant that Islam was irrelevant or insignificant, but it was as if Sharia was socially and politically assumed to be a responsibility of the ummah (nation) as whole, and that the system needed just a popular Islamic check more than a comprehensive Islamic reconstruction.[521] The second phase, according to Arjomand, was when Islam came to be a basis of the whole system, as it appeared to be in post-colonial Muslim states. In this phase, the assumption seemed to be that the basis of the order was a comprehensive project that rebuilt the system according to Islam.[522] The return to the "non-ideological Islamic constitutionalism" was the third phase when the idea of limited government enjoyed a comeback. The law is not merely "Islamic" but Islam is one significant element and a "source" of legislation among many others.[523]

Rudiger Wolfrum provides another categorization where Islamic constitutionalism is examined primarily by its legal and political consequences. Muslim states differ between those who mainly support a symbolic acknowledgement of Islam, with limited consequences, and those who, on the other hand, support a more serious commitment to Islamic law "in which the organization and functioning of state power reflect a deep acknowledgement of Islam."[524]

The current constitutional orders in the Muslim world responded to the circumstances of their own countries and took different but relatively comparable directions.[525] The Ottoman

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[521] See, id. at, 115-6;Mohammad Hashim Kamali, *Constitutionalism in Islamic Countries: A Contemporary Perspective of Islamic Law*, *in* CONSTITUTIONALISM IN ISLAMIC COUNTRIES: BETWEEN UPHEAVAL AND CONTINUITY 31, (Rainer Grote & Tilmann Roder eds., 2011);Tilmann Roder, *The Separation of Powers in Muslim Countries: Historical and Comparative Perspectives*, see id. at 323, (

[522] Arjomand, ANNUAL REVIEW OF LAW AND SOCIAL SCIENCE, 115 (2007).

[523] Id. at, 115.(These phases do not seem to be arranged respectively because in Egypt, for example, the phase of Islam-as-a-source not the source was preceding the presumptively second phase. The president al-Sadat amended the second article of the Egyptian constitution in 1980).

[524] Rudiger Wolfrum, *Constitutionalism in Islamic Countries: A Survey from the Perspective of International Law*, *in* CONSTITUTIONALISM IN ISLAMIC COUNTRIES: BETWEEN UPHEAVAL AND CONTINUITY 79, (Rainer Grote & Tilmann Roder eds., 2011).

[525] Nathan J. Brown suggests that the early Tunisian and Ottomani constitutional structures were a strategy by the rulers to appeal to the Western powers, gain their alliance and weaken the rulers' local rivals and other competing forces of the neighbors. He, then, labeled a bunch of political orders in the Arab and Muslim world as "constitutions

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Empire's constitutional experiment influenced many Muslim countries and inspired some important elements in both structure and content. The next section concerns Egypt as a constitutional case influenced by the context of Islamic countries discussed in the previous section, and as an important experiment that influenced other countries as well.

4.1.2 The Constitutional Framework in Egypt

The first constitution-like document in modern Egypt was *al-La'ihah al-Asasiyyah* (the Fundamental Ordinance) in 1882, which was as a result of the Urabi Revolution, but Khedive Taufeeq aborted it and, instead, issued *al-Qanun al-Nizami* (the Organizational Law) in 1883. Under the British occupation, this Organizational Law in Egypt had placed powers in the hands of Taufeeq and abandoned the idea of an elected legislature. On the eve of World War I in 1913, the Organizational Law was revised to provide the legislature with a very limited power, but the experiment ended in 1915.[526]

In the aftermath of World War I, a nationalist movement developed from the delegation that negotiated with the British in order to retain Egyptian autonomy. The movement became a nationalist party and was named "*Hizb al-Wafd*" (the Delegation Party) under the leadership of Saad Zaghlul. Al-Wafd translated the discontent of the Egyptians over British occupation into a

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in a non-constitutional world." BROWN, Constitutions in a nonconstitutional world: Arab basic laws and the prospects for accountable government 16-29. 2002.

[526] See, Mahmoud Hamad, *The Constitutional Challenges in Post-Mubarak Egypt*, 14 INSIGHT TURKEY, 2 (2012).(The author, Mr. Hamad, seems to imply that the Egyptian constitutional experiment is unique and almost unprecedented in the region. However, the very neighboring Tunisia had its constitution in 1861. The Ottoman Constitution that governed most of Arab countries was drafted in 1876. Both were established decades before the Egyptian first formal Fundamental Ordinance in 1882);BROWN, Constitutions in a nonconstitutional world: Arab basic laws and the prospects for accountable government 26-41. 2002;MUHAMMAD NOUR FARAHAT & OMAR FARAHAT, AL-TARIKH AL-DUSTURI AL-MASRI: QIRA'AH MIN MANDHOUR THAWRAT 2011 YANAYIR 100-15 (The Arabic House for Sciences Publishers & others. 2011);Roder, The Separation of Powers in Muslim Countries: Historical and Comparative Perspectives 326. 2011.

popular mobilization that led to the 1919 Revolution. After extensive negotiations failed, the British unilaterally declared Egyptian independence as a monarchy in 1922, and this move resulted in the drafting of the 1923 Constitution. The 1923 Constitution provided some authority to the parliament but provided the king with the upper hand in the ability to dissolve parliament.[527]

In 1952, a few "Free Officers" led a revolution and announced a Constitutional Declaration abolishing the constitutional monarchy and establishing a republican one. By 1971, three constitutions were drafted during the rule of Jamal Abdul-Nasser (d. 1970)—all constitutions were characterized by a lack of accountability and self-serving its government.[528] The 1971 Constitution was promulgated by Anwar al-Sadat (d. 1981) as an attempt to distance the republic from socialist policies and to incorporate some Islamic elements into the constitutional structure, as we will see in later sections. It proved to be a long-serving constitution (from 1971 to 2011) that introduced some novel elements into the Egyptian constitutional structure. The elements of Article 2 and the Supreme Constitutional Court, which I will discuss in different sections, are examples of elements that are still in force today.

The Constitution of 1971, as amended in 2007, reflected its drafters' intention of fashioning constitutional formalities to clothe non-constitutional operations. This means that constitutional procedures and articles were used to justify ends that are usually in the democratic

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[527] BOTMAN, Egypt from independence to revolution, 1919-1952 25-55. 1991;BROWN, Constitutions in a nonconstitutional world: Arab basic laws and the prospects for accountable government 36-41. 2002;Hamad, INSIGHT TURKEY, 2-3 (2012);FARAHAT & FARAHAT, Al-Tarikh al-Dusturi al-Masri: Qira'ah min Mandhour Thawrat 2011 Yanayir 109-115. 2011;Roder, The Separation of Powers in Muslim Countries: Historical and Comparative Perspectives 343. 2011.

[528] FARAHAT & FARAHAT, Al-Tarikh al-Dusturi al-Masri: Qira'ah min Mandhour Thawrat 2011 Yanayir 115-131. 2011;BROWN, Constitutions in a nonconstitutional world: Arab basic laws and the prospects for accountable government 78-85. 2002.

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systems unconstitutional.[529] Although it looked constitutionally democratic, this Constitution is blamed for establishing an authoritarian regime and for reinforcing the long arm of the executive and the ruling party that lasted for decades.[530] The Constitution granted election for the office of president (Art. 76), asserted that the system in the country "is a multiparty one" (Art. 5), and declared that "[s]overeignty is for the people alone; they are the source of authority" (Art. 3).[531]

From 1971 to 1979, legislation in Egypt was supposed to be exercised exclusively by the People's Assembly while, in fact, Nasser was the de-facto legislator. From 1979 to 2014, another legislative chamber was introduced with less legislative and more advisory tasks called "*Majlis al-Shura*" (Consultative Council). In 1979, a referendum resulted in favor of introducing this Consultative Council as an upper house of the former structure of the parliament. Judicial power is in specialized administrative, criminal, civil, and, more importantly, constitutional courts. I will discuss this next.

4.1.2.1 The Supreme Constitutional Court

The embryonic form of the Supreme Constitutional Court (SCC) was the Supreme Court established by a presidential decree in 1969 in an attempt by Nasser's regime to control judicial power and abort its independent tendencies. As such, the Supreme Court exclusively was given

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[529] For the constitutional formalities without constitutionalism, see VICKI C JACKSON & MARK V TUSHNET, COMPARATIVE CONSTITUTIONAL LAW 219-20&244-5 (Foundation Press. 1999). For the phenomenon in Egypt and the Arab world, see BROWN, Constitutions in a nonconstitutional world: Arab basic laws and the prospects for accountable government 97-111. 2002. See also the interesting argument of Abdulaziz al-Fahad. Al-Fahad's main argument is that despite the fact that the Saudi basic law is not democratic, at least it is honest about it and does not claim representing the "public will" or any formal democratic constitutionalism. Abdulaziz H Al-Fahad, *Ornamental constitutionalism: the Saudi basic law of governance*, 30 YALE J. INT'L L., 7 (2005).

[530] Nathalie Bernard-Maugiron, *Strong Presidentialism: The Model of Mubarak's Egypt*, *in* CONSTITUTIONALISM IN ISLAMIC COUNTRIES: BETWEEN UPHEAVAL AND CONTINUITY 373-4, (Rainer Grote & Tilmann Roder eds., 2011).

[531] EGYPT CONST. OF 1971 arts. 76,5&3.

the authority of judicial review, and was controlled by the executive by means of appointments, regulating the Court, its procedures and structure.[532]

The 1971 Constitution introduced the current form of the Supreme Constitutional Court. The Constitution explains the powers of the Supreme Constitutional Court in Articles 174-8. Article 175 asserted that the Supreme Constitutional Court had the right of judicial review when it stated that it "has the exclusive competence to control the constitutionality of laws and regulations and to interpret the legislative texts…."[533] Despite this article, the SCC had not been really established until 1979 as a gesture of the President Sadat's faith in investment in economic growth in Egypt. By establishing the Court, he wanted to assure to foreign investors that Egypt was ruled by law and investors could enjoy stability. According to Mustafa Tamir, Nathan Brown, and Clark Lombardi, the SCC enjoyed considerable independence.[534]

The SCC's main power is to be the exclusive arbiter of disputed legislative interpretations, the final judge of judicial conflicts over jurisdiction, and a negative legislator by exercising the authority of judicial review.[535] The SCC also practiced the gate-keeping function, which is to request litigants to bring cases to lower courts first; then the lower courts may authorize the challenger to bring the case to the SCC.[536]

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[532] TAMIR MOUSTAFA, THE STRUGGLE FOR CONSTITUTIONAL POWER: LAW, POLITICS, AND ECONOMIC DEVELOPMENT IN EGYPT 65-67 (Cambridge University Press. 2007).

[533] Egypt Const. of 1971 art. 175.

[534] MOUSTAFA, The struggle for constitutional power: law, politics, and economic development in Egypt 57-89. 2007. See, BROWN, Constitutions in a nonconstitutional world: Arab basic laws and the prospects for accountable government 83. 2002;LOMBARDI, State Law as Islamic Law in Modern Egypt: The Incorporation of the Sharī'a Into Egyptian Constitutional Law 141-5. 2006;Rainer Grote, *Models of Institutional Control: the Experience of Islamic Countries*, *in* CONSTITUTIONALISM IN ISLAMIC COUNTRIES: BETWEEN UPHEAVAL AND CONTINUITY 222, (Rainer Grote & Tilmann Roder eds., 2011).

[535] MOUSTAFA, The struggle for constitutional power: law, politics, and economic development in Egypt 79-80. 2007;LOMBARDI, State Law as Islamic Law in Modern Egypt: The Incorporation of the Sharī'a Into Egyptian Constitutional Law 145. 2006.

[536] LOMBARDI, State Law as Islamic Law in Modern Egypt: The Incorporation of the Sharī'a Into Egyptian Constitutional Law 145. 2006;MOUSTAFA, The struggle for constitutional power: law, politics, and economic development in Egypt 80-1. 2007;Grote, Models of Institutional Control: the Experience of Islamic Countries 232. 2011. As part of the supremacy of Islamic law in the Muslim Brotherhood's discourse, they attempted to advance a

The Court is composed of eleven judges including the Chief Judge, All were appointed through nomination by the General Assembly for the Court and approved by the president.[537] This process did not change much in terms of the SCC's power, process, and appointment.[538]

After a brief introduction to the constitutional framework, the next sections will introduce Islamic legislation in the constitutional structure in order for us to understand the ulama's position and functions in the current setting.

4.1.2.2 Islamic Codes in Modern Egypt

Discussing Islamic codes in Egypt intends to portray how Islam was presented in the state by codes as a result of an implied sense of entitlement to legislation. Although inspired and influenced by jurisprudential works, the codes facilitated a departure from exclusive jurists' law.

One of the most influential codified Islamic law drafts was the Mejelle (in Turkish: Mecelle, literally: The Journal). The 16-chapter code was a precedent that was supposed to be followed by similar codes in different areas of law in order to be promulgated as the law of the land. The code inspired similar projects in different Islamic countries.[539]

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proposal to expand their interpretation of Islamic articles in the Constitution and allow any individual to challenge any law that is deemed un-Islamic. Stilt, TEX. INT'L LJ, 98-101 (2010);Haider Ala Hamoudi, *Repugnancy in the Arab World*, 48 WILLAMETTE L. REV., 12(FT44) (2011).

[537] Ran Hirschl, *Constitutional courts vs. religious fundamentalism: Three Middle Eastern tales*, 82 TEX. L. REV., 2-3 (2003).(Hirschl comments on the process by saying "Thus far, all the appointments recommended by the General Assembly have been approved by either former President Anwar al- Sadat (who was assassinated by an Islamic fundamentalist in 1981) or current President Hosni Mubarak.")

[538] Article 193 of the 2014 Constitution reads, "The Commissioners Authority of the Supreme Constitutional Court is composed of a president and a sufficient number of [vice-]presidents in the authority, advisors and assistant advisors."

[539] LOMBARDI, State Law as Islamic Law in Modern Egypt: The Incorporation of the Sharīʿa Into Egyptian Constitutional Law 70-4. 2006;Arjomand, ANNUAL REVIEW OF LAW AND SOCIAL SCIENCE, 123-4 (2007);R Peters, *From jurists' law to statute law or what happens when the shari'a is codified*, 7 MEDITERRANEAN POLITICS, 87-9 (2002). See, CHAMBERS, The Ottoman ulema and the Tanzimat 42-4. 1972. In general about the Mejelle see, FM Goadby, *The Moslem Law of Civil Delict as Illustrated by the Mejelle*, 21 JOURNAL OF COMPARATIVE LEGISLATION AND INTERNATIONAL LAW (1939).

A comparable code by a former minister of justice Qadri Pasha (Qadri's Code) was introduced in Egypt by the 1870s.[540] In the post-Urabi period (after 1882), the Egyptian government wanted to adopt the Code in order to convince the occupying power of its modernity as it remained a de jure part of the Ottoman Empire but a de facto colony.[541] Later, the Qadri's project was officially abandoned altogether, but the idea of codified law prevailed.

Rudolph Peters described the shift toward codifications as a transformation from jurists' law to statute law.[542] In Lombardi's account, by the codification period, Egypt embarked on a secularized law.[543] In the aftermath of the 1919 Revolution, Egyptian influential elites did not adopt the project of Islamization, but, instead, embraced secularized codes and schools, which, according to Lombardi, "loosened the grip of ulama on legal theory."[544]

For Lombardi, Egypt reached the point of consensus to have positive law in the sense that all governing laws whether Islamic or civil should posited and codified.[545] The public was not opposed to positive codes with the exception of ulama and their social forces. Some of the ulama's reservations were on the grounds that classically-trained Islamic jurists should be

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[540] Peters, MEDITERRANEAN POLITICS, 89-90 (2002). For the complete compilations of Qadri's Code, see, Muhammad Qadri Pasha, Qanun al-'adl wa-l-insaf Ii-l-qada''ala mushkilat al-awqaf (Al-Qahira: Al-Matba'a al-Ahliyya 1893).

[541] LOMBARDI, State Law as Islamic Law in Modern Egypt: The Incorporation of the Sharī'a Into Egyptian Constitutional Law 61-71. 2006.

[542] Peters, MEDITERRANEAN POLITICS, 81 (2002). A similar title and comparable article discusses the same shift from jurists' law to state law, Layish, DIE WELT DES ISLAMS, (2004).

[543] LOMBARDI, State Law as Islamic Law in Modern Egypt: The Incorporation of the Sharī'a Into Egyptian Constitutional Law 60-71. 2006. From the way Lombardi treats codification, he seems to always associate codification with secularization while this is not the case. Sharia codified statutes may qualify as "secular" mechanisms in the modern state but they are not always secular in content and essence. It may be true, as Peters and Layish, argue that Islamic codification and the marginalization of jurists set the pattern for completely positive law that tends to favor secularism, but, nonetheless, some codification, at least in certain area and certain countries, can be Sharia-derived law. Compare, Peters, MEDITERRANEAN POLITICS, 82 (2002);Layish, DIE WELT DES ISLAMS, 91 (2004).

[544] LOMBARDI, State Law as Islamic Law in Modern Egypt: The Incorporation of the Sharī'a Into Egyptian Constitutional Law 72. 2006.

[545] Id. at, 60-3.

allowed to be more engaged in discussing and drafting laws and codes.[546] Some others were more opposed to the idea of having a codified law that would pave the way for secularization.[547]

One project tried to solve this dilemma of secularized codes, and attempted to provide an alternative that meets the procedural requirements for codes and, at the same time, reflects the content of Islamic jurisprudence. The project was undertaken by Abd al-Razzaq al-Sanhuri (d. 1971) who was one of the most important legal scholars in the Arab world in the twentieth century.

In the first half of the twentieth century, al-Sanhuri called for a committee that supervised a comprehensive codified Islamic law that can be suitable for different Islamic countries.[548] Al-Sanhuri took it upon himself to establish codes. The Civil Code was a product of al-Sanhuri's efforts and work alongside others.

In response to al-Sanhuri's venture in the 1940s, the Code was opposed by secularists as too Islamic, while the ulama and Islamists opposed it as not Islamic enough. The Code was seen by different groups as an unsuccessful compromise. The Islamists and the ulama were suspicious that the codification projects would set aside the traditional role of scholars.[549] However, the supposed role of scholars was not clear, or at least not unanimous.

The following part will discuss the different directions the modern Muslim countries took in respect to the role of scholars, whether legislative, judicial, or outside the state's apparatuses.

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[546] Id. at, 62-72.

[547] Peters, MEDITERRANEAN POLITICS, 89-91 (2002);Layish, DIE WELT DES ISLAMS, 100-2 (2004). The argument that codification leads to secularization stressed that the mere fact of codification places the authority of legislation in the hands of the state and its institutions alone disregarding the role of Islamic scholars and their public debates.

[548] LOMBARDI, State Law as Islamic Law in Modern Egypt: The Incorporation of the Sharī'a Into Egyptian Constitutional Law. 2006. In general about al-Sanhuri, and his project see, Enid Hill, *al-Sanhuri and Islamic law: the place and significance of Islamic law in the life and work of'Abd al-Razzaq Ahmad al-Sanhuri, Egyptian jurist and scholar 1895-1971*, (1987);Layish, DIE WELT DES ISLAMS, 90-1 (2004).

[549] LOMBARDI, State Law as Islamic Law in Modern Egypt: The Incorporation of the Sharī'a Into Egyptian Constitutional Law 109-32. 2006.

4.2   THE ROLE OF SCHOLARS IN STATE'S INSTITUTIONS

After introducing the constitutional context of the current orders of Muslim countries, this part will discuss the role of scholars in the constitutional setting with emphasis on the case of Egypt.

The part will start by examining the legislative task of Islamic jurists and how they carried it out in constitutional or general legal structure. Then, I will discuss their judicial involvement whether in positive or Islamic courts. I will conclude this part by testing the idea of theocratic constitutionalism and constitutional Islamization projects, and focus on how scholars played their role.

4.2.1   Jurists in Law Making

This section will explore the legislative task given to Islamic jurists in the modern Muslim state. The Pakistani experiment was inspired by the early Iranian model of jurists' involvement in legislatures. However, Egypt took a different path by not recognizing any official role for Islamic jurists per se with ambiguous recognition of Islamic jurisprudence in legislation. The legislative role could take the form of incorporating Islamic jurists into the legislature, establishing a committee partially made up of Islamic jurists, or handing over some legislative task to an Islamic jurisprudential institution.

