CREATING LAWS FOR ECONOMIC GROWTH IN A HYBRID ISLAMIC LEGAL SYSTEM

MALIHEH ZARE✠

ABSTRACT

Modern hybrid Islamic legal systems that maintain Islamic law ("IL") as a source of law while adopting a civil or common law legal system face a constant challenge: safeguarding compatibility of their laws with IL and adapting them to modern realities. In response, some states in Muslim countries with aspirations for economic growth secularize their legal systems in order to modernize them. However, such states should preserve compatibility of their laws with IL. Recent developments in the "legal transplants" theory show that if the original process of transplantation enables the transplanted laws to assimilate the local characteristics, then the laws will be more conducive to economic growth. This phenomenon occurs because individuals will be more likely to comply with these laws and will also be more likely to ask lawyers and courts to enforce and develop newly introduced laws more efficiently. IL possesses the capacity to accommodate reforms; jurists have been aware of this need and have developed methodologies to welcome change. Additionally, "reasonable" interpretations of rules and legal process compliance with IL would make it possible for a state to stay Islamic while ensuring adaptability of its laws with modernity. In the process, consistency of laws, as introduced by Weberian theory of systematic lawmaking and common law precedent-based system, should be guaranteed: consistency in a pluralistic legal system makes it calculable for different actors. A prerequisite is to resolve the conflicts through adoption of an efficient and accountable conflict resolution system. This system must function in a timely manner and produce fair outcomes, accommodating the society's diversity and changes in religiosity.

I. INTRODUCTION

This article identifies the challenges modern Islamic states face in designing a hybrid Islamic legal system that is conducive to economic growth. A hybrid Islamic legal system is one that has preserved ties with Islamic law[1] even while adopting some form of civil or common law legal

✠. New York University School of Law, Doctor of Juridical Science (J.S.D.) candidate.

1. Islamic law is a broad term that refers "to the entire system of law and jurisprudence associated with the religion of Islam, including (1) the primary sources of law, (*Shari'ah*) and (2) the subordinate sources of law and the methodology used to deduce and apply the law," i.e., *uṣūl al-fiqh* (Islamic jurisprudence). IRSHAD ABDAL-HAQQ, *Islamic Law: An Overview of Its Origin and Elements*, *in* UNDERSTANDING ISLAMIC LAW: FROM CLASSICAL TO CONTEMPORARY 1, 3 (Hisham M. Ramadan ed., 2006). Islamic law "was to be found not in precedent established by courts of law (a notion based on the doctrine of *stare decisis*), but rather in a juristic body of writings that originated mostly in the answers given by *muftis,*" i.e., *fuqaha* (pl. of *faqih*) or jurists/scholars. WAEL B. HALLAQ, AN INTRODUCTION TO

system.[2] The dualistic character of such a legal system requires it to create laws that are compatible with Islamic law and are adaptable to modern realities. The tensions between the states' inclination to adhere to classical Islamic law and the necessity of tackling modern issues make hybrid Islamic legal systems prone to conflict. As such, a conflict resolution mechanism is required to guarantee consistency of such a legal system, and thereby make it calculable for local actors and adaptable to their needs.

The design of conflict resolution mechanisms in hybrid Islamic legal systems is especially complicated because Islamic law tends to be flexible and malleable. To any given issue, several possible sets of rules with different principles may be applicable. As a result, multiple interpretations may sometimes be available for jurists to choose from. Over time, jurists have developed a complex methodology to determine the most authoritative interpretation to ensure certainty in law.[3] However, the required authority, principles, and methodology to deal with the conflicts that arise in choosing the most authoritative interpretation, when the state wishes to give economic, political, or social considerations some weight as well, are absent in modern Islamic legal systems.[4] As a consequence, the interpretation chosen via

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ISLAMIC LAW 10 (2009) [hereinafter HALLAQ, AN INTRODUCTION]. The Islamic law sources that the scholars contemplate in order to determine the law are the Quran, *hadith* (Prophet's and Caliphs'/Imams' narratives and practice), *ijma'* (legal consensus) and *qiyas* (juridical inference). *Id.* at 14–17, 21–22.

Islamic law has two main parts: positive law and legal theory. Positive law consists of texts that represent the main sources of Islamic law, *inter alia*, the Quran, *Sunna* (the practices of Prophet Mohammad), and texts that have been produced by jurists based on the primary sources of Islamic Law. Islamic legal theory includes the methodology/jurisprudence that jurists use as an interpretive tool to derive new rules. Differences in legal theory have divided jurists into a few doctrinal schools (*madhab*). WAEL B. HALLAQ, THE ORIGINS AND EVOLUTION OF ISLAMIC LAW 150–53 (2005) [hereinafter HALLAQ, ORIGINS AND EVOLUTION].

2. There are plenty of examples of hybrid Islamic legal systems in Muslim countries. Countries in the Middle East and North Africa like Turkey, Egypt, and Iran, have adopted different forms of hybrid Islamic legal systems. *See* Anton Cooray, *The Reception of Islamic Law in Sri Lanka and Its Interplay with Western Legal Traditions*, *in* MIXED LEGAL SYSTEMS, EAST AND WEST 213 (Vernon Valentine Palmer et al. eds., 2015); Naser Ghorbannia, *The Influence of Religion on Law in the Iranian Legal System*, *in* MIXED LEGAL SYSTEMS, EAST AND WEST, *supra*, at 209; Esin Örücü, *Turkey's Synthetic Civilian Tradition in a "Covert" Mix with Islam as Tradition: A Novel Hybrid?*, *in* MIXED LEGAL SYSTEMS, EAST AND WEST, *supra*, at 185; Christa Rautenbach, *The Contribution of the Courts in the Integration of Muslim Law into the Mixed Fabric of South African Law*, *in* MIXED LEGAL SYSTEMS, EAST AND WEST, *supra*, at 225; Mohamed Ahmed Serag, *Integration of Islamic Law in the Fabric of Legal Thought in Egypt*, *in* MIXED LEGAL SYSTEMS, EAST AND WEST, *supra*, at 203. Also, some countries in Asia like Indonesia, Brunei, and Malaysia have adopted a variety of hybrid Islamic legal systems. *See* Gary F. Bell, *Indonesia: The Challenges of Legal Diversity and Law Reform*, *in* LAW AND LEGAL INSTITUTIONS OF ASIA: TRADITIONS, ADAPTATIONS AND INNOVATIONS 262 (E. Ann Black & Gary F. Bell eds., 2011); E Ann Black, *Brunei Darussalam: Ideology and Law in a Malay Sultanate*, *in* LAW AND LEGAL INSTITUTIONS OF ASIA: TRADITIONS, ADAPTATIONS AND INNOVATIONS, *supra*, at 299; Tsun Hang Tey, *Malaysia: The Undermining of its Fundamental Institutions and the Prospects for Reform*, *in* LAW AND LEGAL INSTITUTIONS OF ASIA: TRADITIONS, ADAPTATIONS AND INNOVATIONS, *supra*, at 212.

3. HALLAQ, AN INTRODUCTION, *supra* note 1, at 9; *see also* ROBERT GLEAVE, *Intra-Madhhab Ikhtlāf and the Late Classical Imami Shiite Conception of the Madhhab*, *in* THE ISLAMIC SCHOOL OF LAW: EVOLUTION, DEVOLUTION, AND PROGRESS 126 (Frank E. Vogel et al. eds., 2006); BABER JOHANSEN, *Dissent and Uncertainty in the Process of Legal Norm Construction in Muslim Sunnī Law*, *in* LAW AND TRADITION IN CLASSICAL ISLAMIC THOUGHT 127, 130–31 (Michael Cook et al. eds., 2013).

4. WAEL B. HALLAQ, *Can the Shari'a be Restored?*, *in* ISLAMIC LAW AND THE CHALLENGES OF MODERNITY 21, 24–25 (Yvonne Yazbeck Haddad & Barbara Freyer Stowasser eds., 2004).

Which Legal Systems are Islamic? A legal system encompasses both laws and legal institutions (such as the legal profession, courts, and administrative agencies). Thus, the extent to which a legal system is "Islamic" depends on the extent to which each of these components is Islamic.

When are laws Islamic? There are at least three ways that laws may be considered Islamic. First, legal texts might refer *explicitly* to Islamic positive law, as in the case where a constitution designates Islam as either "a source" or "the source" of law. *See* Lombardi, *infra* note 14. Second, members of the legislature may have referred to positive Islamic law when developing rules, regulations, and legislation. Third,

(state-imposed) Islamic law compliance mechanisms may face resistance from individuals or jurists that are not part of the state. Such a dissatisfaction may lead to individuals' non-compliance with laws, which can have a negative impact on the country's economic growth.

Secularization of the legal system is not an economically sound option for a modern state governing a Muslim-majority country. Having a system that complies with Islamic law ensures compatibility of laws with local norms and traditions. Arguably, compatibility of a legal system with local norms makes it conducive to economic growth.[5] This theory, which I call *compatibility theory*, requires a legal system to consider local norms and customs when creating laws because, in order for a legal system to be calculable for the local population, businesses, and experts, its rules have to be compatible with local traditions. It is also important that the laws are derived through locally accepted means of argumentation. Compatibility theory would approve of the efforts to ensure the compliance of laws with Islamic law in modern Muslim-majority countries on the basis that such compliance would help guarantee compatibility of these legal systems with their local populations' desires to observe religious mandates. A legal system that is compatible with local norms induces economic growth by encouraging compliance by ensuring the legitimacy of the state and its laws.[6] A state is legitimate if its laws and policies reflect its constituents' priorities, and its structure guarantees those laws' and policies' fair and non-arbitrary enforcement.[7] The local population would trust such a state and follow its

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lawmakers might adopt a process whereby, prior to enforcement, jurists review the bill passed by the parliament to ensure that the laws are compatible with Islamic law. There is a diversity of views in Islamic law that results from the methods of interpretation employed by different Islamic sects and jurists' disagreement as to the reliability, relevance, and hierarchy of different sources. RUDOLPH PETERS, *What Does it Mean to be an Official Madhab? Hanafism and the Ottoman Empire*, *in* THE ISLAMIC SCHOOL OF LAW: EVOLUTION, DEVOLUTION, AND PROGRESS, *supra* note 3, at 147, 147–58.

When are legal institutions Islamic? In determining whether a legal institution is Islamic, one must consider the background, training, and qualifications of the individual judges, legislators, and lawyers. Traditionally, in Muslim countries, judges were classically trained jurists and the jurists had jurisdiction to hear the cases privately. In modern Muslim countries, not all judges are classically trained jurists. For example, in Iran, after the 1979 Revolution, there was an effort to limit the judiciary to classically trained jurists, but this effort did not last long.

5. *See, e.g.*, Victor Nee, *Norms and Networks in Economic and Organizational Performance*, 88 AM. ECON. REV. 85, 87–88 (1998); Thomas W. Waelde & James L. Gunderson, *Legislative Reform in Transition Economies: Western Transplants—A Short-Cut to Social Market Economy Status?*, 43 INT'L & COMP. L.Q. 347, 369–72 (1994).

6. *Cf.* Volker Bornschier, *Legitimacy and Comparative Economic Success at the Core of the World System: An Explanatory Study*, 5 EUR. SOC. REV. 215, 226–28 (1989) (taking "absence of mass political protest" as a measure for legitimacy). *But cf.* Erich Weede, *Legitimacy, Democracy, and Comparative Economic Growth Reconsidered*, 12 EUR. SOC. REV. 217, 222–23 (1996) (arguing that in addition to absence of mass political protests, "age of democracy" and "the relative size of government" influence the growth rates).

7. *See* BENNO NETELENBOS, POLITICAL LEGITIMACY BEYOND WEBER: AN ANALYTICAL FRAMEWORK 50–53 (2016). In this argument, legitimacy of laws does not rest on a consensual relationship between the people and the state. A forced system of government can produce legitimate laws as long as justice is served. Consent does not make the government legitimate if it produces unfair laws or enforces them arbitrarily. Legitimacy does not "rest on the consent of the governed," contrary to some scholars' arguments. *Contra* James A. Gardner, *Consent, Legitimacy and Elections: Implementing Popular Sovereignty Under the Lockean Constitution*, 52 U. PITT. L. REV. 189, 192–93 (1990). In that sense, legitimacy in my theory is closer to Professor Barnett's theory of legitimacy that has two hierarchical standards: for Barnett, "actual unanimous consent to the jurisdiction of the lawmaker" makes the promulgated laws legitimate. In the absence of such an "unanimity" of consent—which is the case even in advanced democracies and thus unanimity is a "fiction"—the laws have to be "made by procedures which assure that they are not unjust." Randy E. Barnett, *Constitutional Legitimacy*, 103 COLUM. L. REV. 111, 145–48 (2003). For a critique of Barnett's theory, see Richard H. Fallon, Jr.,

mandates with a high level of satisfaction because they would believe that the laws are indigenously produced and have taken their needs and goals into account.

Abandoning or ignoring modernity and its economic, social, and political requirements would not be an economically sustainable option for such states either. In order to induce economic growth, a legal system has to reflect social and economic concerns of the people. When interpreting Islamic law, Islamic states would necessarily need to consider the changes in the socio-economic circumstances in which classical Islamic law developed. The evolution of rules in classical Islamic law shows that Islamic jurisprudence has been aware and approves of the need to accommodate change, and it has developed principles for such a process.[8] The laws have to be adaptable to the realities of the time and the place in which they function. This second theory, which I call *adaptability theory*, together with compatibility theory supports the creation of a hybrid Islamic legal system to govern Muslim-majority countries in modern times.