The opinions of Islamic jurists, individuals who articulate and interpret Islamic law, were expected to be considered to understand and apply the law. How to consider these opinions in

modern Muslim-majority states differed not just from state to state but also from one time and regime to another.[550]

The Pakistani experience of the second half of the twentieth century and its attempt to involve jurists in law-making was inspired by its Iranian counterpart. Islamic jurists led the masses to victory during the Iranian Constitutional Revolution (1906-1911) and afterwards apparently impacted constitution-making.[551] One key demand was that all legislation by parliament should be under the scrutiny of high-ranking Islamic jurists. This requirement of the jurists' approval on legislation was incorporated into the Supplementary Fundamental Law adopted by the Iranian parliament in 1907.[552] The task of scrutinizing legislation was entrusted to a committee of at least five Islamic jurists in order for any bill to pass in the parliament.

Inspired by the Iranian model, the Pakistani state-building invoked some elements of involving ulama in the constitution-making and legislation-ratification. In 1949, the Pakistani constituent assembly established a committee of Muslim scholars to deal with Islamic jurisprudence.[553] In the 1950s, some Pakistani scholars proposed that they should establish a committee entrusted with checking the Islamicity of legislation, but the idea was dropped after heated opposition. In 1955, the Constituent Assembly in the final Basic Principle Report deleted

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[550] Khaled Abou El Fadl, *The Centrality of Sharia to Government and Constitutionalism in Islam*, *in* CONSTITUTIONALISM IN ISLAMIC COUNTRIES: BETWEEN UPHEAVAL AND CONTINUITY 48, (Rainer Grote & Tilmann Roder eds., 2011);FELDMAN, 28-74 (2008).

[551] Arjomand, ANNUAL REVIEW OF LAW AND SOCIAL SCIENCE, 117-9 (2007). About the Constitutional Revolution in Iran, see, MANGOL BAYAT, IRAN'S FIRST REVOLUTION: SHI'ISM AND THE CONSTITUTIONAL REVOLUTION OF 1905-1909 123-43 (Oxford University Press on Demand. 1991);Said Arjomand, *The Kingdom of Jurists: Constitutionalism and Legal Order in Iran*, *in* CONSTITUTIONALISM IN ISLAMIC COUNTRIES: BETWEEN UPHEAVAL AND CONTINUITY 147-50, (Rainer Grote & Tilmann Roder eds., 2011). The Iranian model is not part of the discussion except for its impact on other countries like Pakistan.

[552] Arjomand, The Kingdom of Jurists: Constitutionalism and Legal Order in Iran 168. 2011;Arjomand, ANNUAL REVIEW OF LAW AND SOCIAL SCIENCE, 118&125 (2007).

[553] Ahmad, Activism of the Ulama in Pakistan 260-1. 1972.

mention of the committee of jurists.[554] The attempt to engage ulama in official legislation in Pakistan did not succeed for different reasons—one important reason that concerns us here is "the traditional Sunni rejection of clericalism."[555]

More than three decades later and after different regime changes, in 1991, Nawaz Sharif, the Prime Minister of Pakistan, established a committee of members of parliament, lawyers and Islamic scholars to draft an Islamic bill that was directed at facilitating the "Enforcement of Sharia," which passed in the parliament and became law. However, according to Charles Kennedy, the enforcement of that law was limited. Constitutional restraints played a major role in minimizing the impact of the law, along with the jurisdictional boundary the Pakistani High Court set against the application of it.[556]

Unlike Pakistan, the Egyptian experiment in regards to Islamic scholars in legislation dates back to the nineteenth century. When Egypt was part of the Ottoman Empire, it was familiar with the role of Sheikh al-Islam (the Islamic Supreme Scholar) and his check on rulings in order to make sure they reflect Islamic jurisprudence. This system of juristic examination of laws affected Egypt, and formed its early understanding of law-making. In the attempts to transform the system toward positive law in the late nineteenth century, jurists from different schools were appointed to examine the laws and their Islamicity, though it was not clear what authority they had and if their decisions were binding or just advisory.[557]

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[554] ZAMAN, The Ulama in Contemporary Islam: Custodians of Change: Custodians of Change 88. 2010;Charles H. Kennedy, *Repugnancy to Islam: Who Decides? Islam and Legal Reform in Pakistan*, 41 THE INTERNATIONAL AND COMPARATIVE LAW QUARTERLY, 3 (1992).

[555] Jakob Skovgaard-Petersen, *Egypt's 'Ulama in the State, in Politics, and in the Islamist Vision*, *in* THE RULE OF LAW, ISLAM, AND CONSTITUTIONAL POLITICS IN EGYPT AND IRAN 279, (Said Amir Arjomand & Nathan J Brown eds., 2013). Clericalism seems to refer to the stage that follows religious institutionalization. In the previous chapter, I discussed the Sunni tendency to circumvent or even reject institutionalization.

[556] Kennedy, THE INTERNATIONAL AND COMPARATIVE LAW QUARTERLY, 12 (1992).

[557] LOMBARDI, State Law as Islamic Law in Modern Egypt: The Incorporation of the Sharīʿa Into Egyptian Constitutional Law 55-66. 2006. The position as introduced in the Nineteenth century was a precedent, but, nonetheless, did not entailed any binding authority associated with it except for influence and social recognition that

For decades, ulama were still a major player but did not occupy a continuous legislative position. In the 1930s, scholars allied with King Fuad (d. 1936) presented him as a caliph in order to pressure him to adopt an approach that considered Islamic scholars in law-making. The political movement Young Egypt supported the scholars' proposal to check the laws and Young Egypt backed the idea that jurists from al-Azhar examine laws to ensure their consistency with their interpretation of Islamic law.[558]

The legislative ulama in the official sphere suffered a setback prior to the beginning of the 1970s. There are factors that contributed to this decline of the legislative ulama. One important factor is Nasser's regime and its hostility toward any Islamic discourse that was portrayed as a "reactionary movement" that would block the socialist reforms of the regime. The Islamic mood of Sadat revived the demand for Islamic jurists' involvement in legislation. In 1976, al-Azhar established a committee that could suggest legislative reforms to insure that laws were consistent with Islamic jurisprudence. This time, the powerful Islamist movement, the Muslim Brotherhood, supported the ulama's move. Although the suggestions had an impact, the committee had no official legislative authority and had not been incorporated into the parliament.[559]

In 1980, after a parliamentary vote that required amending laws according to principles of Islamic law, the chairman of the committee entrusted with the reform proposals released a report that the suggestions include the consideration of the Islamic texts, the Quran and Sunnah, along with the opinions of Islamic scholars and *Imam*s.[560] This mention of the scholars did not specify

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is located in what I call the meta-constitutional sphere. see, CHAMBERS, The Ottoman ulema and the Tanzimat 35-7. 1972. Compare, JANIWLAT, Qwaneen al-Dawlah al-'uthmanyyah 121-87. 2012.
[558] LOMBARDI, State Law as Islamic Law in Modern Egypt: The Incorporation of the Sharīʿa Into Egyptian Constitutional Law 103-4. 2006.
[559] Id. at, 126-7.
[560] Id. at, 134-5&166.

if Islamic jurists were supposed to be part of a legislative committee, or if Islamic scholars' published opinions would just be examined by the committee entitled to make the proposals. The committee sent the drafts of the reformed codes to al-Azhar and made changes accordingly but the whole idea of the scholar's legislative examination was gradually abandoned.[561]

Generally, invoking scholars in legislation seems very selective and strictly consultative. For example, when the controversial Family Code (known as Jihan's Law) was to be enacted, Sadat (d. 1981) sent the draft to the Chief Mufti to examine its consistency with Islamic law. This move took place probably because of Sadat's awareness of the law's controversial nature so he would preemptively contain any Islamic opposition to the Code.[562]

The norm in Egypt is to refrain from empowering any religious establishment or Islamic body with any official religious or state authority even in matters of Islamic jurisprudence or Sharia interpretation. The attempts to transmit interpretive authority to Islamic jurists were either consultative, which lacks any binding state-like authority, or selective in a subject matter that the state knew in advance the outcome and needed a legitimizing stamp from the Islamic jurists.[563]

The Maghreb's countries provide a long-established and interesting model. In Morocco, Tunisia, Algeria, there are no state Muftis, nor any official Islamic institution that is recognized by the state, or part of the state's apparatuses. Although there are high Islamic councils, these are not the state's religious institutions nor do they have any unique religious authority over interpretation except for people's respect and recognition.[564]

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[561] Id. at, 135-7.

[562] Id. at, 170. The Code was called "Jihan's Law" because Jihan, the president Sadat's wife, was thought to be a major force behind it. About the law and Jihan, see, Amany Kamal El-Din, et al., *After Jihan's Law: A New Battle Over Women's Rights*, THE MIDDLE EAST MAGAZINE (1985).

[563] See, Backer, INDIANA JOURNAL OF GLOBAL LEGAL STUDIES, 169-70 (2009).(Backer reads the move of not submitting to a religious authority as a failure for theocratic constitutionalism and a victory for secularism).

[564] Thierry Le Roy, *Constitutionalism in the Maghreb: Between French Heritage and Islamic Concepts*, in CONSTITUTIONALISM IN ISLAMIC COUNTRIES: BETWEEN UPHEAVAL AND CONTINUITY 116, (Rainer Grote & Tilmann Roder eds., 2011). About the traditions of the Maghreb countries' scholars see, Brown, The Religious Establishment

Although Clark Lombardi describes the approach of demanding jurists' involvement in legislation as a "neo-traditional" school,[565] he does not seem to capture a more traditional and classically dominant jurisprudential canon of refraining from state's legislation for free independent and especially non-binding jurisprudence. Therefore, the "neo-traditional approach" will seem accurate to describe the different groups of non-state jurists who, even if they establish an institution or are affiliated with Islamic bodies like in Morocco, Tunisia and Algeria, still produce Islamic jurisprudence and Islamic law in a way that it is not state-enacted nor state-controlled.[566]

4.2.2 Islam in the Judiciary (Jurists in the Judiciary and Total Islamic Courts)

The previous section explored the legislative tasks or attempts that intended to incorporate Islamic jurists into the legislature or empower a religious institution or a juristic committee with a legislative task. This section is to examine the judicial tasks vested in the jurists whether in general courts, or in Islamic courts, usually known as "Sharia courts."

One researcher claims that the Sunni medieval structure was familiar with judicial duality where there were two types of courts in the same system. The first was Qadi and jurists-appointed courts whose jurisdiction included different subject matters, except for cases of administrative nature. The second was the strictly administrative courts whose jurisdiction was

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in Husainid Tunisia 47-91. 1972;Edmund Burke III, *The Moroccan Ulama, 1860-1912: An Introduction*, see id. at 93-125, (Kenneth Brown, *Profile of a Nineteenth-Century Moroccan Scholar*, see id. at 127-48).

[565] LOMBARDI, State Law as Islamic Law in Modern Egypt: The Incorporation of the Sharī'a Into Egyptian Constitutional Law 80-97. 2006.

[566] See, Quraishi, The Separation of Powers in the Tradition of Muslim Governments 63. 2011.

for cases respecting the rulers' edicts and ordinances. These latter courts were staffed by non-jurists.[567]

In modern times, Pakistan is a salient case of this judicial duality in Sunni Islam. The Islamic jurists in Pakistani courts and their judicial role passed through two phases. The first phase began in the 1970s and lasted until 1980, and there were Islamic benches (Sharia Benches) that operated within the general courts. There was no representation or lawyers in these benches, but rather, Islamic jurists who appeared to be expert witnesses more than judges or attorneys. The benches were to function as Islamic appellate bodies that would decide cases in regards to the Islamic Criminal Code. But if the party was willing to appeal, he or she could take it to the Sharia bench of the Supreme Court within 60 days. The benches did not just decide cases in regards to Criminal Code; they, also, had the power to annul laws that they deemed un-Islamic, which is a prerogative usually vested exclusively in the constitutional or high courts in other Sunni countries like Egypt.[568]

In 1980, the Sharia Benches were dissolved and replaced by an Islamic judicial system called the Federal Sharia Courts. These newly-established courts assumed the powers of the Sharia benches including the judicial authority to declare laws repugnant to Islamic law. The

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[567] LOMBARDI, State Law as Islamic Law in Modern Egypt: The Incorporation of the Sharī‘a Into Egyptian Constitutional Law 54. 2006.(Lombardi depended on Joseph Schacht in making this distinction between these two types of courts in the Medieval Islam. However, I suspect this was true. There is no doubt that jurists-appointed courts were there, but the other "administrative courts" do not seem accurate. It may be that the rulers' political courts where they held their meeting and issue their edicts were mistaken for judicial courts). For general idea of the judicial system in Medieval Islam, see, HUSAIN AL-KASASBIH, AL-SULTAH AL-QADHA'IYYAH FI AL-'ASR AL-'ABBASI 183-93 (Zayed Center for Heritage and History 1st ed. 2001).
[568] MARTIN LAU, THE ROLE OF ISLAM IN THE LEGAL SYSTEM OF PAKISTAN 122-4 (Brill. 2005). For the role of ulama and their activism since the independence of Pakistan, See, Ahmad, Activism of the Ulama in Pakistan 261-7. 1972. For the Egyptian Constitutional Court's exclusive negative legislation see, LOMBARDI, State Law as Islamic Law in Modern Egypt: The Incorporation of the Sharī‘a Into Egyptian Constitutional Law 145. 2006;MOUSTAFA, The struggle for constitutional power: law, politics, and economic development in Egypt 80-1. 2007;Grote, Models of Institutional Control: the Experience of Islamic Countries 232. 2011.

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decisions of these courts could overrule all courts and be appealed only in the Federal Supreme Court.[569]

The notable development in the creation of Federal Sharia Courts in Pakistan is their inclusion of Islamic scholars in their structure. After 1985, an official positioning of Islamic scholars in these courts took place with a constitutional amendment that required some ulama in the Sharia courts. The amendment provided that not more than three well-versed Islamic scholars alongside five legally-trained individuals should sit as judges in the Federal Sharia Courts.[570] In reality, according to Charles Kennedy, the Pakistani Supreme Court's decisions ended up stripping these Federal Sharia Courts of many powers and denied "jurisdiction in many realms important to would-be Islamic reformers of Pakistan's legal system."[571]

In Malaysia, the judicial system established Sharia courts, along with the High Courts and Federal Courts. Although the Federal Courts cannot decide matters pertaining to Islamic law, the Supreme Court can overrule and accept appeals from Sharia Courts. So, despite the ambiguous functions of the Sharia Courts in areas other than family law, the secular Supreme Court supervises the whole judicial system including Sharia Courts. Unlike Pakistan, where the ulama sit as judges beside others, or Saudi Arabia where judges in general courts are only Islamic scholars, Malaysia does not seem to have such a requirement.[572]

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[569] LAU, The role of Islam in the legal system of Pakistan 143&196-7. 2005.(After surveying many cases that wanted the Courts to strike down laws on the ground of their repugnance to Islamic laws, Martin Lau found that the Sharia Courts declined so many objections and cases and, thus, seemed to be relatively careful in annulling laws);Backer, INDIANA JOURNAL OF GLOBAL LEGAL STUDIES, 164 (2009).

[570] LAU, The role of Islam in the legal system of Pakistan 130. 2005;Kennedy, THE INTERNATIONAL AND COMPARATIVE LAW QUARTERLY, 5 (1992). Despite this judicial setting, Muhammad Qasim Zaman notes that Islamic law was determined by Islamic Federal Courts not ulama. ZAMAN, The Ulama in Contemporary Islam: Custodians of Change: Custodians of Change 89-90. 2010.

[571] Kennedy, THE INTERNATIONAL AND COMPARATIVE LAW QUARTERLY, 5 (1992).

[572] Backer, INDIANA JOURNAL OF GLOBAL LEGAL STUDIES, 174 (2009). About Saudi judicial system see, FRANK E VOGEL, ISLAMIC LAW AND THE LEGAL SYSTEM OF SAUDÍ: STUDIES OF SAUDI ARABIA 3-165 § 8 (Brill. 2000);Hossein Esmaeili, *On a Slow Boat towards the Rule of Law: The Nature of Law in the Saudi Arabia Legal System*, 26 ARIZ. J. INT'L & COMP. L., 33-40 (2009).

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These experiments of Islamic courts or the existence of some judicial functions handed over to Islamic scholars did not seem to work well, or at least did not have the chance to work well due to constitutional and superior judicial limitations.

On the other hand, modern Egypt never experienced or seriously considered Sharia courts. The reason for the avoidance of the idea of Islamic courts in Egypt could be the bad memory of the mixed courts that were always associated with showing favoritism and corruption along with imperialistic prerogatives for foreigners and non-Egyptians.[573]

This section examined the scholars and their role in Islamic adjudication. Despite having functioning Islamic courts, these courts were enveloped in a comprehensive civil system that not only mitigated the Islamicity in the system but also decided what Islam and Islamicity were. This brings us to the discussion of secularization versus Islamization in legal systems, and the concept of constitutional theocracy.

4.2.3   Juristic Authority and Constitutional Theocracy

The discussion of the Islamic scholars' role in legislation or adjudication always revives the fear of theocracy or its forms. But, because the Islamization project in the modern Muslim-majority states like Egypt does not conform to the traditional idea of theocracy, the concept of constitutional theocracy or theocratic constitutionalism attempts to offer an analysis of this constitutional phenomenon. This section introduces some concepts related to constitutional

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[573] About the Egyptian judicial system and early mixed system and the Sharia courts before Muhammad Ali Pasha (d. 1849), see, Adel Omar Sherif, *Overview of the Egyptian Judicial System, and Its History, An*, 5 YB ISLAMIC & MIDDLE EL, 12-5 (1998).

Islamization, tries to examine them, and concludes with the Islamization project and the scholars' role in it.

By the end of the twentieth century, there was a confident impression of the universality of a constitutional law and constitutionalism that transcends countries and cultures. This universal system was looked at as the only normatively legitimate national constitutionalism that everyone should follow and respect. In the aftermath of World War II, a different trend has arisen and a more pluralistic understanding of constitutionalism in the American and global academia has begun. Like the transcendental universalistic constitutionalism that wanted to fight extremism and provide constitutional harmony, the more pluralistic and fragmentary current wanted to reach stability and combat fanaticism in an unorthodox way.[574]

One major trend within constitutionalism is a system that accepts fundamental principles of constitutionalism, such as the existence of a constitutions, separation of powers, and the will of the people, and, at the same time, incorporates some local principles from religion. The Islamic world is the central theater of this pervasive religious constitutionalism. Ran Hirschl describes such a system as a "constitutional theocracy." He notes that, while traditional theocracy accumulates power in the hands of clergy or religious institutions, there is a modern

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[574] Backer, INDIANA JOURNAL OF GLOBAL LEGAL STUDIES, 3-15 (2009).(Backer interestingly notes that the wide American acceptance of the pluralistic and particularistic conception of constitutionalism came after the American wars in Afghanistan and Iraq and the theocratic constitutionalism that followed both constitutional reconstructions). It is worth noting that after the Egyptian Revolution in 2011, a document supported by the Supreme Council of Armed Forces (SCAF), the ruling authority then, called for the national adoption of "supra-constitutional principles." The document was speculated to protect the universalist constitutionalism conception from any Islamist/theocratic rule. The document went nowhere as it received a heated opposition from one strong portion of revolutionaries with Islamist sympathies. Hamdy Dabash & Hani al-Wazeeri, *Al-Masy al-Yawum Tanshur Nas Wathyqat al-Mabadi' al-Dusturiyyah*, ALMASRY ALYOUM, 8-14-2011.

phenomenon of "constitutional theocracy" that is run by lay political figures and in accordance with constitutional limits.[575]

Unlike the different degrees of separation of religion and state, constitutional theocracies adopt formally and structurally one single faith. While Hirschl is aware of some European countries' mode of having one single faith recognized in the constitution, he interprets this recognition as a collective entity or social boundary whereas constitutional theocracies require laws to be religiously compliant.[576] According to Hirschl, for a constitutional theocracy to be described as such, it needs to have four components: (1) commitment to all essential aspects of modern constitutionalism, (2) having a state religion that is recognized and endorsed as the dominant single faith, (3) the constitutional establishment of the religion as a source of legislation, (4) a constitutionally recognized relationship between judiciary and religious bodies that is granted some sort of jurisdiction over some issues.[577]

After surveying different countries of constitutional theocracies, Hirschl recognized nine approaches in relation between religion and state:[578] (1) anti-religious states like atheist communism; (2) religion-free states like France and Kemalist Turkey; (3) neutrality-model states like the United States; (4) a lighter model of formal separation of church and state like Canada; (5) a loose recognition and establishment of religion as symbolic "state religion" like Norway, Denmark, Finland, Iceland, Greece, Cyprus, and England; (6) a de-facto dominance of a religion like Ireland, Malta, Poland, Chile, Colombia, Mexico, and Argentina; (7) a selective

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[575] Ran Hirschl, *The Theocratic Challenge to Constitution Drafting in Post-Conflict States*, 49 WILLIAM & MARY LAW REVIEW, 3-4 (2008).(Hirschil asserts that "[p]rinciples of theocratic governance often stem from and adhere to alternative sources of authority and legitimacy. The rule of God, not the rule of law, is the ultimate tenet here").
[576] Id. at, 5;HIRSCHL, Constitutional theocracy 3. 2011.
[577] Hirschl, WILLIAM & MARY LAW REVIEW, 3 (2008);HIRSCHL, Constitutional theocracy 5. 2011.
[578] In an earlier writing, Hirschl limits the relations between religion and state to six models. Hirschl, WILLIAM & MARY LAW REVIEW, 6-7 (2008). However, it seems that in a larger, more detailed, and later work, he added three more to end up in a total of nine approaches. HIRSCHL, Constitutional theocracy 26-54. 2011.

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accommodation of religion in certain areas of law like India and Nigeria; (8) a total

establishment of religion with certain secular enclaves like Saudi Arabia; and (9) a dual system

of recognizing religious principles as the basis of the law, and universalist constitutional

principles, like Pakistan and Egypt.[579]

Larry Catá Backer agrees with Hirschl that what the latter calls "constitutional

theocracies" and universalist secular constitutionalism are incompatible. However, Backer

asserts that theocracy is associated with despotism, while constitutionalism tends to limit power

and distribute authority, which makes it incompatible with a theocracy.[580] In furthering his

criticism of Hirschl, Backer suspects that the former belittles the role of religion in constructing a

set of values whereas Backer recognizes the importance of religion in constructing a system of

values.[581] More importantly, Backer disagrees with Hirschl in the idea that "constitutional

theocracy" is a defective version of constitutionalism in comparison to universalist secular

constitutionalism. Rather, Backer assesses these "constitutional theocracies" in their own scale as

legitimate political systems.[582] For Backer, in the sort of system Hirschl calls "constitutional

theocracy," procedural rule of law is observed, democratic values are respected to a high degree,

and the basic elements of constitutionalism are established. However, the source of values in

secular constitutionalism is different from its counterpart in religious constitutionalism.

Therefore, Backer termed the phenomenon "theocratic constitutionalism," stressing that it is a

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[579] HIRSCHL, Constitutional theocracy 26-54. 2011;Hirschl, WILLIAM & MARY LAW REVIEW, 6-7 (2008). Different authors may provide different categorizations. *See, e.g.,* JELEN, The political world of the clergy 2-5. 1993;Rabb, UNIVERSITY OF PENNSYLVANIA JOURNAL OF CONSTITUTIONAL LAW, 531 (2008);Arjomand, ANNUAL REVIEW OF LAW AND SOCIAL SCIENCE, 115 (2007).
[580] Backer, INDIANA JOURNAL OF GLOBAL LEGAL STUDIES, 120-30 (2009).
[581] Id. at, 104-5&127-8.
[582] Id. at, 130-1.

valid kind of constitutionalism, instead of emphasizing its theocratic nature as is inferred from Hirschl's "constitutional theocracy."[583]

In Backer's "theocratic constitutionalism," it is possible to develop a system that is committed to universalist constitutionalist principles, while having elements of theocratic constitutionalism.[584] Backer seems more aware that traditional religiosity existed in secular regimes.[585] However, both single out traditional religions as an arena exposed to theocracy, downplaying the untraditional religiosity of civil religion on which universalist secular constitutionalism is based. Moreover, secular religion is even more religious in the way it treats unbelievers in its system and its set of values.[586] We may say that the theocratic mindset of the totally secular orders emphasizes their secular religiosity—a phrase that would seem contradictory had not we seen different political religions that did not stem from traditional religions like Judaism, Christianity, and Islam.[587]

What Ted Jelen calls "strict separationist"[588] and Hirschl describes as "anti-religion" states, along with "religion-free states"[589] may indicate another constitutional phenomenon—we may call it "atheocratic constitutionalism." Just as atheism negates religion from its system of values, atheocratic constitutionalism negates religion, in the traditional sense, from its public sphere.[590]

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[583] Id. at, 130-3.
[584] Id. at, 160. What Backer tackles here seems comparable to what Intisar Rabb calls "coordinate constitutionalization". It is "where a constitution incorporates Islamic law, laws of democratic processes, and liberal norms, placing them all on equal footing." Rabb, UNIVERSITY OF PENNSYLVANIA JOURNAL OF CONSTITUTIONAL LAW, 531 (2008).
[585] Backer, INDIANA JOURNAL OF GLOBAL LEGAL STUDIES, 104-5&127-8 (2009).
[586] See, GENTILE, Politics as religion 16-45. 2006.
[587] It is beyond the scope of this chapter to discuss the political religion, but in general see, id. at, 16-45.
[588] JELEN, The political world of the clergy 2-5. 1993.
[589] HIRSCHL, Constitutional theocracy 26-7. 2011;Hirschl, WILLIAM & MARY LAW REVIEW, 6-7 (2008).
[590] It is not the intention of this chapter to discuss this phenomenon, but only to ask questions about the concepts of theocratic constitutionalism and constitutional theocracy here. However, stemming from Gentile's "political religion," I used the word "atheocratic" as opposed to "theocratic" just like "atheism" to theism. Like Constitutional theocracy, constitutional atheocracy takes different forms and some extreme atheocratic regimes may fight any

In the Muslim world, Kemalist Turkey is an example of this *atheocratic* constitutionalism. In 1928, a few years after the dismantling of the caliphate system (the Ottoman Empire), the regime of Mustafa Kemal Atatürk (d. 1938) removed from the constitution and the law any reference to Islam or Sharia. Instead, secularism was adopted, and the word "secularism" was incorporated in the 1937 Constitution. Ironically, a secular ministry (the Directorate of Religious Affairs) was established to control religious endowments, direct religious affairs, and impose a certain religious rhetoric acceptable to the regime's secular system.[591] In short, as Ergun Ozbudun puts it, "Turkish secularism appears as a system of state-controlled religion, rather than the separation of the state and religious institutions."[592] It reached this level when the secular Kemalist regime of 1982 made religious teaching compulsory in order to promote an enlightened interpretation of Islam, a move to which the European Court of Human Rights did not object.[593] The Turkish case is the model Ahmet Kuru calls "assertive secularism" as opposed to "passive secularism." Assertive secularism has a certain religious, or probably anti-religious, discourse and attitude toward traditional religion, and, thus, controls its teaching and movement. On the other hand, passive secularism is what others call neutrality toward religion, while ensuring that there is no religion established by the state.[594]

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traditional religious demonstration in public spheres. The exclusive right to interpretation for atheocratic system is only in the hands of those typical bearers of the national flags. Those legitimate interpreters reject any unauthorized reinterpretation of atheocratic concepts because reinterpretations could distort and demolish the atheocratic pillars like nationalism, secularism, and citizenship. For Gentile's "political religion" and its discussions, see, GENTILE, Politics as religion 16-45. 2006.

[591] Ergun Ozbudun, *Secularism in Islamic Countries: Turkey as a Model*, *in* CONSTITUTIONALISM IN ISLAMIC COUNTRIES: BETWEEN UPHEAVAL AND CONTINUITY 136-9, (Rainer Grote & Tilmann Roder eds., 2011).

[592] Id. at, 139.

[593] Id. at.

[594] Ahmet T Kuru, *Passive and assertive secularism: Historical conditions, ideological struggles, and state policies toward religion*, 59 WORLD POLITICS, 568-572 (2007);Ozbudun, Secularism in Islamic Countries: Turkey as a Model 138. 2011.

While theocratic constitutionalism and constitutional theocracy attempt to explain the wave of Islamization, there is thus a reverse constitutionalism that tends to negate a certain religion, and, in the name of secularism, adopt similar religious discourse against the will of the people. One demonstration of this counter-religious phenomenon is the systematic rejection of Islamic manifestations as part of the battle against theocracy. There remains the question whether the Islamization project constitutes a form of theocracy. The next section will discuss Islamization, especially the mechanism of codification and the role of Islamists and other players along with scholars.

4.2.4   Non-Scholastic Competitors toward Islam

The project of Islamization in post-World War II took different forms but mostly shared the ideas of Islamic reconstructionism that marked this phase.[595] In Said Arjomand's account, the Islamization of this stage is characterized by "the ideological treatment both of Islam and of the constitution."[596] For example, Arjomand describes the Pakistani Islamization of 1949-1956 as a transfer from the inherited British Raj's legal system to the sovereignty of God.[597] Pakistan was to adopt Islam and its law, but the way to implement it was not clear.[598]

To undertake the Islamization project, there were two options: declaring Islamic law as superior but leaving its application to the judiciary, or taking the course of codification. Taqi Uthmani, an influential Pakistani scholar and a former judge in a Sharia Court preferred codification for various reasons including the lack of training of modern judges in Islamic

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[595] LAU, The role of Islam in the legal system of Pakistan 5. 2005.
[596] Arjomand, ANNUAL REVIEW OF LAW AND SOCIAL SCIENCE, 119 (2007).
[597] Id. at, 120.
[598] Kennedy, THE INTERNATIONAL AND COMPARATIVE LAW QUARTERLY, 3 (1992).

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jurisprudence. Although Uthmani acknowledged that codification is not the traditional mechanism for promulgating Islamic law in the premodern era, he nonetheless, still found codification the best way to ensure Islamic law's application in the modern Muslim state.[599] The Pakistani scholars embraced codification and supported its proposals as an acceptable form of Islamization. Codifying Sharia in Pakistan was not seen as a threat to the jurisprudential authority of the ulama. Nonetheless, the jurisprudential works performed outside the state's institutions continued to have influence.[600]

In Pakistan, a number of Islamic constitutions were drafted and abrogated, different regimes followed, but Islam in the law remained undisputable. The 1977 Islamic military coup by Zia ul-Haqq (d. 1988) was a turning point toward Islamic authoritarianism.[601] He issued ordinances to fight un-Islamic activities, and announced laws that criminalized "deviant creeds."[602] Zia arranged with the National Assembly the outline for Islamic codification, but soon grew impatient with the "slow progress of Islamization" and dismissed the National Assembly altogether.[603]

Zia's model represents the Islamization project through authoritarianism. His codification was promulgated solely through presidential ordinances. The codified Sharia as proposed by Zia's regime was an instrument used by the person in power to tighten the grip on all

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[599] ZAMAN, The Ulama in Contemporary Islam: Custodians of Change: Custodians of Change 93-8. 2010.(Of the reasons why Uthmani preferred codification are its modern adaptability, its ability to change, following the prevailing jurisprudential school instead of leaving it to Judges' discretion, and, finally, the preexisting codification projects).

[600] Id. at, 96-99&152. Compare, Kennedy, THE INTERNATIONAL AND COMPARATIVE LAW QUARTERLY, 4 (1992).Lombardi thinks that researchers and academics "who try to bring back fiqh through proposed "codes" acted like jurists did in the classical sense." He surely overlooks the remarkable difference between the codification proposed by appointed modern-state's committees on one hand, and independent scholars exerting their efforts to come up with the interpretations and opinions. It is not just the jurisprudential opinions in the latter setting, but more importantly, the balance they provided for society and the state. See, LOMBARDI, State Law as Islamic Law in Modern Egypt: The Incorporation of the Sharīʿa Into Egyptian Constitutional Law 99. 2006.

[601] See, Kennedy, THE INTERNATIONAL AND COMPARATIVE LAW QUARTERLY, (1992).

[602] Arjomand, ANNUAL REVIEW OF LAW AND SOCIAL SCIENCE, 122 (2007).

[603] Kennedy, THE INTERNATIONAL AND COMPARATIVE LAW QUARTERLY, 10 (1992).

governmental branches and the religious sphere. The attempt to transfer religious authority from societal-based networks to state-controlled institutions was attained by codifying Islamic law and its appointed committees. In Pakistan, Muhammad Qasim Zaman notes:

> Islamization has also served to strengthen the state's control of society, to extend and deepen its reach into new areas, including facets of religious life. Islamization has also served as the instrument for enhancing the government's own authority....[604]

In Egypt, the Islamization of 1971 and its Constitution were also a change provided by the autocratic regime of Anwar al-Sadat (d. 1981). During the Islamic plan of al-Sadat, there were two kinds of religious presence: religious institutions of scholars, mainly Al-Azhar; and religious-inspired "social" movements and political parties, mainly the Muslim Brotherhood (in Arabic: al-Ikhwan al-Muslimeen). These scholars represent the traditional religious authority that carried Islam, Islamic law, and its sciences throughout history while the religious sociopolitical groups like the Muslim Brotherhood emerged as a modern phenomenon composed of lay Islamists. Today's Islamic brotherhoods and Islamists may have been developed from the structure of the brotherhood system in mystical orders in Islamic history. The relationship between these two fractions (scholars and Islamists) fluctuated between competition over the claim of authority and cooperation in reinforcing the presence of Islam in society. While Islamism may pose a challenge to the scholars' classical role as bearers of Islam, Islamists can also be seen as the political player that helps a religious institution like al-Azhar in its active role.[605]

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[604] ZAMAN, The Ulama in Contemporary Islam: Custodians of Change: Custodians of Change 101. 2010.
[605] It is beyond the scope of the research to discuss Islamism or the Muslims Brotherhood. For the history of brotherhood orders in history and their unsettled relationship with scholars (ulama), and the modern competition and cooperation, see e. g., B. G. Martin, *A Short History of the Khalwati Order*, *in* SCHOLARS, SAINTS, AND SUFIS: MUSLIM RELIGIOUS INSTITUTIONS IN THE MIDDLE EAST SINCE 1500 275, (Nikki R Keddie ed. 1972);Ernest Gellner, *Doctor and Saint*, see id. at 307, (;Vincent Crapanzano, *The Hamadsha*, see id. at 327, (;Ahmad, Activism of the Ulama in Pakistan 257. 1972;WICKHAM, Mobilizing Islam: Religion, activism and political change in Egypt.

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While Islamization in Egypt was supposed to revive Islamic jurisprudence, the mechanism was, in reality, a combination of declaring of Islamic law, and codifying Sharia, both of which the autocratic regime of al-Sadat controlled and mastered. While he was said to have sympathy to Islamism and the Muslim Brotherhood in particular, the way in which the Islamization project was administered unveiled a deep suspicion and distrust. After the codified Islamic drafts were announced, the regime did not tolerate any criticism especially from the Islamists.[606] The Egyptian Islamization project was at stake when al-Sadat was assassinated in 1981. As soon as President Hosni Mubarak assumed power, the Islamization plan was dismantled, and the Islamic codes were shelved.[607]

Despite the fact that Islamization was intended to respond to the people's requests, it employed autocratic and authoritarian mechanisms. The project attempted to replace the typical class of socially recognized jurists with appointed committees entrusted with Islamic codification. The experiment was challenged for its operation and its Islamicity. Nevertheless, the Islamization plan has introduced a constitutional phenomenon that includes Islamic codification as we saw in this section, the repugnancy clause, and the Islamic interpretation of the judiciary as we will see in the next sections.

The next section will deal with Islamic constitutional articles that have become part of the constitutional order in many Muslim-majority and Arab states. The discussion will include the

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2002;MARTIN & BARZEGAR, Islamism: contested perspectives on political Islam. 2010;Skovgaard-Petersen, Egypt's 'Ulama in the State, in Politics, and in the Islamist Vision. 2013;Hirschl, TEX. L. REV., 2 (2003).

[606] LOMBARDI, State Law as Islamic Law in Modern Egypt: The Incorporation of the Sharī'a Into Egyptian Constitutional Law 116-36. 2006;Moustafa, INTERNATIONAL JOURNAL MIDDLE EAST STUDIES, 3-7 (2000). In general see, Adel Omar Sherif, *The Relationship between the Constitution and the Sharia in Egypt*, in CONSTITUTIONALISM IN ISLAMIC COUNTRIES: BETWEEN UPHEAVAL AND CONTINUITY 125-6, (Rainer Grote & Tilmann Roder eds., 2011).

[607] LOMBARDI, State Law as Islamic Law in Modern Egypt: The Incorporation of the Sharī'a Into Egyptian Constitutional Law 136-9. 2006.

way Islamic law was interpreted and the power of interpretation between legislature and judiciary.

4.3   ISLAMIC CONSTITUTIONAL ARTICLES

In this part, two main issues are addressed: constitutional texts and articles, and constitutional interpretation. In the constitutional texts, the issue of Article 2, and the repugnancy clause, will be given great emphasis because of its history and impact. There will be a separate section for Egypt and the question of the treatment of scholars and religious institutions like al-Azhar in the different constitutions. The second section discusses the interpretation of the Islamic constitutional articles and the authority of interpretation between the legislature and the judiciary in Egypt. It will also discuss the role of the Egyptian Supreme Constitutional Court (SCC), and what role the Islamic scholars played in the interpretation. Finally, this part will conclude with the current constitutional interpretation and the judicial application of Islamic law.

4.3.1   The Constitutional Texts

To understand the context of the Islamic constitutional articles, I will discuss Islamic articles in various Muslim-majority states and, then, turn to Egypt and its repugnancy clause.

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4.3.1.1 In General: The Genesis of Repugnancy Laws

In the second half of eighteenth-century in India, the British gradually established a new judicial system with civil, criminal, and appellate courts. Muslim judges (*qadis*) assisted the British officials for some time with judiciary duties until the position of these Muslim scholars was abolished altogether. However, Regulation II of 1772 provided:

> In all suits regarding inheritance, succession, marriage and caste and other usages or institutions, the law of the Koran with respect to Mahomedans [Muslims], and those of the Shaster with respect to the Gentoos [Hindus] shall be invariably adhered to.[608]

Regulation II seems to be one of the first Islamic clauses.[609] As a result of the Regulation II, Islamic jurists continued to advise on exclusively family law that involved Muslims until 1864.[610] To reassure Muslims that the British were not playing against their faith or values, the colonizers drafted an "Islamic" law that dealt mainly with family law, called "Anglo-Muhammadan Law."[611] According to Zaman, the "Anglo-Muhammadan Law" was a hybrid law that attempted to marginalize the role of Islamic scholars in Islamic jurisprudence while still maintaining a role for Islam itself.[612]

Around that time, namely in 1876, in the Ottoman Empire, there was other Islamic constitutional articles in which the Basic Law recognized the sultan as the Supreme Islamic

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[608] ZAMAN, The Ulama in Contemporary Islam: Custodians of Change: Custodians of Change 21. 2010.

[609] Haider Hamoudi indicates that the early repugnancy clauses in the British colonized regions were those that served to repeal any customary law that was repugnant to natural justice or public policy. Then, the clauses seemed to treat public policy and natural justice as articulated by the British as superior law to local law, which is the opposite of today's Islamic repugnancy clauses that makes (local) Islamic law superior. Hamoudi, WILLAMETTE L. REV., 1(FT1) (2011).

[610] ZAMAN, The Ulama in Contemporary Islam: Custodians of Change: Custodians of Change 21-2. 2010.

[611] ROLAND KNYVET WILSON, AN INTRODUCTION TO THE STUDY OF ANGLO-MUHAMMADAN LAW 89-130 (W. Thacker. 1894). The word "Muhammadan" or "Mohammadan" means "Muslim" in the language of the Orientalists (westerners) studying Islam in the 18th and 19th centuries. The word seems to have a condescending connotation—it seems to imply that Islam was a creation of Muhammad, and that Muslims should be attributed to the "author" of Quran and Islamic religion, Muhammad. See, EDWARD W SAID, ORIENTALISM 280 (Vintage. 1979).