However, compatibility theory and adaptability theory are in tension with one another. This is due to the common assumption that traditional norms inherently tend to be rooted in the past, while adaptability requires them to be modified and to keep up with the change that the societies experience over time. Traditional Islamic legal systems have been criticized for impeding economic development in Muslim-majority countries due to the reliance of these legal systems on "informal" or "irrational" processes and rules of religion in lawmaking. The best-known proponent of this view is Max Weber, who contends that the laws must be systematic and self-contained—that is to say, *consistent*—in order to be calculable for businesses.[9] Although Weber's theory is still highly celebrated, historical and legal research has shown that his factual claims about inconsistency of Islamic law were not accurate. To the contrary, in classical Islamic law, jurists and judges developed complex methodologies and procedures to deduce law and decide cases.[10] Nevertheless, modern Islamic states that adopt a modern lawmaking system with a mechanism for incorporation of

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Legitimacy and the Constitution, 118 HARV. L. REV. 1787, 1801–06 (2005) (arguing that promulgation of laws is a rubber stamp for their legal legitimacy—at least under the positivist assumption—regardless of the unjust nature of the outcomes because there is a distinction between legal legitimacy and moral legitimacy).

8. Authoritativeness of (some form of) custom in Islamic jurisprudence as a source of law contributes to accommodating change in Islamic law. Custom has played a vital role in the development of Islamic law. *See* MOHAMMAD HASHIM KAMALI, PRINCIPLES OF ISLAMIC JURISPRUDENCE 369–82 (2003).

9. David M. Trubek, *Max Weber on Law and the Rise of Capitalism*, 1972 WIS. L. REV. 720, 722–23, 725–27 (1972) (initiating the link between the modern law and development literature and Weber's works in the area by "a critical re-reading of Weber"); *see also* Duncan Kennedy, *The Disenchantment of Logically Formal Legal Rationality, or Max Weber's Sociology in the Genealogy of the Contemporary Mode of Western Legal Thought*, 55 HASTINGS L.J. 1031, 1037 (2004); Chantal Thomas, *Re-Reading Weber in Law and Development: A Critical Intellectual History of "Good Governance" Reform* 7 (Cornell L. Sch. Legal Studs. Res. Paper Series, Res. Paper No. 08-034, 2008).

10. In both *Sunni* and *Shīʿī* schools of law, *uṣūl al-fiqh* (Islamic jurisprudence)—which deals with the methodology of deducing rules from the sources of law—is highly developed and is perceived as an important knowledge to possess for a jurist. That is because it has evolved over time to deal with complexities in deriving an extensive body of rules based on the limited texts of the Quran and *Sunna* (the Prophet's narratives and practices), as well as logic. *See* MUḤAMMAD AL-BĀQIR AL-ṢADR, PRINCIPLES OF ISLAMIC JURISPRUDENCE: ACCORDING TO SHI'I LAW 39–48 (Hamid Algar & Saʿeed Babmanpour eds., Arif Abdul Hussain trans., 2003); WAEL B. HALLAQ, A HISTORY OF ISLAMIC LEGAL THEORIES: AN INTRODUCTION TO SUNNĪ UṢŪL AL-FIQH 1–35 (1997); KAMALI, *supra* note 8, at 1–15.

Islamic law have faced the new challenge of maintaining such a level of consistency. A modern Islamic state must inevitably deal with both traditional mandates of Islamic law and modern realities of governing a nation. These two concerns can be in tension with one another and need to be managed effectively and efficiently in order to guarantee the consistency of the system as a whole.

Neither compatibility theory nor adaptability theory says anything further about the detrimental effects of possible conflicts that may arise by applying the pure versions of each of them in Muslim-majority countries. A modern Islamic legal system faces the demands of managing a modern state and the rules dictated by classical Islamic law, and as a result, it experiences different degrees of conflict in different areas of law, leaving its lawmakers with the dilemma of determining which considerations should prevail. A third theory, which I call *conflict theory*, describes the reasons that hybrid legal systems need to adopt a mechanism that balances compatibility and adaptability. The problem is that to fulfill the requirements of compatibility theory, a hybrid Islamic legal system is not free to ignore Islamic-law-compliant rules merely because of their short- or long-term detrimental impacts. At the same time, to comply with adaptability theory, lawmakers would have to consider the realities of government by a modern state, which might clash with religious rules.

Managing the conflict between different considerations is a challenge in any legal system, but it is a more important issue in pluralist legal systems with one or more sets of laws that are rooted in tradition or religion.[11] Ensuring legitimacy in such a hybrid legal system requires keeping the conflict between its parallel legal regimes in check. The existence of conflict could mean that some people believe in one view, while others believe that another view is more compelling. The friction arising from the interactions of the considerations justifying each of these views would diminish the legitimacy of the legal system and the state by causing dissatisfaction, which would lead to non-compliance with laws.

The malleability and diversity of views in Islamic law create a potential for two other types of conflict that might lead to the failure of the legal system. One is the tension between individuals' understanding of what Islamic law requires and the state's preferred interpretation. The other is the tension between the different interpretations of Islamic law by the jurists working for the state and by jurists who are not responsible for the process of determining the compliance of a law with Islamic law.

A hybrid legal system will fail unless it develops a conflict resolution mechanism. The conflicts can be resolved at either the enforcement stage or the lawmaking stage. Each of these has its advantages. Judicial conflict resolution is desirable because it allows for direct input from individuals, businesses, jurists, and other experts. As a result, in such a legal system, it is much easier to ensure the compatibility of the laws with indigenous

11. In attempts to explicate the elements that contribute to forming a legal system, religion and religious concepts are introduced as being one of the origins and foundations of law. Even the Western "secular state[s]" are believed to have derived their laws from "Christian theology and canon law." John Witte, Jr., *Introduction*, *in* CHRISTIANITY AND LAW: AN INTRODUCTION 1, 28 (John Witte, Jr. & Frank S. Alexander eds., 2008).

traditions as well as local business realities and needs, especially if individuals have the option to challenge the law in a fair tribunal. It is not, however, well-suited to ascertaining legislative facts and resolving polycentric disputes. Conversely, the main advantage of establishing a legislative conflict resolution mechanism is that it settles the differences of views among the institutions in the lawmaking process, thereby creating certainty in law.

The absence of a conflict resolution mechanism jeopardizes businesses' ability to ascertain legal outcomes and the adaptability of laws to modernity. It would be understandably and admittedly difficult to determine the criteria for compromise when each legal regime insists on its superiority in a pluralist legal system. In the case of Islamic hybrid legal systems, it is clear that Islamic law has developed mechanisms which produce internal consistency. The focus of the following inquiry is the problem of having a pluralist legal system that is a mix of a modern legal system with Islamic law incorporated at either the legislative or adjudicative stage. An ideal conflict resolution mechanism in such a hybrid structure should be efficient and accountable. Efficiency guarantees settlement of conflicts in a timely manner with a reasonable amount of negotiations over the compliance of laws with Islamic law and their adaptation to modern realities. Accountability ensures responsiveness of the conflict resolution process to a variety of views across different segments of society and changes in the population's demands over time.