[612] ZAMAN, The Ulama in Contemporary Islam: Custodians of Change: Custodians of Change 25. 2010.

Caliph (Article 3), and the "protector of the religion of Islam" (Article 4). Article 7 gave the sultan the power to supervise the enforcement of Islamic law, while Article 27 granted the sultan the power to appoint the post of Sheikh al-Islam.[613] There was no article of repugnancy that would annul any law repugnant to Islam.[614]

About four decades later, and specifically in 1918, the Libyan constitutional experiment that took place under Italian colonization could qualify to be the first that produced a repugnancy clause.[615] It mentioned the ulama in its declaration of independence. In 1918, the Tripolitanians (Libyans) declared their independence, but, interestingly, they did it "*according to the will of its great Ulama,* of the nobility, of the notables and of the chiefs of the honored fighters."[616] In 1919, a statute between Libyans provided in Article 12 that "principles that are incompatible with Islamic religion cannot be taught to the members of this religion."[617] The article dismissed teachings that were against the principles of Islamic religion, but did not *per se* dismiss "laws" against Islamic principles, while another article in the Statute declared Islamic law as the law of the polity. This experiment was short-lived as the Tripolitanian Republic was dismantled in 1923. Islam was not given any emphasis in later Libyan constitutions other than it being the "religion of the state.[618]

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[613] The Ottoman Basic Law is included as a supplement in Roder, The Separation of Powers in Muslim Countries: Historical and Comparative Perspectives 341-59. 2011. See, BROWN, Constitutions in a nonconstitutional world: Arab basic laws and the prospects for accountable government 24. 2002;Roder, The Separation of Powers in Muslim Countries: Historical and Comparative Perspectives 328. 2011;Arjomand, ANNUAL REVIEW OF LAW AND SOCIAL SCIENCE, 116 (2007).

[614] One of the reasons could be that the system was not suspected to be un-Islamic unlike states under non-Muslim colonization and influence.

[615] It is striking to note that Anglo-Muhammadan Law in India and semi-repugnancy clause in Libya were during the British and Italian colonizations while the huge Islamic polity of Ottoman Empire did not need to render any un-Islamic law void in its constitution. The repugnancy seems to serve, sometimes, as legitimating vehicle for the colonizers to enact laws and localize their legal restructure. See, Arjomand, ANNUAL REVIEW OF LAW AND SOCIAL SCIENCE, 120 (2007).

[616] Karim Mezran, *Constitutionalism and Islam in Libya*, *in* CONSTITUTIONALISM IN ISLAMIC COUNTRIES: BETWEEN UPHEAVAL AND CONTINUITY 516, (Rainer Grote & Tilmann Roder eds., 2011).(emphasis mine)

[617] Id. at, 516-7.

[618] Id. at, 515-7&521-6.

While the Libyan Statute dismissed *teachings* that were against the principles of Islamic law, the Pakistani constitutional order dismissed *laws* that were against Islamic law, and reached the climax of the repugnancy clause, as we know it today, including the use of the term "repugnant" to Islam.[619]

The Constituent Assembly of the 1949 passed a resolution that stated the principles of the Pakistani state, known as the "Objectives Resolution." After the Objectives Resolution faced some attempts by the High Court to diminish it as a preamble with no constitutional value, it was incorporated in the 1985 Constitution Article 2-A.[620] It included the following provisions:

> The Government of Pakistan will be a state … Wherein the
> Muslims of Pakistan shall be enabled individually and collectively
> to order their lives in accordance with the teachings and
> requirements of Islam as set out in the Holy Quran and Sunnah.[621]

Article 205(1) of the Pakistani Constitution of 1956 stated that "no law shall be enacted which is repugnant to the Injunctions of Islam as laid down in the Holy Qur'an and the Sunnah."[622] As a result of that, Zia-ul-Haqq in 1988 introduced the Sharia Bill that gave supremacy to Sharia as "the supreme source of law in Pakistan and the Grundnorm for guidance of policy-making by the state and shall be enforced in the manner and as envisaged thereunder," and that the court shall decide cases according to Sharia.[623]

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[619] Hamoudi, WILLAMETTE L. REV., 1(FT1) (2011).
[620] LAU, The role of Islam in the legal system of Pakistan 6-7,17&47. 2005;Arjomand, ANNUAL REVIEW OF LAW AND SOCIAL SCIENCE, 120 (2007);Kennedy, THE INTERNATIONAL AND COMPARATIVE LAW QUARTERLY, 775-8 (1992).
[621] PAKISTAN CONST. OF 1985 Art. 2-A. See, Kennedy, THE INTERNATIONAL AND COMPARATIVE LAW QUARTERLY, 769 (1992).
[622] PAKISTAN CONST. OF 1956 Art. 205(1). See, Arjomand, ANNUAL REVIEW OF LAW AND SOCIAL SCIENCE, 122-3 (2007).
[623] Kennedy, THE INTERNATIONAL AND COMPARATIVE LAW QUARTERLY, 778 (1992).

Other Muslim-majority states, like Syria (with its short-lived Syrian Constitution of 1950),[624] Kuwait,[625] Iraq[626] and Palestine soon followed suit, declaring that Islam was the main source of legislation.[627] Such a provision does not exist in the Maghreb countries of Morocco, Tunisia, and Algeria, however.[628] The specific case of Egypt will be discussed in the next section.

4.3.1.2 In Egypt

In Egypt, as we have seen, the Islamization plan of President al-Sadat produced the Constitution of 1971. The first clause of Article 2, which inherited Article 149 from the 1922 Constitution, reads: "Islam is the religion of the state."[629] In addition, Article 2 declared that "Islamic law (Sharia) is *a* principal source of legislation."[630] In 1978, al-Azhar Islamic University published a proposal for "the Islamic constitution" wherein it states that Islamic law is *the* source of all legislation.[631] Therefore, in 1980, Article 2 was amended to provide that "Islamic law (Sharia) is *the* principal source of legislation."[632] According to Adel Omar Sherif, an influential justice at

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[624] Arjomand, ANNUAL REVIEW OF LAW AND SOCIAL SCIENCE, 123 (2007).

[625] Id. at.

[626] Id. at, 133.

[627] Hirschl, WILLIAM & MARY LAW REVIEW, 4 (2008).

[628] Roy, Constitutionalism in the Maghreb: Between French Heritage and Islamic Concepts. 2011. Although the influential Islamist party Ennahda is considered a prominent, if not the main, faction of the Islamists in Tunisia, it promised that it would not seek an explicit mention of "Islam" in the Constitution and it fulfilled its promise in the 2014 Constitution. See, Hamoudi, WILLAMETTE L. REV., 16-7 (2011).

[629] Egypt Const. of 1971 Art. 2. See, LOMBARDI, State Law as Islamic Law in Modern Egypt: The Incorporation of the Sharīʿa Into Egyptian Constitutional Law 102. 2006.

[630] Egypt Const. of 1971 Art. 2.(emphasis is mine).

[631] Arjomand, ANNUAL REVIEW OF LAW AND SOCIAL SCIENCE, 123 (2007);ABDULLAHI AHMED AN-NAʿIM, TOWARD AN ISLAMIC REFORMATION: CIVIL LIBERTIES, HUMAN RIGHTS, AND INTERNATIONAL LAW 95-6 (Syracuse University Press. 1996);LOMBARDI, State Law as Islamic Law in Modern Egypt: The Incorporation of the Sharīʿa Into Egyptian Constitutional Law 2&132. 2006.

[632] Egypt Const. of 1971 Art. 2.(emphasis is mine). Arjomand observes that the move "was followed by one country after another, and by 2000, constitutions of some 24 Muslim states had declared the Sharia (or its principles) "a" or "the" source of legislation." Arjomand, ANNUAL REVIEW OF LAW AND SOCIAL SCIENCE, 123 (2007). See, Hirschl, TEX. L. REV., 3 (2003).

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the SCC, the Amendment of 1980 was thought to suggest that Sharia supersedes positive law and possibly even the Constitution.[633]

In the same Constitution of 1971, the other reference to Islam was in Article 11 that granted women's equality "without violation of the rules of Islamic jurisprudence."[634] Islamic scholars were not mentioned either nor was al Azhar, as the most important Islamic institution in the state. The Constitution of 1971 remained in effect until 2011 when an uprising broke out as part of what is known as the "Arab Spring."[635]

On January 25, 2011, the Egyptian Army led by the Supreme Council of Armed Forces (SCAF) responded to the demands of the street and ousted President Hosni Mubarak. On March 30, the 1971 Constitution was suspended, and the SCAF announced a constitutional declaration. However, the position of Islam did not change much in the declaration as it states: "the principles of Islamic law are the principal sources of legislation."[636] After the Islamists' victory in the Egyptian Constituent Assembly, they along with other representatives of what is known as the "Civil Mainstream" produced the 2012 Constitution, probably the shortest-lived Egyptian constitution. The Constitution was signed by the Muslim Brotherhood president, Mohamed Morsi in December 2012, but was suspended on July 3, 2013 by the Egyptian Army. The 2012 Constitution introduced novel articles like Articles 4, 7, and 219.[637]

While Article 2 remained the same, declaring the principles of Islamic law as *the* principal source of legislation, Article 4 for the first time since 1952 mentioned al-Azhar—it

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[633] Sherif, The Relationship between the Constitution and the Sharia in Egypt 127. 2011.
[634] Egypt Const. of 1971 Art. 11.
[635] About the Constitutional issues of Egypt in the Arab Spring wave, see e.g., Kristen A Stilt, *The End of" One Hand": The Egyptian Constitutional Declaration and the Rift between the" People" and the Supreme Council of the Armed Forces*, 2-4 (2012);GROTE & RODER, Constitutionalism in Islamic countries: Between upheaval and continuity 3-15. 2012.
[636] Sherif, The Relationship between the Constitution and the Sharia in Egypt 121. 2011. For an analysis of the SCAF Constitutional Declaration, See, Stilt, 11-9 (2012).
[637] Clark B Lombardi & Nathan J Brown, *Islam in Egypt's new constitution*, FOREIGN POLICY, DECEMBER, 1 (2012).

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granted al-Azhar its *independence as an Islamic institution* with *exclusive autonomy over its affairs*.[638] Moreover, Article 4 recognized the consultative task of Islamic scholars in regards to Islamic law when it announced that al-Azhar's senior scholars should be consulted in Sharia matters. Article 4 reads:

> Al-Azhar is an encompassing independent Islamic institution, with exclusive autonomy over its own affairs, responsible for preaching Islam, theology and the Arabic language in Egypt and the world. Al-Azhar Senior Scholars are to be consulted in matters pertaining to Islamic law.[639]

Unlike the commitment to al-Azhar's independence in Article 4, the 2012 Constitution, Article 212, established the Endowments Commission as self-regulated but contained nothing about its independence.[640] Also, Article 21 states that the "State guarantees and protects… endowments, as shall be regulated by law."[641] Nevertheless, the unprecedented provision in regards to Islamic interpretation of Article 2 and Islamic law in general is found in Article 219. The controversial article of 219 reads:

> The principles of Islamic Sharia include general evidence, foundational rules, rules of jurisprudence, and credible sources accepted in Sunni doctrines.[642]

It is more than likely the first constitutional article to mention the word "Sunni" in Egyptian modern history, and the first to limit Islamic jurisprudence to the four Jurisprudential schools. Article 219 of the 2012 Constitution specified some guidelines for Islamic interpretations that turned out to be a blow to the competing authorities within the state and a victory to what

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[638] EGYPT CONST. OF 2012 Art. 2&4.

[639] Id. at, Art. 4.

[640] Id. at, Art. 212. As Daniela Pioppi defines Islamic endowment (waqf), it "is, in Islamic law, the act of founding a charitable trust and hence the trust itself. The essential elements are that a person, wanting to commit a pious deed, declares part of his or her property (i.e. land, a commercial activity, estates, etc.) to be henceforth inalienable and designates persons or public utilities as beneficiaries of its yields." Daniela Pioppi, *From Religious Charity to the Welfare State and Back. The Case of Islamic Endowments (waqfs) Revival in Egypt*, 4 (2004).

[641] Egypt Const. of 2012 Art. 21.

[642] Id. at, Art. 219.

Lombardi calls the "neo-traditionalist" approach that tends to consult traditional Islamic sources and lean on Islamic scholars and medieval jurisprudence.[643] Nevertheless, Lombardi and Brown think that the article was a bargain that the modernist Islamists, like the Brotherhood, did not fight for but rather accepted as a compromise with more conservative Salafists[644] and other political figures in the Assembly.[645]

On July 3, 2013, the Egyptian military, led by then-Colonel General Abd al-Fattah al-Sisi, orchestrated a coup that suspended the 2012 Constitution, dissolved the Islamist-dominated parliament, and imprisoned President Mohamed Morsi along with his cabinet. In the televised declaration of this change of regime, Sheikh al-Azhar was sitting first on the left of al-Sisi while the latter announces the change. The appearance of Sheikh al-Azhar next to the de-facto ruler was seen as a sign of religious support and al-Azhar's confidence.[646]

The change of regime resulted in the appointment of a fifty-member Constituent Assembly that drafted what became the 2014 Constitution as it was announced in January 2014. As expected, Article 2 remained untouched, while the controversial Article 219 of 2012 was completely removed.[647] Article 90 ensures the "State shall encourage the charitable endowment system" and at the same time "shall ensure the independence thereof." Article 90 ensures more independence of the endowment than existed in the previous 2012 Constitution, by stating that

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[643] Lombardi & Brown, FOREIGN POLICY, DECEMBER, 4 (2012). For Lombardi's detailed analysis of "neo-traditionalism" see, LOMBARDI, State Law as Islamic Law in Modern Egypt: The Incorporation of the Sharī'a Into Egyptian Constitutional Law 80-97. 2006;Clark B Lombardi & Nathan J Brown, *Do Constitutions Requiring Adherence to Sharia Threaten Human Rights?: How Egypt's Constitutional Court Reconciles Islamic Law with the Liberal Rule of Law*, 21 AMERICAN UNIVERSITY INTERNATIONAL LAW REVIEW, 406 (2006).

[644] About the Salafist movement and its role in post-2011-revolution Egypt see, Kamran Bokhari, *Salafism and Arab Democratization*, 2 STRATFOR. OCTOBER, 1-4 (2012).(Bokhari defines salafism as "an austere reinterpretation of Islam, calling for Muslims to return to the original teachings outlined in the Koran and the practices of the Prophet Mohammed as understood by the earliest generation").

[645] Lombardi & Brown, FOREIGN POLICY, DECEMBER, 4 (2012).

[646] In general about the 2014 Constitution and the SCC from 2011 onwards see, Nathan Brown, *Egypt: A Constitutional Court in an Unconstitutional Setting*, 7 POLITICAL AND CONSTITUTIONAL TRANSITIONS IN NORTH AFRICA: ACTORS AND FACTORS, 1-16 (2014).

[647] EGYPT CONST. OF 2014 Art. 2.

the "affairs of such [endowment] institutions shall be managed in accordance with the conditions set by the person who created the endowment, as regulated by Law."[648]

More interestingly, while the Islamic articles invented by the Islamist-dominated Assembly of 2012 were compromised or completely removed in the 2014 Constitution, the latter Constitution expanded what used to be Article Four pertaining to al-Azhar and its affairs, granting the Sheikh of al-Azhar independence and permanence. However, more importantly for the civil camp in Egyptian politics, the clause about consulting al-Azhar in regards to Islamic law was removed. Therefore, two changes took place and should bring al-Azhar closer to its meta-constitutional role. One is ostensibly enhancing its independence and the other is eliminating its formal constitutional role in evaluating legislation. Article 7 of the 2014 reads:

> Al-Azhar is an independent Islamic scientific institution, with exclusive competence over its own affairs. It is the main reference for religious sciences and Islamic affairs. It is responsible for calling to Islam, as well as, disseminating religious sciences and the Arabic language in Egypt and all over the world.
> The State shall provide sufficient financial allocations thereto so that it can achieve its purposes.
> Al-Azhar's Grand Sheikh is independent and may not be dismissed. The Law shall regulate the method of appointing the Grand Sheikh from amongst the members of Council of Senior Scholars.[649]

While various articles were adopted and changed, Article 2 was the cornerstone and the article that was debated in courts and had an effect on legal and constitutional issues. This section examined the Islamic articles in general, the repugnancy clause and Article 2 in particular. It started with various Islamic countries like Libya and Pakistan, and concluded with Egypt, and its

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[648] Id. at, Art. 90. It is worth noting that it is not my intention to discuss *waqf* system *per se*, but to include it as much as it affects religious institutions and ulama's independence. The discussion is just a modern development of the historical and theoretical discussions of economical independence of classical Islamic scholars mentioned in the previous chapter.
[649] Id. at, Art. 7.

changes regarding Islam in the recent two constitutions as compared to the long-serving Constitution of 1971. The next section will explore the debate of constitutional interpretation especially Article 2 that has remained unchanged since 1980.

4.3.2   The constitutional interpretation

The previous section introduced the Islamic articles, emphasizing Article 2. The Egyptian case received special attention due to its centrality and role on the Arab and Islamic world. In this section, the interpretation of these Islamic articles will be discussed focusing on Egypt. The section will be divided into two main subsections. The first deals with the power of interpretation and the competing institutions and powers over the question of who has the right to interpret Islamic articles and Islam in the state. The second subsection examines the judicial application of Islamic law within the Egyptian modern system and the discourse of the SCC.

4.3.3   The Dispute over Authority of Interpretation:

This subsection about the authority of interpretation regarding Islamic law will start by discussing general debates about the right to interpret Islamic law in the modern state taking into account the context of the varying Islamic countries. Then, I will consider the case of Egypt and the competing powers and their role in the interpretation of Islamic law within the state's structure.

4.3.3.1 In General:

The classical Islamic science of the "sources of jurisprudence" discusses extensively the central question of the "requirements of the *mujtahid*" (the jurist capable of independent reasoning to derive Islamic rules from the revelatory sources). Classical jurists set forth requirements that the individual Islamic jurists need to fulfill in order to have the right to independent Islamic reasoning in jurisprudence. According to the classical origins of Islamic jurisprudence, one important requirement to be *mujtahid* is to be well-versed with all rulings discussed in the Quran and *Sunnah*. Another condition is to master the Arabic language as used in Islamic texts. The discussion of *ijtihad* (the Islamic capability of independent reasoning and issuing independent opinions) was developed to protect Islamic jurisprudence from irresponsible interpretations.[650]

The classical debates on *ijtihad* and the right to jurisprudential reasoning and opinions were conducted to guide and protect the society in the meta-constitutional sphere. However, the discussion of the right to interpretation in a constitutional context is different—it deals with the right to interpretation *within a state's authorities and state's institutions that are enforceable* in the modern sense of the word. This should never mean that the issue of the right to interpretation is similar throughout the modern states because theorists disagree.[651]

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[650] For the classical discussions of *ijtihad* and its rulings and requirements, see the classical sources in the origins of jurisprudence e.g., BADR AL-DEEN AL-ZIRKESHI, AL-BAHR AL-MUHEET 8:226-58 (Dar al-Kutbi. 1994);ABU HAMID AL-GHAZALI, AL-MUSTASFA 4:10-129 (1995);ALI BIN AHMED AL-AAMIDI, AL-IHKAM FI USUL AL-AHKAM 4:162-221 (Al-Maktab al-Islami.);ALJAWZEYYAH, I'lam Al-Muqe'een 2:126-9. 1991;IBRAHEEM AL-SHATIBI, AL-MUWAFAQAT 5:41-58 (Dar Ibn al-Qayyem-Dar Ibn Affan. 2003);NAJM AL-DEEN SULAIMAN AL-TUFI, MUKHTASAR SHARH AL-RAWDHAH 3:575-84 (Mu'assasat al-Risalah. 1987);MUHAMMED ALI AL-SHUKANI, IRSHAD AL-FUHUL ILA TAHQEEQ 'ILM AL-USUL 2:713-54 (Dar al-Salam. 1998);AL-SHINQEETI, Al-Mudhakkirah Fi Usul Al-Fiqh 369-74. 2001. In the orientalist literature, Joseph Schacht discussed the concept of "closing the door of ijtihad" that was introduced to the Islamic jurisprudential centuries after the development of the four main schools (Hanafi, Maliki, Shafi'I, and Hanbali) in Islamic jurisprudence. Joseph Schacht, *An introduction to Islamic law*, 69 (1964). Compare with Wael Hallaq's critique of Schacht's approach in discussing *ijtihad* and "closing the door of ijtihad", Wael B Hallaq, *Was the gate of ijtihad closed?*, 16 INTERNATIONAL JOURNAL OF MIDDLE EAST STUDIES, 2 (1984).
[651] JACKSON & TUSHNET, Comparative constitutional law 225. 1999. See, BALKIN, Constitutional Redemption: Political Faith in an Unjust World 226. 2011.

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As a result, the right to interpretation discussed in this context is the official authority to exercise interpretation of the law and the constitution within the state. In the context of Muslim-majority countries, Article 2 is included in this debate.

Generally speaking, in the modern state's setting, there is a debate regarding how interpretation should be exercised in the constitutional literature. Vicki Jackson and Mark Tushnet divide the modern constitutional literature into two main camps, democratic theorists and constitutionalists. Democratic theorists tend to place the power of interpretation in the hands of the democratic institutions and elected individuals, while constitutionalists empower unelected institutions and individuals with the authority of interpretation. Both approaches adopt different degrees of distributive tendency in regards to interpretation, and nations differ in making the distribution of interpretive authority explicit. The distribution of interpretive authority means that the state distributes different authorities of interpretation issue by issue to different institutions and individuals that are related and more familiar with the subject matter.[652]

Now, with the setting of Islamic articles in Muslim-majority states, interpretation of these religious articles becomes more controversial and critical. One factor is that these articles like Article 2 in Egypt do not resemble any similar article in non-Muslim-majority states. The uniqueness of these articles creates a challenge for Muslim-majority states to find an approach that protects their constitutionalism and their constitutional commitment to the Islamic principles. Because most Islamic articles adopted were not coupled with explicit language or a clear referral to a specific state's apparatus lodged with interpretive power, competing powers dispute over the authority of interpretation. While legislatures and appointed committees of the executive branch play an important role, the main player is the highest courts that deal with

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[652] JACKSON & TUSHNET, Comparative constitutional law 225-8. 1999.

constitutional issues such as the SCC in the case of the Egyptians. Elected legislatures became much less involved in interpretation in general, and in regard to Islamic articles in particular as we will see in a later section.

In the Pakistani experiment, Martin Lau suggests that "the Islamization of laws in Pakistan has been primarily a judge-led process, which was initiated to enhance the power of the judiciary…."[653] The initial introduction of Islamic law was through the parliament until the creation of an Islamic Judicial system when the locus of most areas of Islamic law was shifted to Sharia courts.[654] There were early proposals (before 1979) to empower the Supreme Court with Islamic interpretation and to incorporate this agreement in the constitution, but it was never adopted.[655] In the end, the Pakistani Supreme Court adopted the theory of trusteeship for the judges on interpretation of Islamic law, which ended up putting the handling of Sharia law in their hands. As a result, the Supreme Court oversees decisions by lowers courts and legislation by parliament.[656]

The Pakistani Objectives Resolution was a compromise drafted by the secular Liaqat 'Ali Khan, one of the founding fathers of Pakistan, to balance divine sovereignty with the people's dominion. This balance means to provide a system that combines superior positive law and Islamic-codified law. However, Lau notes that, in reality, when the Resolution was challenged by the ulama, "God had no difficulty trumping the other putative sovereigns."[657] The Pakistani Supreme Court in 1972 charted a path to interpret the Resolution as a "Grundnorm" of the constitutional system and concluded that God's sovereignty surpasses the entire universe.

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[653] LAU, The role of Islam in the legal system of Pakistan 1. 2005.
[654] Id. at, 6.
[655] Id. at.
[656] Id. at, 34.
[657] Id. at, 120.

Although the decision left the ulama and Islamists satisfied, the Supreme Court secured its position as the arbiter in interpretive authority over any other institution or court.[658] This tactic of the Supreme Court seemed to work— prominent Islamists supported the broadening of the court's authority of Islamic interpretation against the other two branches.[659]

In 1991, the Sharia Bill in Pakistan explicitly empowered the judiciary with Islamic interpretation resolving the conflict of who has the power of interpretation.[660] In the constitutional interpretive process, the role of the Islamic scholars was not so clear. Nevertheless, scholars still occupy their meta-constitutional positions by directing unofficial teachings and issuing Islamic jurisprudential opinions, which led Martin Lau to suggest that it is possible that "in cases of constitutional breakdowns, references to Islam could offer legal continuity and stability."[661]

Unlike the Pakistani Islamic scholars' cautious acceptance of judicial authority over interpretation, their Indian counterparts were disturbed by the Indian Constitutional Court's decision of handling the interpretation of Islamic law.[662]

In Malaysia, the judiciary resisted any Islamic interpretation that could provide a vehicle for Islamists and Islamic scholars to import Islamic constitutionalism.[663] Courts in some other countries like Tunisia and Algeria tended to monopolize the authority of interpreting Islamic law.[664] In a more rigid way, the Turkish Constitutional Court fought against religious authority

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[658] Id. at, 120-1. Rainer Grote and Tilmann J Roder comment on the Pakistani approach by comparing it to Suadi Arabia where there is no clear process of how the Divine sovereignty should be interpreted. Grote and Roder say that "unlike the Iranian Constitution or the revised Pakistani Constitution, the Saudi Basic Law does not provide for any specific mechanism for how this supremacy [of God] shall be implemented and enforced in legal practice." GROTE & RODER, Constitutionalism in Islamic countries: Between upheaval and continuity 10. 2012.

[659] Kennedy, THE INTERNATIONAL AND COMPARATIVE LAW QUARTERLY, 19 (1992).

[660] Arjomand, ANNUAL REVIEW OF LAW AND SOCIAL SCIENCE, 123 (2007).

[661] LAU, The role of Islam in the legal system of Pakistan 209-10. 2005.

[662] ZAMAN, The Ulama in Contemporary Islam: Custodians of Change: Custodians of Change 168. 2010.

[663] Backer, INDIANA JOURNAL OF GLOBAL LEGAL STUDIES, 173 (2009).

[664] Roy, Constitutionalism in the Maghreb: Between French Heritage and Islamic Concepts 109. 2011.

by adopting assertive secularism that did not just fight religion in public spaces but also espoused a "secularist" religious discourse against the traditional one. This, sometimes, would mean dissolving an *elected* parliament and toppling *elected* officials.[665]

As we saw, the vast majority of the Muslim-majority states tend to present judiciaries as the arbiter in Islamic interpretation though these countries differ in the level of their distribution of (Islamic) interpretation, in their embracement of Islamic constitutionalism, and their recognition of divine sovereignty. Different proposals to make the legislatures the interpretive arbiter were not successful. The state authorities in these various countries were careful not to empower religious institutions, Islamic scholars, or lay Islamists with any actual interpretive authority. Judiciaries that presented themselves as the exclusive interpreter of Islamic law tended to mitigate Islamicity, and at the same time, kept a plausible degree of Islamic reasoning in order to gain Islamic legitimation.

After dealing with Muslim states, their struggle over Islamic interpretation, and their attempt to answer the question of who has the right to interpret Islamic law, in the next subsection, the dispute over authority of interpretation will be discussed in the Egyptian context. The discussion will include the role of the three branches, executive, legislative, and judicial, and the possibility of consulting Islamic scholars.

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[665] Ergun Ozbudun, *Secularism in Islamic Countries: Turkey as a Model*, see id. at 143-4, (. In an interesting comparison, Hootan Shambyati likens the Turkish assertive secularist approach to the Iranian model in the way both of their judiciaries operated. Both of their highest courts worked to guard the principles of the established doctrine of the state against elected officials. Both judiciaries justified abridging the freedom of dress to fight against anti-establishment tendencies. A more critical similarity lies in the judicial willingness to safeguard supranational principles, whether secularist or religious, and their readiness to restore the values of the systems against non-state authority. Hootan Shambayati, *A tale of two mayors: Courts and politics in Iran and Turkey*, 36 INTERNATIONAL JOURNAL OF MIDDLE EAST STUDIES, 253-8 (2004). See, Arjomand, ANNUAL REVIEW OF LAW AND SOCIAL SCIENCE, 131 (2007).

4.3.3.2 In Egypt: Phases toward the establishment of the authority of Islamic

   interpretation:

When the Islamization project was introduced, Egypt was torn between Islamization adopted by the executive, an ambiguous Islamic legislation, and a new-born constitutional court that was hesitant to deal with Islamic interpretation. In undertaking Islamization, the Egyptian regime faced the question of who interprets Islamic law, how, and what interpretive practices should be used in order to convince the public of its Islamic legitimacy.[666] More importantly was the question to what level the government can lean on Islamic institutions and scholars in Islamic interpretation without abandoning the modern nature of the Egyptian state.

   The ambiguity of Article 2 in regards who interprets Islamic law helped create a space for different authorities to compete to determine who should be the interpreters, those from within the powers of the state or outside authorities. For example, the Muslim Brotherhood, the prominent Islamist movement in Egypt, advocated an interpretation that treats Islamic law principles like transcendent higher law that surpasses state laws.[667] In this arrangement, the Islamist movement would be more influential in the interpretation process by presenting itself and the Islamic scholars as the groups more familiar and attached to Islam than the state's institutions. Sometime later, the Islamists adopted a tone that presented them as the interpreter of Islamic law even at the expense of traditional Islamic scholars—a move that terrified the traditional interpreters of Islamic law, the ulama. At another point, as we will see, the Muslim

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[666] LOMBARDI, State Law as Islamic Law in Modern Egypt: The Incorporation of the Sharī'a Into Egyptian Constitutional Law. 2006.
[667] Hamoudi, WILLAMETTE L. REV., 11(FT43) (2011).

Brotherhood accepted the exclusive authority of the SCC while the legislature was never mentioned in this context.[668]

In the SCC's process of interpreting Islamic law, it intentionally rejected what Lombardi calls the "neo-traditional approach" that seeks Islamic interpretation directly from the traditionally trained Islamic scholars. While the court did not directly consult Islamic scholars, it could not articulate even its own approach without leaning on the jurisprudential legacy of Islamic scholars. The court on different occasions avoided the need to defer to ulama, and expressed its reservations on the idea that modern Muslims should submit Islamic judgment exclusively to Islamic scholars.[669] The SCC dodged the question of what is the process of Islamic law-making and treated Article 2 as a "negative criterion," where legislations do not have to implement any sort of Islamic scrutiny. On the other hand, however, legislations can be challenged if they are found to be repugnant to the rules of Sharia in the way the SCC interprets them (definite in authenticity and meaning).[670]

In the next pages, I will discuss the state's two main interpreters who practiced enforceable interpretive authority in Egypt, the legislature and the judiciary. I will start with the legislature, and then turn to the judicial claim of authoritative interpretation. The discussion will involve whether Islamic interpretation passed through phases and also whether the judiciary could establish an undisputed authority of Islamic interpretation.

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[668] Arjomand, ANNUAL REVIEW OF LAW AND SOCIAL SCIENCE, 132 (2007).
[669] LOMBARDI, State Law as Islamic Law in Modern Egypt: The Incorporation of the Sharīʿa Into Egyptian Constitutional Law 183&206. 2006.
[670] Stilt, TEX. INT'L LJ, 81 (2010).

4.3.3.2.1 The legislature's initiative and the SCC's deference to legislature

This subsection will deal with the early phase of Islamic interpretation when the legislature seemed to have the upper hand in Islamic law and its interpretation. Moreover, the Egyptian judiciary seemed to accept Islamic interpretation from the legislature. In the early stages of Islamic articles and their debates, the SCC deferred to the legislature and withheld from engaging in real Islamic interpretive efforts until later stages. When the legislature abstained from dealing with Islamic legislation and interpretation, the SCC was gradually faced to deal with more and more Islamic-related issues as we will see in the following section.

During the drafting stage of Article 2, the preparatory committee gave the legislature the power to define and articulate the meaning of Islamic law and its "principles."[671] Adel Omar Sherif narrates the idea of this report of 1981 saying:

> the amendment meant to mandate the revision of laws in affect
> before the application of the Constitution of 1971, and to amend
> these laws in such a manner as to make them conform to the
> principles of Islamic Sharia.[672]

The report was a step forward for the legislature's interpretive power in issues pertaining to Islamic law, but the initiative did not seem to go anywhere. The legislature did not seem to recognize this signal and, in the end, was probably weak and less representative of the people taking into account the authoritarian restrictions on the legislature's process during Sadat.[673] In 1975, the Ministry of Justice established a committee to adopt Islamic legislation but the move was not clear about whether the committee was part of the legislature or if it was to perform

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[671] LOMBARDI, State Law as Islamic Law in Modern Egypt: The Incorporation of the Sharī'a Into Egyptian Constitutional Law 160. 2006;Hamoudi, WILLAMETTE L. REV., 5 (2011).
[672] Sherif, The Relationship between the Constitution and the Sharia in Egypt 131. 2011.
[673] See in general, MOUSTAFA, The struggle for constitutional power: law, politics, and economic development in Egypt 19-57. 2007.

some sort of "repugnancy" scrutiny meaning to invalidate laws deemed repugnant to Islamic law.[674]

From the judiciary's side, we can understand its position by recognizing three different phases toward the authority of Islamic interpretation. The first phase was in 1976 when the SCC deferred the issue of Article 2 and the "principles of Islamic law" to the legislature to articulate "Islamicity."[675] In 1981, the Court of Cassation refused to void a ruling that was thought to be in contradiction with Sharia on Article 2, and instead, deferred the authority of interpreting Islamic law to the legislative branch in a strong move of holding the legislature responsible for the authority of interpreting Islamic law.

The second phase was when the SCC stepped up to deal with Article 2 and the issue of "principles of Islamic law" but with some hesitation and self-restrictions. In this phase, the SCC seemed to present itself, at least relatively, to be the self-proclaimed arbiter in matters of Islamic law. It is relative because the court laid down restrictions and bounds on its own authority pertaining to Article 2. The SCC in this phase decided that it did not have the authority to hear cases against laws that were enforced before 1980.[676] The SCC's decision recognized the clear relativity of the SCC's authority over Article 2. Thus, the court denied its own authority over laws before 1980, but this implied that the legislature could act to propose any change to laws enacted before 1980—changes upon which the court would then have the ability to act.

The third phase was from 1984 onward when the SCC introduced the no-retroactivity doctrine where cases before 1980 cannot be decided on Article 2. The important and subtle shift here is that laws enacted before 1980, which were previously deferred to the legislature in the

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[674] LOMBARDI, State Law as Islamic Law in Modern Egypt: The Incorporation of the Sharīʿa Into Egyptian Constitutional Law 130. 2006.
[675] Id. at, 132.
[676] Id. at, 6.

second phase, became part of the judicial jurisdiction in the third phase. In this third phase, the court grew bolder in announcing its authority over Article 2 cases. This phase is the issue of the next subsection

4.3.3.3 Deference to Judiciary

The previous subsection examined the Egyptian legislature's authority and the early phase of Article 2 of the Constitution when the legislature seemed to be in charge of articulating and defining "principles of Islamic law." The later phases seemed gradually to introduce the SCC as the arbiter in issues concerning Islamic interpretation.

If we go back to the time when Article 2 was introduced, the Egyptian regime under Sadat seemed to intend to keep the article ambiguous to provide some flexibility for the ruling party to play around with the language while claiming Islamic legitimacy for the state. In this arrangement, the regime anticipated that the ruling party would control the Islamic interpretation by predominating the legislature, and controlling the judiciary. Mubarak, al-Sadat's successor, was no different from his predecessor in the sense that his adherence to Islamic principles was intentionally vague and flexible.[677] The SCC was established during the constitutional momentum that accompanied the 1971 Constitution in order for the regime to control constitutional interpretation.

The judicial jurisdiction was not clear. Lombardi and some commentators think that some, or maybe all, of the Article 2 cases do not fall under the SCC's jurisdiction, as Article 2

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[677] Id. at, 135-9. See, MOUSTAFA, The struggle for constitutional power: law, politics, and economic development in Egypt 19-57. 2007.

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cases were comparable to political questions that no court should decide.[678] On the other hand, in the early 1980s, a public prosecutor stated that the courts should decide Article 2 issues and determine the meaning of Islamic principles applied in the cases.[679] For its part, the court reluctantly started to deal with some issues relating to Article 2 but its interpretation implied some deference to the legislature and the executive.[680]

By the mid-1980s, the SCC reached its later phase and grew bold in tackling Islamic interpretation. However, the court was confronted with critical questions regarding its authority and legitimate authoritativeness in deciding Islamic interpretation and whether they were trained or even qualified to do so. The court relentlessly asserted that Islamic principles can be interpreted by lay Muslims who exerted their efforts to reach the meaning. The approach that expands the authority of interpretation to lay Muslims seemed to cling to the concept of *ijtihad*.[681] This *ijtihad*, nonetheless, is within the state's jurisdiction meaning that the "Islamic jurisprudence" produced by the SCC is enforceable but it cannot be a religious ruling for the Muslim individual to follow.

Struggling with the legitimacy of Islamic interpretation, the SCC in 1994 concluded with what Lombardi described as "unprecedented postscript" where the court emphasized the importance of the lower-court judges following the SCC's interpretation and applying it as

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[678] LOMBARDI, State Law as Islamic Law in Modern Egypt: The Incorporation of the Sharīʿa Into Egyptian Constitutional Law 160. 2006.
[679] Id. at, 162.
[680] Id. at, 177.
[681] Id. at, 82-3. The famous medieval jurist al-Ghazali (d. 1111) established the concept partial *ijtihad* where the Muslim individual can be qualified *partially* in one issue while unqualified in other issues that he or she doesn't have the required knowledge and understanding about. AL-GHAZALI, Al-Mustasfa 4:11. 1995. Interestingly, the influential medieval jurist, al-Shatibi (d. 1388) allowed the *ijtihad* even from the non-Muslims if they acquire the requirements of mastering Arabic, Islamic texts, and other conditions. AL-SHATIBI, Al-Muwafaqat 5:7-12. 2003. Nonetheless, both require that the basic requirements for *ijtihad* must be fulfilled for the individual to be adequate.

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prescribed.[682] To entrench its authority over Islamic interpretation, the SCC adopted an approach that, while committing to modernist "secular" principles, posited a theory that is used by modern Islamists, whose legitimacy was never at stake. The Muslim Brotherhood then accepted the position of Islam in Article 2 and the authority of the SCC over Islamic interpretation.[683] Moreover, the SCC intentionally used traditional language and terms to clothe its rulings with what is called "enunciative legitimacy."[684] At the same time, the SCC grew more willing to present itself as the exclusive interpreter of (Islamic) laws in order to protect the state's apparatuses from traditional religious views that had long been established in the traditional circles and *madrasas*.[685]

Adel Omar Sherif, the SCC judge, described some lower-court decisions pertaining to Islamic principles as "ill-founded." He attributed this not to the ill-founded jurisdiction of the judiciary over Islamic interpretation but to the lack of a moderate Islamic discourse that the SCC was willing to offer.[686]

Researchers like Hirschl and Noah Feldman count on the power of the judiciary and assumed that its "legitimate" jurisdiction over the issue of Islamic principles was not only to mitigate Islamicity in the system but also to balance the executive branch. Therefore, according to these scholars, the "legitimacy" of the court's power over Islamic legitimacy was also supported by the fact that the people saw the judiciary as a refuge from the executive's long

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[682] LOMBARDI, State Law as Islamic Law in Modern Egypt: The Incorporation of the Sharīʿa Into Egyptian Constitutional Law 235-6. 2006.
[683] Stilt, TEX. INT'L LJ, 87 (2010).
[684] LOMBARDI, State Law as Islamic Law in Modern Egypt: The Incorporation of the Sharīʿa Into Egyptian Constitutional Law 267-8. 2006. For the concept of "enunciative legitimacy" see, RICOEUR, Reflections on the Just 94. 2007;Taylor, PAUL RICOEUR AND THE TASK OF POLITICAL PHILOSOPHY, 18-9 (2012);LAKOFF, The political mind: why you can't understand 21st-century politics with an 18th-century brain 231. 2008.
[685] Hirschl, WILLIAM & MARY LAW REVIEW, 10 (2008).
[686] Sherif, The Relationship between the Constitution and the Sharia in Egypt 128. 2011.

hand.[687] This constitutional formula presupposed that the constitutional judiciary, the SCC, would remain an independent entity entrusted by political players, including Islamists, with Islamic judicial review—an assumption proven wrong by the SCC's unprecedented political involvement in 2012 and afterwards with its alliance with the army in the 2013 when the elected Islamist government was overthrown.[688]

The post-2012 SCC has assumed a far more political position than it has ever done since its establishment. In the army's overthrow of elected Islamists following massive protests against the latter, the SCC has become what Nathan Brown described as "a constitutional court in an unconstitutional setting."[689] Therefore, this interpretive Islamic "legitimacy" contingent upon the SCC's independence on one hand, and the influential Islamists' acceptance of it on the other is utterly questionable considering the events following the SCC's political engagement in the aftermath of the 2011 Revolution.