Several types of constitutional provisions are used to guarantee Islamic law compliance in Muslim countries. The 1861 Tunisian and the 1876 Ottoman Empire constitutions directly referred to Islam as the law of the land. The 1907 Amendment to the 1906 Iranian Constitution adopted an article requiring all laws to be reviewed for their Islamic law compliance by a group of jurists seated in Parliament. Other countries in the region have since adopted a variation of this provision.[12] The 1979 Iranian constitution followed the same structure: a council, which is called the Guardian Council ("GC") and consists of six jurists, oversees the compliance of the bills passed by Parliament with Islamic law.[13] Several constitutions make Islamic law "the" or "a" source of law and either use a judicial review system or assign their parliaments to the task of Islamic law compliance review.[14] These constitutional provisions are called "repugnancy clauses" or "*Sharīʿa* Guarantee Clauses" and created the notion of "Islamic constitutionalism" or

12. Dawood I. Ahmed & Tom Ginsburg, *Constitutional Islamization and Human Rights: The Surprising Origin and Spread of Islamic Supremacy in Constitutions*, 54 VA. J. INT'L L. 615, 631–34 (2014). Ahmed and Ginsburg also explain that the origin of the idea was "repugnancy doctrine," which was common in colonial India and was adopted "to constrain the application of domestic and customary laws . . . deemed to be repugnant to British law or moral sentiment." *Id.* at 631. The authors further suggest that the drafters of the 1907 Amendment to the Iranian Constitution borrowed it from India, as it was Iran's neighbor. However, they do not explain the mechanism of how the idea was transplanted into Iran. *Id.* (citing NOAH FELDMAN, THE FALL AND RISE OF THE ISLAMIC STATE 83 (2008)).

13. The GC also has six lawyer members who, together with its jurist members, review the compliance of the bills with constitutional provisions. QANUNI ASSASSI JUMHURII ISLAMAI IRAN [THE CONSTITUTION OF THE ISLAMIC REPUBLIC OF IRAN] 1358 [1980], arts. 91–97 [hereinafter THE 1979 IRANIAN CONSTITUTION].

14. Clark B. Lombardi, *Constitutional Provisions Making Sharia "A" or "The" Chief Source of Legislation: Where Did They Come from? What Do They Mean? Do They Matter?*, 28 AM. U. INT'L L. REV. 733, 734 (2013).

"Islamic constitutions."[15] In addition, Islamic constitutions often contain substantive provisions that refer to Islamic law as the limit of or source of individuals' rights as well as the state's authority.[16]

The drafters of constitutions in Muslim-majority countries established Islamic law compliance mechanisms to smooth out the consequences of transforming a traditional Islamic legal system into a modern one by introducing new legal concepts and institutions. Legitimacy concerns and, most likely, the drafters' genuine religious devotion are the key explanations for these provisions.[17] Under compatibility theory, Islamic law compliance clauses were vital for ensuring the compatibility of the introduced modern institutions and laws with local norms in Muslim countries. Nevertheless, the concerns with regard to inevitable tensions between modernity and tradition remain unexplored. If conflict exists in hybrid Islamic legal systems as a result of applying these clauses, the modern Islamic states have to adopt an effective and efficient conflict resolution mechanism to solve them.

Although state enforcement of Islamic law has been a common practice in modern Islamic states, it has also been controversial. Apart from resistance that some jurists show when the first constitution is introduced in a country,[18] some scholars question the practice of allowing a top-down mechanism of incorporation of Islamic law or establishment of an Islamic state. One argument is that a secular state that would allow democratic incorporation of Islamic law into the legal system should be established in Muslim countries. The state structure would exercise an ideal level of freedom of religion and would leave adherence to Islamic law to the will of the individual.[19] Another argument is that it is impossible for a modern Islamic state to attain the

15. Intisar Rabb, *"We the Jurists": Islamic Constitutionalism in Iraq*, 10 U. PA. J. CONST. L. 527, 527–28 (2008). Professor Rabb

> "distinguish[es] between three different types of constitutionalization of Islamic law: dominant constitutionalization—where a constitution explicitly incorporates Islamic law as the supreme law of the land; delegate constitutionalization—where a constitution incorporates Islamic law but delegates its articulation to the jurists; and coordinate constitutionalization—where a constitution incorporates Islamic law, laws of democratic processes, and liberal norms, placing them all on equal footing. Iran is an example of the first, where jurists effectively control the government and all interpretive legal decisions; Gulf Arab states are an example of the second, where interpretive authority over Islamic family law in particular is vested in the juristic classes; and Egypt and Morocco are examples of the third, where the government and interpretive decision makers have devised schemes of differing relationships with the jurists."

Id. at 531 (emphasis added); *see also* Intisar Rabb, *The Least Religious Branch: Judicial Review and the New Islamic Constitutionalism*, 17 UCLA J. INT'L L. & FOREIGN AFF. 75 (2013).

16. An example is a provision in the 1979 Iranian Constitution that posits: "only ownership of property obtained through *Sharīʿa*-compliant means is protected." THE 1979 IRANIAN CONSTITUTION, *supra* note 13, art. 47.

17. *See* JANET AFARY, THE IRANIAN CONSTITUTIONAL REVOLUTION, 1906–1911: GRASSROOTS DEMOCRACY, SOCIAL DEMOCRACY, & THE ORIGINS OF FEMINISM 98–131 (1996); Saïd Amir Arjomand, *Shiʿite Jurists and the Iranian Law and Constitutional Order in the Twentieth Century*, *in* THE RULE OF LAW, ISLAM, AND CONSTITUTIONAL POLITICS IN EGYPT AND IRAN 15, 17–31 (Saïd Amir Arjomand & Nathan J. Brown eds., 2013); Mina E. Khalil, *Early Modern Constitutionalism in Egypt and Iran*, 15 UCLA J. ISLAMIC & NEAR E. L. 33, 36–44 (2016).

18. An example is resistance that some jurists showed when the 1906 Constitution was adopted in Iran. *See* BEHROOZ MOAZAMI, STATE, RELIGION, AND REVOLUTION IN IRAN, 1796 TO THE PRESENT 77–91 (2013).

19. ABDULLAHI AHMED AN-NAʿIM, ISLAM AND THE SECULAR STATE: NEGOTIATING THE FUTURE OF SHARIʿA 1–20 (2008).

necessary institutions and processes to accommodate the complexities of jurist-based Islamic law or meet the level of sophistication of Islamic governance.[20] Modern practices of codification and centralization put the state, which lacks the well-developed methodologies that exist in classical Islamic law, in charge of Islamic law and the determination of the most "authoritative, soundest and weightiest" opinion. This leads to the state's arbitrary selection between different opinions on an issue.[21] An even more potent argument is that codifying Islamic law, instead of allowing judges to continue to promulgate it—together with the selectivity of Islamic states in using transplants in economics-related areas of law and the relegation of Islamic law to personal status law—renders it useless.[22]

A practical approach to the phenomenon of incorporation of Islamic law into state law provides a more realist analysis of Islamic law compliance mechanisms in countries which attempt such incorporation. Under this approach, a critical question is why a traditional Islamic legal system would adopt a constitution in the first place, only to later add an Islamic law compliance mechanism. Some factors have been suggested to explain—alone or in combination—the aim of introducing a constitution into a traditional Islamic legal system: to provide certainty in law, to make it accessible for everyone, to unify the law, and/or to limit the authority of the ruler and the jurists, providing the chance for the people to democratically pass laws.[23]

The outline of this article is as follows: In Part I, I begin by tracing the history of thought regarding the concept of an Islamic state and a modern Islamic legal system. In Part II, I highlight the role of compatibility in ensuring legitimacy and calculability, drawing on the literature on legal transplants. Part III explicates adaptability theory and its similarities to the premises of accommodation of change in Islamic law. In Part IV, my analysis of desired features of a hybrid Islamic legal system will culminate with acceptance of Weber's emphasis on consistency, calculability and legitimacy, while refuting his description of Islamic law. In Part V, I develop my conflict theory and explain how it covers the tensions between compatibility and adaptability theories as applied to hybrid legal systems, especially modern Islamic legal systems. I also examine the procedural and substantive criteria for an ideal conflict resolution mechanism, identifying accountability and efficiency as the two main criteria.

II. ISLAMIC STATES WITH ISLAMIC CONSTITUTIONS

Recent regime changes and subsequent constitutional reforms in some Muslim countries have invited scholars to reexamine the role of Islamic law

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20. WAEL B. HALLAQ, THE IMPOSSIBLE STATE: ISLAM, POLITICS, AND MODERNITY'S MORAL PREDICAMENT 48–51 (2013).

21. Hallaq, *Can the Shari'a be Restored?, supra* note 4, at 21–22, 24–25.

22. Haider Ala Hamoudi, *The Death of Islamic Law*, 38 GA. J. INT'L & COMP. L. 293, 322–25 (2010).

23. Nathan J. Brown & Adel Omar Sherif, *Inscribing the Islamic Shari'a in Arab Constitutional Law*, *in* ISLAMIC LAW AND THE CHALLENGES OF MODERNITY, *supra* note 4, at 55, 57 ("The states involved sought less to impress European states and creditors (the most often cited motive for constitutional reform) and more to practice fiscal discipline and regularize state authority (and thus fend off European control.").

as the source of law in these countries' constitutions.[24] Scholars have inquired into the different forms and institutional structures that such legal systems have taken, naming the phenomenon of codifying Islamic law in modern constitutions "Islamic constitutionalism."[25] There are controversies among local lawmakers over whether *Sharīʿa* is or should be adopted as "the" or "a" source of law in each of the promulgated constitutions.[26] Other inquiries delve into how to characterize this type of constitutionalism in an effort to define its unique identity.[27] More often, scholars are concerned with the ability of these constitutional provisions to accommodate human rights, democracy, and the rule of law.[28] In spite of the large body of literature on Islamic constitutions, the concern of the economic consequences of establishing such a legal system is regularly overlooked.[29] These otherwise-modern constitutions face the dilemma of reconciling modern concerns with traditional norms. The superposition of these two interests raises several questions: First, is an Islamic state necessary to uphold Islamic law and are the laws created by such a legal regime Islamic? Second, should a hybrid Islamic legal system be adopted by a country in its efforts to achieve and maintain economic growth?

The idea of a modern state being "Islamic" has faced criticisms by scholars who base their theories on an internal inquiry into Islamic jurisprudence.[30] The underlying theoretical question for such critics is how Islamic law, as a unique traditional legal system, would fit into the governance principles and institutional innovations introduced by modern states. These criticisms are beside the point since, as I argue below, an Islamic state is a non-negotiable precondition of economic growth. Regardless of how such questions are answered, it remains that Muslim-majority countries are bound to ensure the compliance of their legal systems with Islamic mandates in order to avoid a possible negative impact on their

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24. *See, e.g.*, Mohamed Abdelaal, *Religious Constitutionalism in Egypt: A Case Study*, 37 FLETCHER F. WORLD AFF. 35, 36–39 (2013); Mohammad Rasekh, *Sharia and Law in the Age of Constitutionalism*, 2 J. GLOBAL JUST. & PUB. POL'Y 259, 273–75 (2016); Kristen A. Stilt, *Islamic Law and the Making and Remaking of the Iraqi Legal System*, 36 GEO. WASH. INT'L L. REV. 695, 707–10 (2004); Nimer Sultany, *Religion and Constitutionalism: Lessons from American and Islamic Constitutionalism*, 28 EMORY INT'L L. REV. 345, 367–90 (2014); Bassam Tibi, *The Return of the Sacred to Politics as a Constitutional Law: The Case of the Shari'atization of Politics in Islamic Civilization*, 115 THEORIA: J. SOC. & POL. THEORY 91, 95–103, 105–07 (2008).

25. Rabb, *supra* note 15.

26. Lombardi, *supra* note 14.

27. *See* Asifa Quraishi-Landes, *Islamic Constitutionalism: Not Secular. Not Theocratic. Not Impossible*, 16 RUTGERS J. L. & RELIGION 553, 564–78 (2015).

28. *E.g.*, Azizah Y. al-Hibri, *Islamic Constitutionalism and the Concept of Democracy*, 24 CASE W. RES. J. INT'L L. 1, 11–20 (1992); A.T. Shehu, *Democracy, Constitutionalism and Shariah: The Compatibility Question*, 16 EUR. J. L. REFORM 247, 258–72 (2014); Nimer Sultany, *Against Conceptualism: Islamic Law, Democracy, and Constitutionalism in the Aftermath of the Arab Spring*, 31 B.U. INT'L L. J. 435, 440–48 (2013); Anicée Van Engeland, *The Balance Between Islamic Law, Customary Law and Human Rights in Islamic Constitutionalism Through the Prism of Legal Pluralism*, 3 CAMBRIDGE J. INT'L & COMP. L. 1321, 1323 (2014).

29. For a notable exception, see TAMIR MOUSTAFA, THE STRUGGLE FOR CONSTITUTIONAL POWER: LAW, POLITICS, AND ECONOMIC DEVELOPMENT IN EGYPT 219–38 (2009). For a pioneering discussion of the relationship between constitutional provisions, policies, and economic outcomes, see generally TORSTEN PERSSON & GUIDO TABELLINI, THE ECONOMIC EFFECTS OF CONSTITUTIONS 211–16 (2003) (identifying electoral rules and forms of government as the two main constitutional institutions that may influence economy in a country by shaping its fiscal policies as well as its patterns of political rents and productivity).