The initial question concerning who has the interpretive power over Islamic law seems to be far from settled. On the other hand, there is a continuous challenge to the SCC's Islamic interpretive authority from religious circles and forums beyond the state's institutions. Meanwhile, the SCC has functioned as a self-legitimized arbiter of Islamic interpretation and produced an Islamic judicial discourse that has intended to work Islamic law within the modern constitutional framework and universal principles.[690]

After dealing with the issue of interpretive power and who has the right to Islamic interpretation, the following section explores the judicial application of Islamic law in Egypt.

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[687] Hirschl, WILLIAM & MARY LAW REVIEW, 3&7. (2008);FELDMAN, 121-3 (2008). Compare, Backer, INDIANA JOURNAL OF GLOBAL LEGAL STUDIES, 132 (2009);Stilt, TEX. INT'L LJ, 89 (2010).
[688] See, Brown, POLITICAL AND CONSTITUTIONAL TRANSITIONS IN NORTH AFRICA: ACTORS AND FACTORS, 2-6 (2014).
[689] Id. at, 6-11.
[690] See, Sherif, The Relationship between the Constitution and the Sharia in Egypt 131. 2011.

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The judiciary here is represented by the SCC in the phase when the court decided that it could take cases related to Article 2 of the Constitution.

4.3.3.4 The Judicial Application of Islamic Law

When Article 2 was introduced into the 1971 Constitution, the Constitution did not specify the method of interpretation to be used or what approach or school should be adopted. The "Islamic principles" that the state should follow was too broad and vague. When the court was first confronted with Article 2 cases, it needed to establish its jurisdiction over these cases, as we saw in the previous section. This section will discuss the judicial application developed by the SCC and how different segments of the Egyptian society responded to the judicial discourse in regards to Islamic law.

According to Lombardi and Nathan Brown, when interpreting Article 2 of the Constitution, the SCC used a mixed method of classical and contemporary Islamic jurisprudence in order to reach a liberalized approach that fits in the liberal rule of law and universal human rights concept.[691] According to Justice Sherif, one of the prominent minds in the SCC, the court laid down three critical assumptions regarding Islamic interpretation and Article 2. The first assumption is that Article 2 cannot be isolated from the remaining articles of the Constitution and that the Islamic articles should be understood in the context of the "organic whole" of all of the articles. The second assumption is the rule of non-retroactivity, meaning that Article 2 as amended in 1980 cannot be enforced against laws and cases that took place before 1980. The

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[691] Lombardi & Brown, AMERICAN UNIVERSITY INTERNATIONAL LAW REVIEW, 379 (2006).

third assumption is the distinction between the definitive and non-definitive Islamic sources—a distinction that can define the interpretation and application of a principle.[692]

The organic-whole doctrine established the ground for interpreting Islamic articles in a way that does not undermine the remaining articles especially those articles concerning human rights and basic principles of freedom and equality.[693] For example, Article 64 and the subsequent articles of the 1971 Constitution (or 94 and subsequent articles in the 2014 Constitution) founded and respected the rule of law. The court used to interpret "rule of law" to mean procedural legality irrespective of the "law" and its compatibility with accepted principles of human rights. Employing the "organic-whole" doctrine, the court started to interpret "rule of law" as a check on laws and began to impose certain standards that parties and institutions, including state institutions, should follow and respect.[694] This universalist rule of law was part of the organic-whole interpretation that was supposed to limit the scope of the vague commitment to "principles of Islamic law."

The principle of universalist rule of law, along with the principle of Islamic law, are among the four pillars of the constitutional interpretation in the doctrine of "organic-whole." The other two pillars are social justice and democratic principles. Human rights are to be observed as part of rule of law and as part of the commitment to democratic principles. Universal acceptance of principles and declarations in regards to human rights are incorporated into the court's interpretation and treated as constitutional standards as well.[695]

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[692] Sherif, The Relationship between the Constitution and the Sharia in Egypt 129-32. 2011.
[693] LOMBARDI, State Law as Islamic Law in Modern Egypt: The Incorporation of the Sharīʿa Into Egyptian Constitutional Law 149. 2006;Sherif, The Relationship between the Constitution and the Sharia in Egypt 130. 2011;Arjomand, ANNUAL REVIEW OF LAW AND SOCIAL SCIENCE, 131 (2007).
[694] LOMBARDI, State Law as Islamic Law in Modern Egypt: The Incorporation of the Sharīʿa Into Egyptian Constitutional Law 148. 2006.
[695] Id. at, 150-5.

The second doctrine of the court's Islamic interpretation is the non-retroactive application of Article 2. While the constitutional principles in general were meant to have an effect on prospective as well as retroactive cases, the court seemed to partially circumvent the application of Islamic law by limiting its implementation to laws and cases after 1980.[696] The SCC deliberately singled out Article 2 cases as amended in 1980 to have a non-retroactive enforcement. Haider Hamoudi assessed the court's decision and concluded that non-retroactivity partially defeats the purpose of the constitutional amendment. Consider the following example:

> It would make little sense to amend a constitution to grant all citizens equal protection under the law and then for a court to suggest that existing slavery laws might be exempted because enacted before the amendment in question. Such a result would be one that courts would generally resist to the extent it was possible to do so, given how much violence is done to the amendment by the limitations. This would seem to be no less the case for a clause requiring legislative conformity with Islam.[697]

The distinction between definite (*qat'i*) and indefinite (*zanni*) Islamic rulings was the third doctrine adopted by the SCC in regards to interpreting Article 2. While the doctrine of non-retroactivity is unorthodox, if not at odds with the Islamic jurisprudential norms,[698] the distinction between definite and indefinite rulings echoed the long discussions and arguments in the classical Islamic scholarship.[699]

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[696] Id. at, 167. See, Hamoudi, WILLAMETTE L. REV., 429 (2011);HIRSCHL, Constitutional theocracy 110-2. 2011.
[697] Hamoudi, WILLAMETTE L. REV., 428 (2011). Despite the Egyptian Court's arbitrary interpretation of article 2 as not retroactive, the decision seemed to provide an acceptable compromise of the Iraqi constitutional drafters. The doctrine of the non-retroactivity was incorporated into the Iraqi Constitution Article 130. Id. at, 440.
[698] Prominent classical scholars asserted the principle that Sharia is fit for everyone and every *time* although they differed in the interpretation and application. Ibn Hazim, for example, started his book asserting the consensus on the certain principle that all Muslim scholars from all schools and sects agree that Islamic principles are for everyone and every time and era. TAYMIYYAH, Maratib Al-Ijma' + Naqd Maratib Al-Ijma' 7. 1938. See, TAYMIYYAH, Raf' al-Malam 'an al-'aemmah al-'a'lam 9&89. 1992;ALJAWZEYYAH, I'lam Al-Muqe'een 1:40-5. 1991.
[699] Classical jurists used to begin their discussions in the origins of jurisprudence with the division of *ijtihad*'s grounds into "certain/definite sources" or "certain/definite interpretations" and "uncertain/indefinite sources" or "uncertain/indefinite interpretations." The discussion is sometimes translated as certainty in authenticity and meaning versus uncertainty in both. See, AL-SHEHRESTANI, Al-Milal Wa Al-Nihal 1:210. 1992;TAYMIYYAH, Raf' al-Malam 'an al-'aemmah al-'a'lam 45. 1992;IBN AABIDEEN, RADD AL-MUHTAR ALA AL-DURR AL-MUKHTAR 1:207 § 1 (Dar Alam al-Kutub Special Edition ed. 2003). See in general, WAEL B HALLAQ, AN INTRODUCTION TO ISLAMIC

The SCC was committed to following certain sources of Sharia and enforcing rulings that are definite in authenticity and meaning. Outside this circle of absolute certainty, the state could exercise its *ijtihad* and enact whatever it thought was in the best interest of the state and its people. The court ruled that an Islamic ruling could invalidate a law if it meets not only the requirement of certainty in authenticity and meaning but also the standard that the ruling is religiously proved to be fit for all times and places. Although the court was vague about how it identified and reached this absolute certainty, it applied it in a very flexible way so that almost no case could meet this "absolutely-certain" test.[700]

Therefore, there remains an open area of indefinite (*zanni*) rulings. The court made use of the "jurisprudential objectives" that were developed by the leading classical jurist al-Shatibi (d. 1388). Al-Shatibi identified a three-tier theory of these goals that Islamic law should protect and consider. The first tier is "necessities," without which a Muslim could not live, while the second and third are "needs" and "supplementaries." What concerned the court was the first tier of necessities, because the other two tiers do not fall into the strict and certain "goals" of Sharia. The court adopted the main five necessities identified by al-Shatibi—the preservation of religion, self, reason, dignity, and property.[701] To apply these standards, the court concluded that human rights are not just universally accepted principles, but also divinely ordained values.[702]

LAW 17-8 (Cambridge University Press. 2009);LOMBARDI, State Law as Islamic Law in Modern Egypt: The Incorporation of the Sharīʿa Into Egyptian Constitutional Law 22-8. 2006.

[700] LOMBARDI, State Law as Islamic Law in Modern Egypt: The Incorporation of the Sharīʿa Into Egyptian Constitutional Law 185-7, 207& 254. 2006. The Court sparked a controversy by implying that only Quran could be a certain source of Islamic jurisprudence. The Court cited only Qur'anic versus and neglected traditions of Muhammad (PBUH) in an unorthodox way. Id. at, 222,247-62.

[701] AL-SHATIBI, Al-Muwafaqat 2:7. 2003;AHMED AL-REESUNI, NADHRAYYAT AL-MAQASID 'IND AL-SHATIBI 89 (al-Dar al-'Alamyyah llkitab al-Islami 2nd ed. 1992);Adis Duderija, *Contemporary Muslim Reformist Thought and Maqāṣid cum Maṣlaḥa Approaches to Islamic Law: An Introduction*, in MAQĀṢID AL-SHARĪʿA AND CONTEMPORARY REFORMIST MUSLIM THOUGHT 3, (2014).

[702] LOMBARDI, State Law as Islamic Law in Modern Egypt: The Incorporation of the Sharīʿa Into Egyptian Constitutional Law 240. 2006.

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The court's absolutely certain test was to serve as a negative criterion to check on laws whilst the jurisprudential objectives (or the goals of Sharia) were positive standards toward examining public policy issues that were classically discussed in the Islamic literature under *siyasah shar'iyyah* (Islamic public policies, sometimes translated as "religious politics").[703] The court pronounced itself as interpreter provoking the classical interpreters, Islamic jurists, even though at times, it also leaned on classical jurists and their theories to support its arguments as it did with the theory of jurisprudential objectives.[704]

As a result of the SCC's interpretive approach, the court broadened the space where the state could work, and limited the Islamic check on laws. In Lombardi's account, the court deliberately left the theory of Article 2 unelaborated to allow impressionistic interpretations that are consistent with the universal principles of human rights and rule of law.[705] Therefore, it is not surprising to know that the court has never struck down a law based on Article 2 alone.[706] To compensate for this modern unprecedented approach within the Islamic orthodoxy, the court tended to use classical terms and emphasize its classical concepts.[707] For Vogel, "the traditionalism of this usage suggests that the SCC means to invoke the Islamically conventional

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[703] See, id. at, 179-91. About the science of Islamic public policies, see the classical works such as AL-JWAINI, Al-Ghyathi: Ghyath AlUmam fi Eltyath AlDhulam 10-3. 1980;AL-MAWARDI, Al-Ahkam Al-Sultanyyah 1-29. 1989. See also, Vogel, ENCYCLOPAEDIA OF ISLAM, (1997);COOK, Commanding right and forbidding wrong in Islamic thought 5-6. 2010. In this sense, positive standards are those that the legislator should consider while enacting a legislation while negative standards are those that qualify to negate a legislation if it was found in contradiction with these standards.

[704] See, LOMBARDI, State Law as Islamic Law in Modern Egypt: The Incorporation of the Sharī'a Into Egyptian Constitutional Law 239-47. 2006;Hirschl, TEX. L. REV., 3 (2003).

[705] LOMBARDI, State Law as Islamic Law in Modern Egypt: The Incorporation of the Sharī'a Into Egyptian Constitutional Law 253. 2006.

[706] Id. at, 175&254.

[707] Id. at, 181.

siyasa shar'iyya version of state legitimacy,"[708] a kind of legitimacy described, sometimes, as "enunciative."[709]

Commenting on the modern approach of the SCC along with the approaches of other constitutional courts in Malaysia, Nigeria, Pakistan, and Turkey, Hirschl argued that these courts have become "key secularizing agents for elites despite intense scrutiny from the more religious segments of the public." In this take, constitutional courts and their modern interpretation are the secular rescue mission from the trap of constitutional theocracy and Article 2. According to Hirschl, Article 2 should remain symbolic, while secular judges armed with secular legal training should circumvent Islamic law and mitigate it, sometimes with classical terms and medieval concepts.[710] He explains, "transferring these contested issues to the courts allows secularist leaders to talk the talk of commitment to religious values without walking the actual walk of that commitment."[711]

Hirschl's approach intentionally reduced Article 2 to symbolic legislation and supported the SCC's exclusive authority of interpretation in order to attain the legitimacy injected in Article 2. Meanwhile, this interpretive exclusivity of the judiciary helps to avoid the hustle of real applications of Article 2 and the risks of Islamic enforcement.[712] However, portraying constitutional courts as *secularizing* forces presupposes that these forces should have certain qualities and *secular* legal training—the conditions that not all Muslim-majority countries have. Thus, even if we look for secularization as understood by Hirschl, the mechanism to achieve it is

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[708] Frank E Vogel, *Conformity with Islamic Shari'a and Constitutionality Under Article 2: Some Issues of Theory, Practice and Comparison*, FROM DEMOCRACY, THE RULE OF LAW AND ISLAM, EDS. EUGENE COTRAN AND ADEL OMAR SHERIF,(THE NETHERLANDS: KLUWER LAW INTERNATIONAL, 1999), 535 (1997). See, LOMBARDI, State Law as Islamic Law in Modern Egypt: The Incorporation of the Sharīʿa Into Egyptian Constitutional Law 265. 2006.
[709] About enunciative legitimacy, see, RICOEUR, Reflections on the Just 94. 2007.
[710] Hirschl, WILLIAM & MARY LAW REVIEW, 9-12 (2008);Hirschl, TEX. L. REV., 2 (2003);HIRSCHL, Constitutional theocracy 67-120. 2011. See, Backer, INDIANA JOURNAL OF GLOBAL LEGAL STUDIES, 173 (2009).
[711] Hirschl, WILLIAM & MARY LAW REVIEW, 9 (2008).
[712] See, Hamoudi, WILLAMETTE L. REV., 431 (2011).

contingent on a specific constitutional setting, certain qualities and circumstances that not all countries have, and even if some do at times, there is no guarantee that they will always remain this way. Therefore, the proposal is temporary and conditional at best and dodges, rather than solves, this issue.

Judicial secularization is not just a temporary and conditional solution to the risks of "constitutional theocracy," it also risks defeating its purpose of legitimacy by overextending judicial authority to questions that are probably not legitimately judicial. Empowering the judiciary with Article 2 issues could jeopardize legitimacy by placing heavyweight Islamic decision-making in the hands of mainly secular individuals. Moreover, the secularizing approach of the Islamic articles assumed that Article 2 and its application should be employed to contain Islamism. As Hamoudi argues, Islamists seem to use Article 2 not to Islamize the system, but rather "to address their fears of further state secularization…."[713]

Despite the problematic judicial authority over Islamic interpretation and its application, Islamists, mainly the Muslim Brotherhood, did not just accept the SCC's power over the interpretation of Article 2 but also recognized and adopted its interpretive discourse toward Islamic articles.[714] So, the secular task of the SCC to balance Islamists with a modern discourse seems pointless when these Islamists share the same discourse but armed with more familiarity with Islamic legitimacy.

In the formula of the SCC and its application, Islamic jurists, the group that was typically more concerned with Islamic interpretation and was more equipped with the very accumulative jurisprudential instruments, was not part of the deal. Although the SCC leaned on concepts,

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[713] Id. at, 430.

[714] Arjomand, ANNUAL REVIEW OF LAW AND SOCIAL SCIENCE, 132 (2007);Stilt, TEX. INT'L LJ, 99 (2010);Hamoudi, WILLAMETTE L. REV., 436 (2011).

theories, and opinions developed by Islamic jurists, the court carefully proceeded to take the matter exclusively in its own hands.[715] To sum up, the court applied Islamic articles in a way that partially defeated their purpose and stated already accepted discourse among Islamists. This brings us back to the basic issue of whether the SCC and judiciary in general is the right entity to tackle Islamic interpretation and issues with Article 2. The next section presents my proposal of who should have the right of interpretation within the state's institutions.

4.4   A PROPOSAL ON THE OVERLAPPING JURISDICTIONS

The previous few sections have dealt with the question of who has the right to Islamic interpretation, specifically within the state's institutions. Egypt has experienced different phases in respect to this question but has seemed to introduce the judiciary, namely the SCC, as the interpreter. Because of this arrangement, the court decided to apply Islamic articles in a modern and more-than-likely problematic way that sought to attain local legitimacy and universal principles. Nevertheless, the question is far from being settled in Egypt and elsewhere as constitutions have refrained from articulating "Islamic principles" and from empowering a specific institution with the authority of interpretation in Islamic issues.

The current setting posits a dilemma of deference; the SCC had been refraining from ruling on Article 2 altogether, the Court of Cassation had referred to the legislature at first, and, later, the SCC has started interpreting Article 2. Eventually, the court has ended up claiming exclusive right to interpretation of Article 2 and Islamic provisions. While the SCC has sought

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[715] See, LOMBARDI, State Law as Islamic Law in Modern Egypt: The Incorporation of the Sharīʿa Into Egyptian Constitutional Law 247&265, 2006.

support from Islamic jurisprudential literature, it placed no interpretive authority whatsoever on Islamic jurists. In its defense, placing any binding state-like authority could qualify as a theocratic power in a modern state that is supposed to be civil and constitutional.

On the other hand, Islamic law was developed through accumulative jurisprudential efforts and was articulated by jurists who interacted with people, responded to their objective conditions, and, sometimes, represented them. With these qualities, and with the silence of the Constitution toward interpretation, I propose that legislatures are more fit and equipped to deal with Islamic law through their interaction with society and their relative, but more interactive, representation of society. At the same time, Islamic jurists should conduct independent non-binding interpretive efforts in the meta-constitutional sphere as they are historically accustomed to doing. In the following pages, I will further explain the current proposals and conclude with my own.