30. *See* AN-NAʿIM, *supra* note 19, at 28–29; HALLAQ, *supra* note 20.

economic growth; from an economic perspective, an Islamic state is necessary.

A. IS THE ISLAMIC STATE OBSOLETE OR NECESSARY?

Islamist movements in southeast Asia, the Middle East, and North Africa have advocated the desirability of establishing Islamic states since the twentieth century. The popularity of this view in countries including Pakistan, Iran, and Sudan transformed it from a dream into a reality. The intellectuals who proposed the models of an Islamic state in these countries found them to be necessary for the adherence of their people to their religious convictions and to guarantee social justice.[31] However, these popular movements have faced challenges from modern scholars of Islamic law who question the possibility of limiting *Sharīʿa* to the structures offered by the modern state apparatus.

A view favored by Abdullahi Ahmed An-Naʿim, professor of Islamic law at Emory University, is that there should be an "institutional separation of Islam and the state."[32] He focuses on the diversity of opinions that exists in Islamic law to support his theory. According to Professor An-Naʿim, it is impossible to satisfy every individual; any opinion that the state prefers could potentially cause dissatisfaction among a group of individuals who have a different preference. In his theory, Islam remains a part of politics and would shape the choices of the population through democratic means.[33] He proposes two overarching principles to manage individuals' urges to rely on Islam in governing their daily life and the realities of living under the institutional frameworks of a modern state:

> First, the modern territorial state should neither seek to enforce Shari'a as positive law and public policy nor claim to interpret its doctrine and general principles for Muslim citizens. Second, Shari'a principles can and should be a source of public policy and legislation, subject to the fundamental constitutional and human rights of all citizens, men and women, Muslims and non-Muslims, equally and without discrimination.[34]

In response to a possible objection concerned with majoritarian advocacy for the state's enforcement of Islamic law, he further emphasizes that:

> [t]he belief of even the vast majority of citizens that these principles are binding as a matter of Islamic religious obligation should remain the basis of individual and collective observance among believers. But that cannot be accepted as sufficient reason for their enforcement by

31. *See, e.g.*, ERVAND ABRAHAMIAN, A HISTORY OF MODERN IRAN 161–67, 179 (2008); A HISTORY OF PAKISTAN AND ITS ORIGINS 9, 16–17, 33 (Christophe Jaffrelot ed., Gillian Beaumont trans., 2002); NOAH SALOMON, FOR LOVE OF THE PROPHET: AN ETHNOGRAPHY OF SUDAN'S ISLAMIC STATE 57–94 (2016).

32. Abdullahi Ahmed An-Naʿim, *Shariʿa in the Secular State: A Paradox of Separation and Conflation*, *in* THE LAW APPLIED: CONTEXTUALIZING THE ISLAMIC SHARI'A 321, 333 (Peri Bearman et al. eds., 2008).

33. *See id.* at 329, 334.

34. AN-NAʿIM, *supra* note 19, at 28–29.

> the state, because they would then apply to citizens who may not share that belief.35

Likewise, he strongly rejects historical claims about the need and necessity of government of a Muslim-majority nation by an "Islamic state" calling it "a postcolonial innovation."[36]

An-Naʿim ensures the reader that he does not advocate for a completely secular government, with no reliance on Islam as a religion. People should be free to refer to Islam as a root of their opinions in the lawmaking process and their demands of the state. He recognizes "a right" for citizens to do so.[37] However, he adds a caveat to this "right": citizens should have what he calls "civic reason." "The word 'civic' here refers to the need for policy and legislation to be accepted by the public at large, as well as for the process of reasoning on the matter to remain open and accessible to all citizens."[38] He approves of an Islamic law-based opinion becoming law only if the proposal is supported and weighed by "the sort of reasoning that most citizens can accept or reject."[39] Referencing religious convictions or an argument that a practice is required by *Sharīʿa* does not seem to satisfy his test. His ideal process of incorporation of Islamic law into a legal system seems closer to a legislative system or a direct democracy where people's preferences are put forward, supported by reason, and negotiated with others in order to achieve an agreement on what law is best to be adopted—without a direct reference to or a review system of compliance of the law with *Sharīʿa*. This model is in line with his view of "the incompatibility of Sharia [*Sharī'a*] with the principles of constitutionalism."[40]

Another argument An-Naʿim makes against the possibility of establishing an Islamic state is that, in his view, the state has no authority to enforce *Sharīʿa*. According to An-Naʿim, "the state can only enforce its own political will, not the will of God."[41] The process of a state picking and choosing from the different available opinions that are "equally authoritative" in *Sharīʿa* is a precondition of modern positive law. The state's decision to codify one opinion into law separates that opinion from *Sharīʿa* and brings it into the realm of state's law. Such a law is no different from any other laws that the state passes. Thus, "an Islamic state is conceptually impossible."[42]

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35. *Id.* at 29.
36. *Id.* at 7. ("The notion of an Islamic state is in fact a postcolonial innovation based on a European model of the state and a totalitarian view of law and public policy as instruments of social engineering by the ruling elites. Although the states that historically ruled over Muslims did seek Islamic legitimacy in a variety of ways, they were not claimed to be 'Islamic states.'").
37. *Id.*
38. *Id.* at 7–8.
39. *Id.* ("By civic reason, I mean that the rationale and the purpose of public policy or legislation must be based on the sort of reasoning that most citizens can accept or reject. Citizens must be able to make counterproposals through public debate without being open to charges about their religious piety. Civic reason and reasoning, and not personal beliefs and motivations, are necessary whether Muslims constitute the majority or the minority of the population of the state. Even if Muslims are the majority, they will not necessarily agree on what policy and legislation should follow from their Islamic beliefs.").
40. Abdullahi Ahmed An-Naʿim, *Religion, the State, and Constitutionalism in Islamic and Comparative Perspectives*, 57 DRAKE L. REV. 829, 839 (2009).
41. *Id.* at 840.
42. *Id.*

The theory of the impossibility of an "Islamic state" or an "Islamic constitution" has also been supported by another prominent scholar, Wael Hallaq, professor of Islamic law at Columbia University. Hallaq bases his theory on a different set of justifications from An-Naʿim, focusing on the fundamental inability of modern state institutions to accommodate what he calls "Islamic governance," as determined by *Sharīʿa*. He writes that, "Islamic governance (that which stands parallel to what we call 'state' today) rests on moral, legal, political, social, and metaphysical foundations that are dramatically different from those sustaining the modern state."[43] Hallaq has two main arguments: first, that the moral aspects of Islamic governance were much stronger than those of the modern state. He argues:

> The rise of the legal and the political in the modern project renders them incompatible with the constituent forms of any Islamic mode of governance, because they contravene even the minimum degree of moral fabric that must exist in any such governance in order for it to be meaningfully called Islamic.[44]

The strong moral dimension of *Sharīʿa* is likewise reflected in the legal dimension of Islamic governance: "Paradigmatic modern law is positive law, the command of the fiction of sovereign will. Islamic law is not positive law but substantive, principle-based atomistic rules that are pluralistic in nature and ultimately embedded in a cosmic moral imperative."[45]

Second, Hallaq argues that, in Islamic law, authority belongs to the people and is regulated by *Sharīʿa.* In addition, contrary to the ultimate power that the sovereign state enjoys, the people (and the jurists on their behalf) only possess the power to interpret God's revelations.[46] He recognizes the fact that "the ruler" is bestowed the power by *Sharīʿa* "to 'manage worldly affairs' and to uphold the Sharīʿa world on behalf of the Prophet, a mandate that translates into observing the norms of the Sharīʿa."[47] He also argues that "[t]he abstract notion of the Community becomes here concretized: the ruler is the keeper of the safety of and maintainer of order in that Sharīʿa community or communities which he rules."[48] Thus, according to Hallaq, the power to interpret *Sharīʿa* stays with the people. However, for pragmatic reason and to guarantee the security of the people, *Sharīʿa* allows the ruler to rule over the people albeit within the framework of Islamic governance determined by *Sharīʿa*.[49] The logical consequence of

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43. HALLAQ, *supra* note 20, at 49.
44. *Id.* at 75.
45. *Id.* at 89.
46. *Id.* at 49 ("In Islam, it is the Community (Umma) that displaces the nation of the modern state . . . the boundaries and defining concept of the Community is the Sharīʿa . . . the Community itself neither possesses sovereignty nor does it have—in the sense the modern state has—an autonomous political or legal will, since the sovereign is God and God alone. Of course, the Community as a whole, and as represented by its chief jurists, does have the power of decision . . . . But this power is an interpretive one bounded . . . by *general moral principles* that transcend the Community's control . . . Paradigmatically defined, the Community consists of the totality of believers who are, as believers, equal to each other in value and thus stand undifferentiated before God.") (emphasis in original).
47. HALLAQ, *supra* note 20, at 66.
48. *Id.* at 67.
49. *Id.* at 64 ("All this is to say that the executive ruler stood apart from the 'legislative' and even the judicial powers, being in many respects subservient to their commands. Islamic juristic-political theory and practice (*siyasa Shari'yya*) demanded this much, and the theory was largely put into practice.

such a definition for the institution of "ruler" in his theory is that "the state" has no independent authority to interpret *Sharīʿa*.[50]

So, what is the practical solution for the structure of "the ruler" in Muslim countries? Hallaq claims that a government that follows an authentic Islamic governance would inevitably fail because it would have to "compete with and readjust under the pressure of globalization" and as a result "would suffer multiple and incremental challenges."[51] Does that mean that he would approve of the strategy of Muslims making peace with the modern state but molding its institutions to their liking? No, not at all! He suggests that such an "assumption forgoes a proper understanding of the nature of the modern state, its form-properties, and its inherent moral incompatibility with any form of Islamic governance." [52] He concludes that an Islamic state is impossible.[53]

The criticisms that An-Nai'm and Hallaq raise of modern Islamic states have interested *Shī'ī*[54] jurists for several centuries. Around the time of the recognition of *Shī'īsm* as the official religion in Iran by the Safavid dynasty (1501-1736), prominent *Shī'ī* jurist Muhaqiq Karaki[55] (d. 940 HQ/1534),

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An essential constitutional fact here is that it was the Sharīʿa itself that arrogated certain powers to the ruler.").

50. *Id.* at 72 ("For Muslims today to seek the adoption of the modern state system of separation of power is to bargain for a deal inferior to the one they secured for themselves over the centuries of their history. The modern deal represents the power and sovereignty of the state, which . . . [works] for its own perpetuation and interests. By contrast, the Sharīʿa did not—because it was not designated to—serve the ruler or any form of political power. It served the people, the masses, the poor, the downtrodden, and the wayfarer without disadvantaging the merchant and others of his ilk. In this sense it was not only deeply democratic but humane in ways unrecognizable to the modern state and its law.").

51. *Id.* at 162.

52. *Id.*

53. *Id*.

54. The two main Islamic schools of thought are *Sunni* Islam and *Shī'ī* Islam, each of which is divided into several branches. The main branches of *Sunni* school of thought are *Hanafi, Shafii*, *Maleki*, and *Hanbali*. The main branches of *Shī'ī* school of thought are Twelver (*athna ashari*), *Ishmaili*, and *Zeidi*. *Shī'ī* Twelver is the most popular *Shī'ī* school of thought and has both reformist (*Usuli*s) and traditionalist (*Akhbari*s) perspectives. In Iran, the *Usuli*s perspective is the dominate school of thought; *Usuli Shī'ī* jurisprudence was used to create the current political structure in Iran.

The origin of the divergence between *Sunni* Islam and *Shī'ī* Islam relates back to the time immediately following the death of the Prophet Muhammad. After his death, Caliphs nominated themselves as the political and religious leaders. *Shī'ī* Muslims differentiated themselves from the followers of Caliphs (*Sunnis*) by unofficially respecting Ali, the son-in-law and the companion of the Prophet, as their religious and political leader (*Imam*). The Caliphs were the prophet's companions. The first four Caliphs after the Prophet were Abubakr, Umar, Uthman, and Ali (the Prophet's son-in-law and the first *Imam* of *Shī'ī* Muslims). Their actions and sayings are authoritative for *Sunni* schools of law as a part of *Sunna*. For *Shī'ī* Muslims, there were twelve authoritative leaders called *Imam*s. The *Imam*s were the Prophet's descendants with the exception of the first, Ali. Ali married the Prophet's daughter, Zahra, and all the *Imam*s are their descendants. Twelver *Shī'ī* Muslims believe that the last *Imam* went into the Occultation in the ninth century. Over time, *Sunnis* developed different schools of law and most of them are now following the prominent scholars as the head of schools instead of Caliphs in jurisprudence and legal theory. However, *Shī'ī* Muslims follow the classically trained *Shī'ī* jurists (*Marja'/ulama/faqīh*) as regents for the last *Imam* who went into the Occultation. *See generally* Juan Cole, *Shi'i Clerics in Iraq and Iran, 1722–1780: The Akhbari-Usuli Conflict Reconsidered*, 18 IRANIAN STUDIES 3, 3–27 (1985).