4.4.1   Appraisal of the current proposals

There has always been the question of who has the right to *ijtihad* (Independent Islamic reasoning). Islamic classical jurists settled on dividing individuals dealing with Islamic interpretation and jurisprudence into *mujtahid*(capable of independent reasoning) and *muqallid*(individual incapable of independent reasoning). The jurists developed a set of qualities and conditions for an *ijtihad* to be legitimately acceptable in Islamic jurisprudence.[716] However,

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[716] For the classical discussions of *ijtihad* and its rulings and requirements, see the classical sources in the origins of jurisprudence e.g., AL-ZIRKESHI, Al-Bahr al-Muheet 8:226-58. 1994;AL-GHAZALI, Al-Mustasfa 4:10-129. 1995;AL-AAMIDI, Al-Ihkam fi Usul al-Ahkam 4:162-221;ALJAWZEYYAH, I'lam Al-Muqe'een 2:126-9. 1991;AL-SHATIBI, Al-Muwafaqat 5:41-58. 2003;AL-TUFI, Mukhtasar Sharh al-Rawdhah 3:575-84. 1987;AL-SHUKANI, Irshad al-Fuhul Ila Tahqeeq 'Ilm al-Usul 2:713-54. 1998;AL-SHINQEETI, Al-Mudhakkirah Fi Usul Al-Fiqh 369-74. 2001.

the whole discussion was conducted in a free space and was not directly intended to control the state's interpretive power except through public representation and social pressure.[717]

As far as Islamic jurisprudence is concerned, the judge is either *mujtahid* or *muqallid*, and in either case, socially-recognized jurists check on their *ijtihad* through their social networks and presence. The state may determine its own *ijtihad* and decide who has the right to Islamic interpretation, but in order to be broadly acceptable, the power of interpretation should be vested in a socially accountable entity. If we incorporate the representative nature that used to characterize the jurists, the representative legislature of today's modern state could form an Islamically plausible compromise where Islamic jurisprudential decision-making can be articulated. Meanwhile, Islamic jurists continue their non-state efforts and conduct their free *ijtihad* and opinion-making. In the next pages, I will summarize the different proposals, and then proceed to further explain my own.

4.4.1.1 The judiciary's exclusive power over Islamic interpretation

One important and actually widely applied proposal is to entitle the judiciary, especially the constitutional courts and the SCC in Egypt, to Islamic interpretive power. Thus, the bottom line of this proposal is to continue vesting interpretive power in the constitutional judges, such as the SCC's, in order to counterbalance Islamism with secular forces and modern discourse.[718] In fact, most Muslim-majority countries place the "Sharia check" on the hand of supreme courts or constitutional judiciaries.[719] Asifa Quraishi attributes the current judicial power of Islamic

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[717] See, FELDMAN, The Fall and Rise of the Islamic State:[New in Paper] 21. 2012.
[718] See, Hirschl, WILLIAM & MARY LAW REVIEW, 9-12 (2008);Hirschl, TEX. L. REV., 2 (2003);HIRSCHL, Constitutional theocracy 67-120. 2011. See, Backer, INDIANA JOURNAL OF GLOBAL LEGAL STUDIES, 173 (2009).
[719] Quraishi, The Separation of Powers in the Tradition of Muslim Governments 71-2. 2011.

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interpretation to the modern desire for political balance and separation of powers. However, Quraishi notes that "empowering a high court with Sharia-based judicial review is not the same thing as [the classical Islamic arrangement of] balancing rulers with scholars."[720]

Constitutionally speaking, the specialized constitutional courts are supposed to decide constitutional cases, and settle constitutional disputes. Because constitutions deal with diverse basic aspects of laws, however, it is impossible and contradictory to expand the jurisdiction of constitutional courts to every principle or aspect of law mentioned in the constitution.[721] There are questions that are not even supposed to be decided by the judiciary at all. Compared with different systems of the world, Lombardi concluded that the Egyptian Supreme Constitutional Court should probably not even have jurisdiction over Article 2 and issues related to "Islamic principles." Lombardi suggested that the SCC could operate as a check on the interpretation provided by other branches of government more than as an interpreter *per se*.[722]

At the early stages of the SCC's response to Article 2 cases in Egypt, the court itself determined that Article 2 was a limitation on the legislature to decide whether laws had been consistent with Islamic law—a unique move of adopting jurisdictional deference to another state's power in dealing with a constitutional article.[723] However, the SCC ended up self-proclaiming its exclusive authority over Islamic interpretation—a position that seemed problematic, if not totally wrong.

To summarize my criticism of the judicial jurisdiction over Islamic interpretation: first, the Egyptian Constitution is silent about the jurisdiction of Article 2 and how to implement it.

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[720] Id. at, 72.

[721] TOM GINSBURG & ROSALIND DIXON, COMPARATIVE CONSTITUTIONAL LAW 265-7 (Edward Elgar Publishing. 2011). I'm not questioning the basic role of the SCC, but actually questioning the exclusivity over Islamic interpretation that the SCC ended up claiming.
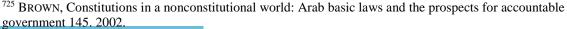
[722] LOMBARDI, State Law as Islamic Law in Modern Egypt: The Incorporation of the Sharīʻa Into Egyptian Constitutional Law 160. 2006.

[723] Sherif, The Relationship between the Constitution and the Sharia in Egypt 131. 2011.

Thus, the judicial jurisdiction over "Islamic principles" and its interpretation seemed to be gradually attained and self-proclaimed by the SCC. The court hesitated for some time and waited for the legislature to take the initiative, but after failed legislative attempts, the SCC decided to take the matter into its own hands. From this outcome, the jurisdiction of the judiciary over Islamic interpretation was neither granted by the constitution nor given as a genuine authority of the judiciary that had expected the legislature or another branch to take the initiative.

Secondly, the SCC in Egypt pronounced itself as the *exclusive* authority over Islamic interpretation, ignoring what some constitutionalists describe as a universal practice of the distribution of interpretive authority among the state's institutions. Constitutionalists assert that most constitutional democracies in the world have tended to distribute interpretive power to the extent that some countries have made the sharing of interpretive authority an explicit doctrine enshrined in the constitution and practiced in the system.[724] Accordingly, restricting interpretation to a certain institution could carry the risk that the unelected officials and judges develop a system that practices a tyranny of its own or establishes a rule of lawyers instead of a rule of law.[725]

Moreover, granting secular judges the exclusive authority over Islamic interpretation defeats the whole purpose of Article 2 and the Islamic articles altogether and empties even the

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[724] See, JACKSON & TUSHNET, Comparative constitutional law 226-8. 1999.(The authors consider the case of the United states. "Even in the United States, the Supreme Court has been reluctant to claim the role of "ultimate constitutional interpreter" as far as other branches of the federal government are concerned…." To explain how this distrbutive approach works, the authors explain that "presidents and congresses have frequently and effectively asserted equal interpretive authority. The power to veto legislation gives the president a pulpit from which to expound his own constitutional doctrines." The two main examples given for the explicit adoption of the distribtuive approach were Irland and Canada). On the other hand, George Taylor drew my attention to the argument that although the universality of the practice of distributing interpretative authority is debatable, a larger and more applicable approach in the US is the procedures to prevent judicial tyranny. Despite the authority of the US Supreme Court, some state supreme courts have the final say on matters that fall into their authority.
[725] BROWN, Constitutions in a nonconstitutional world: Arab basic laws and the prospects for accountable government 145. 2002.

symbolic gesture of Article 2 of its role and meaning as a legitimizing vehicle.[726] If the meaning of Islam is to be *exclusively* decided by unelected secular officials, then the whole point of using the word "Islam" is pointless.[727]

Finally, the supposed secular balance of the judiciary with Islamism is conditional and partial if not totally meaningless. The presumptive balance could not be considered as such if the discourse adopted by the judiciary, the SCC here, resembles the rhetoric adopted by the Islamists that the court was supposed to balance. The main Islamist movement, the Muslim Brotherhood, embraced ideas of the role of Islam and the state that are similar to those pronounced by the SCC.[728] So, the presumptive balance to the Islamist discourse is not real if Islamists share the same rhetoric that the SCC promotes.

In conclusion, the judiciary took the wrong direction when it proclaimed its exclusive authority over Islamic interpretation. If this is the case, is it constitutionally possible and plausible to consult or defer some interpretive power to a religious authority in order to involve the most specialized institution in matters related to religious principles and their interpretation? The next section deals with this issue and the proposal of involving religious institutions like al-Azhar in the interpretive process.

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[726] See, id. at, 184.

[727] I intentionally used the word "unelected" here not just to invoke the criticism of the democratic theory toward judges as unelected officials' whose interpretive role in a democratic government is disputed, but also to hint toward my proposal that representatives of the nation could have a legitimate role Islamically in articulating the bounds of Islamic law and its implication. The idea is explained in a later section. For the democratic theory see, JACKSON & TUSHNET, Comparative constitutional law 225. 1999.

[728] See, Hamoudi, WILLAMETTE L. REV., 429&436 (2011).

4.4.1.2 The deference to appointed religious institutions (al-Azhar)

This subsection examines the proposal that an Islamic jurisprudential institution, like al-Azhar, should have a say in the meaning of "Islamic principles" and the implementation of Islamic law in Muslim-majority states, more specifically, Egypt in this case.

In the summer of 2007, the Muslim Brotherhood in Egypt circulated a constitutional platform that was supposed to express the movement's political and constitutional vision.[729] The platform sparked controversies, but one important issue that invited heated discussions was the proposal in regards to the "council of scholars." The Muslim Brotherhood announced that, if they won, they would establish a council composed of scholarly experts in civil and Islamic law to draft a constitution in Egypt. The platform proposed a creation of council of Islamic scholars to advise lawmakers on the legislative process. According to the proposal, the members of the council should be elected freely from the Islamic scholars who are completely independent from the government and its influence.[730]

The proposal was ambiguous on how to measure this independence from the executive branch although the qualities and required qualification of these scholars, in general, were left for the legislature to decide. Nevertheless, the platform was decisive on the fact that the council was strictly advisory, unless it was dealing with a ruling that is certain in meaning and authenticity. If the issue involved a definite Islamic ruling that was absolutely certain in both meaning and authenticity, the platform implied that the council's decision would be binding for the legislature.[731]

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[729] For the Platform and its context, see, Amr Hamzawy, *The Draft Party Platform of the Egyptian Muslim Brotherhood: Foray Into Political Integration or Retreat Into Old Positions?*, MIDDLE EAST SERIES, 9-16 (2008).

[730] Stilt, TEX. INT'L LJ, 88-102 (2010);Hamoudi, WILLAMETTE L. REV., 437 (2011).

[731] Stilt, TEX. INT'L LJ, 102 (2010);Hamoudi, WILLAMETTE L. REV., 437 (2011).

The proposal of the Council of Scholars faced opposition even within the Brotherhood. The reformist wing of the Brotherhood criticized this conservative proposal. Shortly after this dispute, even leaders within the conservative wing of the Brotherhood retreated from their proposal of the Council of Scholars, and a prominent former Brotherhood leader, Muhammad Habib, considered the proposal a mistake. Later, official leaders of the Brotherhood modified their position to reduce the council to a strictly advisory body.[732]

As a result of the 2011 Revolution, the Brotherhood's political party was recognized, and in the following election, the Brotherhood won a victory. The Islamist-dominated constituent assembly drafted Article 4 that dealt with al-Azhar. The final clause in Article 4 declared that "Al-Azhar Senior Scholars are to be consulted in matters pertaining to Islamic law."[733] The Brotherhood seemed to completely abandon the idea of the Council of (independent) Scholars, and they shifted the language toward specifically recognizing al-Azhar as the independent Islamic institution. Thus, they presented al-Azhar as a body responsible for legislative consultation in regards to legislation. The language of Article 4 of the 2012 Constitution was not clear concerning whether the opinion of al-Azhar is merely advisory or binding.[734] At any rate, the whole clause was suspended along with the 2012 Constitution, and a new constitution took effect in 2014—a constitution that made sure that there is no legislative role whatsoever for scholars of al-Azhar or Islamic scholars in general.[735]

The Brotherhood's 2007 proposal of the Council of Scholars and the shift of Article 4 of the 2012 Constitution could indicate the two different and long-recognized forces in Islamic

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[732] Stilt, TEX. INT'L LJ, 103 (2010).
[733] Egypt Const. of 2012 Art. 4.
[734] Lombardi & Brown, FOREIGN POLICY, DECEMBER, 1-6 (2012).
[735] See in general, Brown, POLITICAL AND CONSTITUTIONAL TRANSITIONS IN NORTH AFRICA: ACTORS AND FACTORS, 10-2 (2014).

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literature: Islamic scholars, ulama, on one hand, and lay Islamists, brotherhood movements on the other. Although the two forces could cooperate and agree on some issues, the dispute grew between the officially-recognized scholars and politically active Islamists, mainly the Brotherhood members.[736] Accordingly, the required "independence," which was previously stipulated by the Brotherhood, hinted at the current scholars' subordination to the state. In any event, the proposal of the legislative role of the scholars went nowhere.

The idea of a state-like legislative role for scholars or for any Islamic scholarly institution could qualify for one type or another of theocracy. If there is any binding religious authority, the chances of a Taliban-style state become greater.[737] The theocratic proposals did not just contradict the universal understanding of civil government, it also contradicts the long-established literature of the Islamic scholars themselves as we saw in the second chapter. If this theocratic proposal is doomed to fail, the next proposal is to defer the interpretation of "Islamic principles" to the legislature as initially suggested by the SCC. The next section will discuss this proposal.

4.4.1.3 The legislative initiative

After exploring two different proposals for how to deal with the interpretive authority within the state, the third proposal is to return to the initial position toward Article 2 and "Islamic

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[736] For the differences between the two forces, see e. g., Martin, A Short History of the Khalwati Order 275. 1972;Ernest Gellner, *Doctor and Saint*, see id. at 307, (;Vincent Crapanzano, *The Hamadsha*, see id. at 327, (;Ahmad, Activism of the Ulama in Pakistan 257. 1972;WICKHAM, Mobilizing Islam: Religion, activism and political change in Egypt. 2002;MARTIN & BARZEGAR, Islamism: contested perspectives on political Islam. 2010;Skovgaard-Petersen, Egypt's 'Ulama in the State, in Politics, and in the Islamist Vision. 2013; Hirschl, TEX. L. REV., 2 (2003).

[737] See, Hannibal Travis, *Freedom or theocracy? Constitutionalism in Afghanistan and Iraq*, 3 NORTHWESTERN UNIVERSITY JOURNAL OF INTERNATIONAL HUMAN RIGHTS, 11-4 (2005); LAU, The role of Islam in the legal system of Pakistan 5. 2005. Compare, Backer, INDIANA JOURNAL OF GLOBAL LEGAL STUDIES, 14 (2009);HIRSCHL, Constitutional theocracy 50-4. 2011.

principles." The initial position of the state powers was to entitle the legislature with Islamic interpretation, and leave much of the work on these issues to the legislative branch to figure out and articulate. While the judiciary may have some say, its role should be reduced to the minimum check on the legislature; i.e., it should not decide and articulate the meaning and bounds of Islamic principles.

The position of deferring to the legislature was the previous stand of the SCC until probably the mid-1980s.[738] The idea of deferring to the legislative branch came not just from the legislature but also from within the judiciary itself when, in 1975, the SCC put the legislature in charge of checking the Islamicity of laws.[739] Even after that, as we saw, in 1982, the Court of Cassation refused to void a ruling that was thought to be in contradiction with Sharia and deferred that authority of interpreting Islamic law to "legislative branches."[740]

Theoretically, in Islamic constitutionalism, as Mohammad Hashim Kamali argues, separation of powers in an Islamic context can be exercised when legislation is in the hands of the *ummah* (nation) by adopting a modern form of *ijma'* (the traditional Islamic jurisprudential concept of consensus). This practice of Islamic consensus represents the nation in the modern sense and can provide a form of separation of powers in the idea that representatives of the nation are separate from the judiciary and the executive. Those representatives, although mostly secular, are better equipped to deal with the meaning and bounds of Islamic law in the state than unelected secular officials. The representatives interact directly with people and can better represent their values and draw boundaries.[741]

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[738] Sherif, The Relationship between the Constitution and the Sharia in Egypt 131. 2011.

[739] LOMBARDI, State Law as Islamic Law in Modern Egypt: The Incorporation of the Sharī'a Into Egyptian Constitutional Law 132. 2006.

[740] Id. at, 161-2.

[741] Kamali, Constitutionalism in Islamic Countries: A Contemporary Perspective of Islamic Law 31. 2011. See, Mohammad Hashim Kamali, *Constitutionalism and democracy: an Islamic perspective*, 2 ISLAM AND CIVILISATIONAL RENEWAL, 34-6 (2010). In the Shi'i school, there is a constitutional theory that champions the

The idea of Kamali not only Islamically contextualizes a modern democratic concept of representation and separation of powers through the Islamic idea of consensus, but also makes it more plausible to entrust the consensus-makers within the state with Islamic interpretation. Khaled Abou El Fadl reinforces the representation of the nation and suggests that there are two approaches toward Islamic law in the state.

The first school toward Sharia in Muslim-majority states is to enforce the prevailing subjective commitments of the community and leave the articulation and interpretation of Islamic law to the community. In this approach, Islamic principles are like any other principles in the sense that what matters in the state is communal commitments while the state is completely neutral toward religion. The mechanism of how to figure out these communal commitments, or where to draw a line between communal commitments and enforceable state law, is not so clear. In the context of Muslim-majority states, this approach means that there should be no article 2 or repugnancy clauses of any sort because religion is merely a communal commitment.

According to Abou El Fadl, the other approach toward Islamic law is to "enforce what the majority believes to be closer to the Divine Ideal." This means that the majority is entrusted to figure out and decide the meaning and bounds of Islamic law, and this can be exercised by their representatives in the modern parliaments. The discussion here all stemmed from the premise that "Islamic law" is not law *per se* as long as the state is concerned, and that it becomes

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"guardianship of the *ummah*," as opposed to the "guardianship of the jurist" theory that is adopted by the Iranian regime. The guardianship of the *ummah* means that the only true and possible guardian of the nation is the nation itself by its representatives. The Sunni scholar al-Qaradawi echoed this theory with his saying that sovereignty of the ummah precedes the implementation of Islamic law. The Saudi writer Abdullah al-Malki expanded the idea of al-Qaradawi in a book that its title could be translated as "Sovereignty of the Ummah Precedes the Implementation of Islamic Law." MUHAMMAD M. SHAMS AL-DEEN, NIDHAM AL-HUKM WA AL-IDARAH FI AL-ISLAM 419 (The International Institution for studies and publishing. 2000);AL-KATIB, Tatawwur Al-Fikr Alshi'i Al-Syasi 405-47. 1998;ABDULLAH AL-MALKI, SIYADAT AL-UMMAH QABLA TATBEEQ AL-SHARIA 119 (Arab Network for Research and Publisjing 1st ed. 2012).

enforceable law if it was enacted and articulated for the state by representative councils in the Muslim-majority countries.[742]

The idea of having a legislature representing the nation to articulate the meaning and bounds of Islamic law and its "principles" in the state resonates partially with the idea of meta-constitutionalism. The dynamics of the meta-constitutional sphere is to work within the social networks in the implied conviction that society is who decides issues and determines meanings in regard to Islamic law *at the state level*.

I assume that the state arrangement should lead to the legislature being in charge of interpretation within the state as this is in line with different proposals and with the fact that Sharia is more with "people" than with unelected *secular* judges deciding *Islamic* law. However, for debates to be legitimately Islamic, the typical articulators of Islamic law in the social level, the Islamic scholars, should be allowed and recognized in their meta-constitutional sphere. Because the mere proposal of having the legislature decide Islamic law at the state level does not suffice for Islamic law in the traditional context, another, and more important element should be incorporated in the proposal to make more sense of it all—the element of the meta-constitutional sphere where Islamic scholars operate, articulate Islamic law, and develop it at the social level. The next section will discuss this proposal and defend it in the modern constitutional context.

4.4.1.4 The Meta-Constitutional Proposal

This section does not reject the legislature's authority over Islamic interpretation, but rather provides it with a complex formula which considers cultural and religious contexts. Islamic

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[742] Fadl, The Centrality of Sharia to Government and Constitutionalism in Islam 61. 2011.

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jurists are a crucial group that can help in this process by lending support to the state's arrangement through the mechanism of legitimacy. Therefore, I will discuss my two-prong proposal that attempts to bring conformity between Islamic law at the social level on one hand, and its conceptions at the state level on the other. At the social level, the meta-constitutional sphere facilitates traditional legitimacy, while at the state level, the legislature engages in the main interpretive tasks in regards to Islamic law.

In his appraisal of the rule of law and constitutionalism in the Arab world, Nathan J Brown emphasizes that effective constitutionalism emerges from political struggles within society more than legal and procedural efforts.[743] Therefore, the problem is not interpretations at the state level, but obstructions of political and social struggles that could establish the constitutional rules. In addition, when we talk about social struggles and recognition, we are describing the backbone of very old and lasting activism, the meta-constitutional sphere that allows jurists and scholars to interact and debate as their principles guide. In this sphere, Islamic law was interpreted and developed in different times and places. Several leading scholars agreed that Islamic law was interpreted and elaborated in different times and places, which made it flexible and able to fit different contexts, but overlooked the fact that these jurists were never state officials or scholars within state-controlled religious institutions.[744]

In dealing with the free-floating jurists or even (loosely) affiliated scholars, Backer expresses the need for dealing with this "priesthood", or institutions charged with legitimately interpreting holy texts at the social level.[745] At the same time, if these institutions are granted a

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[743] BROWN, Constitutions in a nonconstitutional world: Arab basic laws and the prospects for accountable government 113&197. 2002.
[744] See, Sherif, The Relationship between the Constitution and the Sharia in Egypt 126. 2011.
[745] Larry Catá Backer, *God (s) Over Constitutions: International and Religious Transnational Constitutionalism in the 21st Century*, 27 MISSISSIPPI LAW REVIEW, 22 (2008).

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state-like power, it paves the way for some modern form of theocracy. In Abdullahi An-Na'im's words:

> any principles or rules of Sharia simply cease to be part of a religious normative system by the very effort to enact and enforce them by the organs of the state, because the state can only enforce its own political will, not the will of God.[746]

In addition to the fear of modern theocracy if clergy are granted state's power, mainstream Islamic scholars struggle to gain recognition of their autonomy, not a binding power that is unique to the state's institutions.[747] The sphere of these juristic societies has existed for a long time and does not seem to fade, and may indeed never fade. This is because the operation of the sphere is substantially linked to the very core of Islamic law, and its jurisprudence. The key point is to suggest a kind of recognition of this meta-constitutional sphere. This would not need be established, as it has been already established. Nevertheless, one very vital advantage of this already established sphere is that it is not state-patronized. This is why the proposed recognition means to respect the crucial feature of the autonomy of this sphere, and its institutions as this recognition would benefit from this legitimation tools. At the same time, it keeps the state from establishing a religious institution as a state office. Acknowledging the meta-constitutional sphere means constitutionally recognizing the sphere's *autonomy* and its importance, not one institution or another, and not providing any official or legally-binding authority in the state.

Consequently, al-Azhar should be no different from any other religious institution in the sense that they are all part of the respected independent meta-constitutional sphere. If the Egyptian constitution is to respect al-Azhar's independence, it should respect all similar plural institutions existing in the same sphere as al-Azhar. It is not only about al-Azhar, but also every

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[746] An-Na'im, DRAKE L. REV., 840 (2008).
[747] See, LOMBARDI, State Law as Islamic Law in Modern Egypt: The Incorporation of the Sharīʻa Into Egyptian Constitutional Law 53, 2006.

other institution that could present itself with Islamic knowledge and authority. The previous two constitutions (in the post 2011 Revolution period) mentioned al-Azhar by name, and respected its independence - a step forward. Al-Azhar, however, was treated as if it had a monopoly over Islamic interpretation. This reminds us of Nasser's regime granting al-Azhar monopoly over Islam as a technique to control the institution, and Islamic interpretation.[748]

To deal with the traditional community of the jurists, and its concepts in the Islamic constitutionalist field, ceaseless efforts by researchers including Abou El Fadl, An-Na'im, and Kamali try to contextualize universal democratic principles into Islamic culture and literature. The Islamic concepts like *shura* (consultation) and *ijma'* (consensus), and *amanah* (trust) are elaborated to reflect universal democratic and modern liberal principles.[749] An-Na'im acknowledges that, although the concepts of consultation and consensus in the Islamic context could be developed and realized to support universal constitutional and democratic principles, "it would be grossly misleading to suggest that this notion has already been understood and practiced in this [universalistic modern] sense."[750] As a result, it is more likely that efforts outside the traditional Islamic juristic community could inject untraditional elements into traditional concepts. Without recognizing the jurists and their free sphere, the conceptual efforts would gain less authority from within the community itself. Moreover, although the approach that tends to tackle Islamic concepts and relate them to the modern state and its system of values contributes greatly to the Islamic constitutional literature, some efforts seem to miss one

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[748] Egypt Const. of 2012 Art. 4;Egypt Const. of 2014 Art. 7. For Nasser's attempts to control al-Azhar through the project of "nationalization" see, Moustafa, INTERNATIONAL JOURNAL MIDDLE EAST STUDIES, 7 (2000);HATINA, 'Ulama', politics, and the public sphere: an Egyptian perspective 207-8. 2010;ZAMAN, The Ulama in Contemporary Islam: Custodians of Change: Custodians of Change 60. 2010;Rahemtulla, Reconceptualizing the contemporary Ulama: Al-Azhar, Lay Islam, and the Egyptian state in the late twentieth century 26&50. 2007.
[749] Fadl, The Centrality of Sharia to Government and Constitutionalism in Islam 61. 2011;An-Na'im, DRAKE L. REV., 831-44 (2008);Kamali, ISLAM AND CIVILISATIONAL RENEWAL, 30-6 (2010).
[750] An-Na'im, DRAKE L. REV., 838 (2008).

important component—the traditional community that introduced these concepts in the first place—the Islamic scholars.

Similarly, there are other constitutionalists like Hirschl and Backer who deal with the theocratic elements in some modern states. In their attempts to mitigate this theocracy, they discuss the problem from the vantage point of state related issues (up-to-down). As a result, they overlook another important aspect (the bottom-up).[751] The bottom-up approach involves the very community that traditionally has dealt with Islamic jurisprudence, and continues to strongly retain their sphere as a forum for Islamic jurisprudential debates and discussions. At the same time, at the state level, the legislature could be the main interpreter that poses a very plausible solution constitutionally, and Islamically, to the dilemma of interpretive deference and the crisis of legitimacy.

4.5   THE TWO-PRONG PROPOSAL

As demonstrated in the previous sections, there is a dilemma of the right to interpretation among state institutions in Egypt and in other Muslim-majority states. On the other hand, there is a profound predicament related to legitimacy, as well as the legitimate authority that carries an Islamic discourse that gains the trust and confidence of people.

In the previous chapter, I reinforced the idea that the meta-constitutional sphere was well-established in meaning and function by classical jurists and had, and practically has, been practiced for centuries. The sphere was functioning as the typical arena for jurists, and was

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[751] Hirschl, WILLIAM & MARY LAW REVIEW, 3 (2008);HIRSCHL, Constitutional theocracy 5. 2011;Backer, INDIANA JOURNAL OF GLOBAL LEGAL STUDIES, 3-15 (2009);Backer, MISSISSIPPI LAW REVIEW, 11-7 (2008).

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supported by narrations and literature. In this chapter, I focus on the second part of my proposal - the role of the representative legislature in interacting with the people to establish and articulate the meaning of Islamic articles and codes. In the previous sections, I attempted to underpin the supposed upper hand of the legislatures in articulating Islamic law as long as the state is concerned.

In this concluding section, I will summarize my proposal which contains two parts: the first part is to support the legislative initiative in matters respecting Islamic interpretation in the state level, and the second part addresses the meta-constitutional sphere.

The elected legislature is more reflective of the people's beliefs. "As creators of the compact, they have authority to define its parameters. Elections may allow them to do so indirectly."[752] To give a modern example from the American experience, constitutionalists invoke the founding fathers who championed the direct interpretive role of the people by their deputies in the representative assemblies.[753]

From the Islamic context, to have the nation decide disputed interpretive matters echoes the reasoning that legislative authority lies with the community.[754] The community here could combine the two parts by introducing the elective legislature as representative of the community at the state level. The meta-constitutional sphere, which carries the religious authority, could do so at the social level. By stressing the "social level," I emphasize the power-free sphere where residents of this sphere conduct their work without state control and, at the same time, without the state establishment behind them.

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[752] JACKSON & TUSHNET, Comparative constitutional law 225. 1999.
[753] Id. at.
[754] Roder, The Separation of Powers in Muslim Countries: Historical and Comparative Perspectives 323. 2011.

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In the meta-constitutional sphere, Islamic jurisprudential differences, disagreements, scholastic debates, and even sectarian disputes take their natural course by retaining their scholastic nature. The political interference between these schools and jurisprudential disputes does not "solve" anything other than controlling some religious segments. Sometimes this in the name of patronage and adoption of religion, and thereby escalates the dispute and involves the state's institutions that can use enforcement and violence.[755]

Despite its being *meta-constitutional*, this sphere could greatly contribute to the formation of a stable constitutional structure in the Muslim world. Some constitutionalists affirm that constitutional law develops over time in different countries according to the productive interaction of political players with influential cultural segments.[756] Cass R. Sunstein argues that, especially in newly formed systems, constitutionalism is best developed "as precomittment strategy."[757] H. W. Okoth-Ogendo puts it perfectly, when she says:

> The paradox…is that *all law*, and *constitutional law* in particular, is concerned, not with abstract norms, but with the creation, distribution, exercise, legitimation, effects, and reproduction of *power*…. The very idea of power, hence of a *constitution* as a special body of law, entails commitment or adherence to a theory of organized power, as appears evident in the historical experience and shared aspirations of all societies.[758]

I would also argue that meta-constitutionalism is the typical arena that can largly contribute to forming such cultrual and religious comitments.

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[755] See the example of al-Sadat's interferences in jurisprudential debates—the thing that complicated the issue and brought it to another level. See, LOMBARDI, State Law as Islamic Law in Modern Egypt: The Incorporation of the Sharī'a Into Egyptian Constitutional Law 163. 2006.

[756] JACKSON & TUSHNET, Comparative constitutional law 143. 1999.

[757] Cass R Sunstein, *Constitutionalism and secession*, 58 THE UNIVERSITY OF CHICAGO LAW REVIEW, 637 (1991).

[758] Hastings WO. Okoth-Ogendo, *Constitutions without Constitutionalism: Reflections on an African Political Paradox*, *in* CONSTITUTIONALISM AND DEMOCRACY: TRANSITIONS IN THE CONTEMPORARY WORLD 67, (Douglas Greenberg, et al. eds., 1993).(Italics from the source)

In dealing with meta-constitutionalism and its indirect role on constitutionalism, I invoke what Vicki Jackson and Mark Tushnet call "grass-root constitutionalism." Jackson and Tushnet explain this concept as a slow construction of constitutional principles "from below" by involving powerful social and cultural segments in the discussions of pre-legal (or perhaps, pre-constitutional) principles.[759] Although different, grass-root constitutionalism and meta-constitutionalism share the notion that social and cultural forces can contribute in forming and strengthening a healthy constitutional structure directly or indirectly.

The fine line between the meta-constitutional sphere and the constitutional domain is that the first is free from state-like power, while the latter is supposed to produce binding laws that are enforceable. According to Kamali, Muslim scholars developed the notion that religious (*dini*) commitments are different from judicial (*qada'i*) obligations, and only judicial obligations are enforceable before courts.[760]

Therefore, as I explained in the second chapter, in Muslim society we can distinguish two sets of laws. One is located outside the political sphere but powerfully affects it—this is Islamic law while the other is politically-binding law, which is enforced by the state apparatuses. When Sherman Jackson studies al-Qarafi, one remarkable notion that al-Qarafi articulated is the variation between "*fatwa*" (jurisprudential ruling/opinion) and "*hukm*" (judicial ruling/decision). The variation resembles the differentiation here between the effect of the two laws.[761] According to al-Qarafi the fatwa is non-binding, while *hukm* is binding.[762] This difference between the two

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[759] JACKSON & TUSHNET, Comparative constitutional law 289. 1999.
[760] Kamali, Constitutionalism in Islamic Countries: A Contemporary Perspective of Islamic Law 24. 2011.
[761] JACKSON, Islamic law and the state: the constitutional jurisprudence of Shihāb al-Dīn al-Qarāfī 145. 1996.
[762] Id. at, 173.

spheres is what Wael Hallaq describes as the separation between the political and the legal in Islamic jurisprudence.[763]

Noah Feldman analyzed the position of the class of jurists in the Islamic traditional model as a counterbalance to state institutions—a dynamic that presented the Islamic separation of realms instead of separation of powers.[764] Quraishi explains the Islamic separation of realms between rulers and scholars as a "mutually independent relationship stemmed largely from a division of law-making authority that distinguished ruler-made law, *siyasah*, from scholar-crafted law, *fiqh*."[765]

The separation between the constitutional realm and meta-constitutional sphere is a notion that is established in the Islamic culture and history, which has been practiced for centuries. This long-held idea helps establish a stable constitutional structure, and legitimize the system if there is respect for the scholarly-developed sphere.

To conclude this section, if we apply the two-prong proposal in the Egyptian case, the legislature should have the main authority over Islamic interpretation because of its representation of the nation, and its ability to interact with traditional jurisprudential forces. Second, Article 7 of the 2014 Constitution concerning al-Azhar implies that al-Azhar has a monopoly over interpretation and that the state controls al-Azhar despite the firm assurance of its "independence," a negative connotation. When the article deals with Islamic scholars, it should deal with a whole sphere that institutions and scholars in general occupy to render their jurisprudential opinions on the daily basis. Moreover, the "independence" of al-Azhar granted by the same article seems to be essentially abridged by a clause of the same article that ensures that

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[763] Hallaq, JOURNAL OF LAW AND RELIGION, 251 (2004).
[764] FELDMAN, 51-3&68-73 (2008). See also, Roder, The Separation of Powers in Muslim Countries: Historical and Comparative Perspectives 323. 2011;Hallaq, JOURNAL OF LAW AND RELIGION, 251 (2004).
[765] Quraishi, The Separation of Powers in the Tradition of Muslim Governments 63. 2011.

all financial matters are provided for, and controlled by the state.[766] Therefore, I proposed the two-prong solution that attempts to bring conformity to Islamic law at the social level, on one hand, and its conceptions at the state level on the other. At the social level, the meta-constitutional sphere can facilitate traditional legitimacy, while at the state level, the legislature can engage in the main interpretive tasks in regards to Islamic law.

4.6   CONCLUSION

In this chapter, I studied the current constitutional setting of Muslim-majority countries, specifically Egypt as a case study. The main issue is the current position of Islamic scholars and religious institutions within the constitutional order.

I divided the chapter into four main sections. I started by exploring the current constitutional context in the Muslim and Arab world, and the different early phases of Islamic constitutionalism. I ended the first section by introducing the constitutional framework in Egypt, the Egyptian Supreme Constitutional Court, and the project of al-Sanhuri and codification.

The second section explains the role of Islamic scholars in the constitutional orders, and in constitution-making. I examine the role of scholars in two areas: law-making and judicial adjudication. A legislative task was given to scholars in different countries, either in legislative committees or as state religious institutions. I show that the direct constitutional involvement of the scholars in state institutions does not seem to have worked. It results in the entanglement of

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[766] Egypt Const. of 2014 Art. 7.

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ruler-made law, *siyasah*, and scholar-crafted law, *fiqh* in a manner that clashes with the nature of Islamic jurisprudence.

In the third section, I discussed Islamic constitutional articles with special emphasis on the genesis of repugnancy laws in the Muslim world, and Article 2 of the respective constitutions. Then I turned to constitutional interpretation by discussing the question of who has the right to Islamic interpretation. At first, the legislature seemed to have the initiative, but the judiciary ended up proclaiming its own exclusive authority over Islamic interpretation. The section concluded with the Supreme Constitutional Court's application of Islamic law in Egypt, where the court took a modern universalistic approach in interpreting Islamic principles.

The fourth and final section examines my two-prong proposal in the overlapping jurisdictions. The two-prong proposal will involve the very community that traditionally dealt with Islamic jurisprudence, and has continued to retain its importance in this sphere as a forum for Islamic jurisprudential debates and discussions. At the same time, at the state level, the legislature could be the main interpreter that poses a very plausible solution constitutionally and Islamically to the dilemma of interpretive deference and the crisis of legitimacy.

CONCLUSION OF THE DISSERTATION

In the First chapter, we saw that Islamic religious institutions acquire their importance by being the body that carries the values and principles of the public. Achieving normative legitimacy, then, is to adapt the state to people's values as reflected in the religious institutions. This process of making the system compliant to social values needs initial legitimization of the very existence of the state, while continuous legitimacy ensures that the state is living up to that cause. A regime may come into existence without responding to the expectation or imagination of the people continuously, but it will lack long-term stability. A state that lacks popular faith is doomed to collapse, and is the reason why even the most authoritarian regimes use popular signs and language as a way of achieving what has been described above as enunciative legitimacy. The Latter is a set symbolic references that invoke cultural, religious and historical events or concepts in order to legitimize a current system.

Muslim-majority countries are particularly sympathetic to religious discourses. As a result, Islamic legitimacy is a political requirement that can be exercised by the typical legitimizers, jurists. The jurists use acceptable juristic language and mechanisms to either legitimize the system or challenge it. Thus, the locus of power of the jurists and their interaction with the system is through societal channels by means of public faith, confidence, and support. Legitimacy is the tool that jurists use to influence politics, an exercise that needs to be independent of the control of the system in order to legitimize that same system, if that

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legitimization is to be credible. The nature of jurists' political exercise can be described as a soft, indirect presence that sweeps like their fatwas do, as long as they appeal to the public and speak the language that the people believe and support.

In the second chapter, I have aimed to craft a role that historically, and normatively fits the ulama's nature according to their own literature and social dynamics, in order to stabilize society and its religious authority. At the same time, it is an attempt to place the ulama in a locus that is both constitutionally possible and plausible in today's society.

I have divided the second chapter into four sections. I start by examining the concept of a "religious institution" in the Islamic context, and conclude that it is more important to look at religious institutions as imagined, rather than formal brick and mortar institutions. The fact that there is no comprehensive religious body leaves us with a dispersed authority within Sunni jurisprudence.

The second section explains the different roles and modes of scholars focusing on their relationship to the political authorities, especially in pre-modern times.

The third section is devoted to the proposal that the meta-constitutional sphere is the locus of authority for scholars. This sphere is not political but also not merely public. The case of the Islamic Inquisition (*mihna*) is discussed as a historical example to avoid in the Sunni subconscious.

The fourth section discusses the concept of independence among these imagined and formal institutions of scholars and jurists. The ability to dissent that characterizes the medieval and modern jurists demonstrates the extent and importance of their autonomy intellectually and economically. The case of al-Azhar in Egypt was given special attention to show that infringing on scholars' independence, as occurred in Egypt, produces the phenomenon of peripheral ulama

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that are even more independent and resistant. I emphasized the idea that the independence of scholars is central to their nature, but independence and the autonomy of these Islamic institutions and scholars never means that they have power or political control.

In the third and final chapter, I studied the current constitutional setting of Muslim-majority countries, specifically Egypt as a case study. The primary concern is the current position of Islamic scholars and religious institutions within the constitutional order.

I divided the third chapter into four main sections. I started by exploring the current constitutional context in the Muslim and Arab world, and the different early phases of Islamic constitutionalism. I ended the first section by introducing the constitutional framework in Egypt, the Egyptian Supreme Constitutional Court, and the project of al-Sanhuri and codification.

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In the third section, I discuss Islamic constitutional articles with special emphasis on the genesis of repugnancy laws in the Muslim world, and Article 2 of the respective Egyptian constitutions. Then I turn to constitutional interpretation by discussing the question of who has the right to Islamic interpretation. At first, the legislature seemed to have the initiative, but the judiciary ultimately proclaimed exclusive authority over Islamic interpretation. The section

concluded with the Supreme Constitutional Court's application of Islamic law in Egypt, where the court took a modern universalistic approach in interpreting Islamic principles.

The fourth and final section examines my two-prong proposal in the overlapping jurisdictions. Pursuant to this proposal, on the one hand, at the state level, the legislature could be the main interpreter of Islamic Law. This poses a plausible solution constitutionally and Islamically to the dilemma of interpretive deference. However, as to the second prong, the very community that traditionally dealt with Islamic jurisprudence, and has continued to retain its importance in this sphere, the jurists, will continue to hold sway. They will exercise their power metaconstitutionally. This is to say, they are not a formal state power, and have no formal role in lawmaking or adjudication. However, as the source of legitimating authority for the state, derived by virtue of their connection to and support from the people, they will continue to exercise considerable influence over the state's activities. The jurists, in other words, ensure that the state is legitimate, by ensuring that it is Islamic, precisely as they have always done throughout Islamic history.

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