While the *Sunni* and *Shī'ī* schools of thought have much in common, major jurisprudential differences still exist. *See* MOOJAN MOMEN, AN INTRODUCTION TO SHI'I ISLAM: THE HISTORY AND DOCTRINES OF TWELVER SHI'ISM 184 (1985). *Sunni* Islam and *Shī'ī* Islam both rely on the main sources of Islamic law (the Quran, *Sunna* and *Hadith*). However, *Sunni* jurists also use *qiyas* (analogical reasoning) and *ijma* (consensus among jurists) as the source of law, while *Shī'ī* jurists use *aql* (logical reasoning). These methodological differences have resulted in the *Sunni* and *Shī'ī* schools of law substantially diverging in some areas and remaining largely the same in others.

55. His full name was Ali Ibn Hossein Ibn Abdulali Karaki Jabal Amili. He was born in Jabal Amil in Lebanon and lived in modern day Lebanon, Iraq, and Iran.

raised similar arguments, i.e., that the state lacks the authority to interpret Islamic law and should not enforce *Sharīʿa*.[56] He concluded that it was necessary to have a jurist take over the people's affairs.[57] In the nineteenth century, during the Qajar dynasty (1794-1925), another prominent *Shī'ī* jurist, Mulla Ahmad Naraqi (d. 1248 HQ/1833), expanded upon Muhaqiq Karaki's work by introducing the theory of *wilāyat al-faqīh* (governance of the jurist) as a political theory of governance.[58]

These jurists were the pioneers in the historical evolution of the theory of the authority of jurists to govern in *Shī'īsm*. Their theory manifested in the 1907 Amendment to the Iranian Constitution—which required that a group of five jurists in Parliament ensure the compliance of all bills with Islamic law[59]— as well as the establishment of an Islamic state in Iran in 1979. Allameh Mirza Hossein Qarawi Naini (d. 1355 HQ/1937) approved the Islamic law compliance of the model adopted in the 1907 Amendment, arguing that jurists would be in charge of overseeing the people's affairs if they sit in Parliament and are part of the legislative power scrutinizing the promulgated laws.[60] The theory of *vilayat-al-fiqh*, i.e., the jurist as the head of state, remained dormant until two modern *Shī'ī* jurists, Muhammad Baqir al-Sadr (1935-80) from Iraq[61] and Ayatollah[62] Hossein-Ali Montazeri (1922-2009) from Iran, expanded it further in the 1970s-80s. This theory was adopted in the 1979 Iranian Constitution by the efforts of Ayatollah Montazeri, who was one of the (elected) members to the Constitutional Assembly. It led to the appointment of Ayatollah Khomeini (1902-89) as the first jurist who ever occupied the role of the head of the state.[63]

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56. MOHSEN KADIVAR, NAZARIHAY-E DOLAT DAR FIQH SHIA [THE THEORIES OF THE STATE IN THE SHI'ITE FIQH] 15–16 (7th ed., 2008) (Iran).

57. *Id.*

58. *Id.* at 17–18.

59. *See generally* AMIRHASSAN BOOZARI, SHI'I JURISPRUDENCE AND CONSTITUTION: REVOLUTION IN IRAN 45–98 (2011).

60. KADIVAR, *supra* note 56, at 19–20.

61. *See generally* CHIBLI MALLAT, THE RENEWAL OF ISLAMIC LAW: MUHAMMAD BAQER AS-SADR, NAJAF AND THE SHI'I INTERNATIONAL 59–78 (1993); Sajjad Panahi Arsanjani, *Tathir Andishehayi Allameh Seyyed Mohammad Baqir Sadr dar Qanuni Asasi J.I.I.* [*The Impact of the Views of Mohammad Baqir al-Ṣadr on the Constitution of the Islamic Republic of Iran*], 17–18 FAṢLNAMEH DIN WA SIASAT [RELIGION AND POLITICS QUARTERLY] 173, 175–90 (1387 [2008]).

62. *Ayatollah* and *Hojjat al-Islam* are prefixes that are used for jurists in *Shī'ī* Islam. *Ayatollah* refers to a senior jurist who is an expert in Islamic law and religious rituals and who may have followers. *Hojat al-Islam* refers to junior jurists who have studied Islamic law but not yet achieved the status of an expert.

63. Hossein-Ali Montazeri was one of the founding fathers of the Islamic Revolution and one of the ideologists involved in different post-revolutionary institutions. He was the Head of Assembly of Experts for the Constitution—an assembly elected to adopt the Constitution—and was officially appointed successor of Ayatollah Khomeini to be the next leader from 1985 to 1989, after Khomeini's passing away.

In his autobiography, Ayatollah Montazeri recalls that the first draft of the 1979 Iranian Constitution prepared by Dr. Hassan Habibi did not include the institution of Supreme Leader. Montazeri read the first draft and wrote a booklet on June 22, 1979 [1358/04/01] on *vilāyat-e faqīh*, jurisprudential evidences for it, and its necessity referring to his own views and a summary of his studies. In the Assembly of Experts, Ayatollah Beheshti, the Deputy to the Head of Assembly of Experts for the Constitution, and others followed him. Ayatollah Montazeri believed that the Leader's supervision over the law-making process and managing the country would protect the Islamic features of the regime. ḤUSAYN ʻALĪ MUNTAẒIRĪ, KHĀṬIRĀT-I ĀYAT ALLĀH ḤUSAYN ʻALĪ MUNTAẒIRĪ [AUTOBIOGRAPHY OF AYATOLLAH HOSSEIN-ALI MONTAZERI] 254 (Ketab Corp., 2001).

Ayatollah Hossein-Ali Montazeri developed his theory of *vilayat-al-faqih* and the Islamic state in his book, first published in 1988 in Arabic in two volumes called "*Dirāsāt fī wilāyat al-faqīh wa-fiqh al-dawlah al-Islāmīyah,*" which then was translated into Farsi by his students and is called "*Mabani Fiqi Hukamat Islami*" and spans four volumes.

Ultimately therefore, the solution of *Shīʿī* jurists to the problem of lack of authority of the state to interpret and enforce *Sharīʿa* was to appoint jurists as the head of the state. This innovation introduced a new version of political Islam in which the legitimacy of a modern Islamic state originates in the jurists' authority and duty to guide the people in their worldly journey to fulfill their religious duties.

This model also proposes a solution for the other criticism, especially focused on by An-Naʿim: the inability of the state to choose one opinion, among the variety of opinions in *Sharīʿa*, that would satisfy all individuals' religious convictions. Under *Sharīʿa*, jurists have the authority to come to the opinion they prefer by relying on a well-developed body of jurisprudence, principles, canons, and logic. So, if jurists have the discretion to adopt an opinion using their classical expertise, that opinion would be *a* right opinion even if it is not *the* right one.[64] Building on this seemingly simple jurisprudential rule, the 1907 Amendment and the 1979 Constitution both bestowed the power on a group of jurists to pick the most authoritative opinion based on their own discretion. The groups created by the two constitutional instruments were composed of five and six members, respectively, probably to ensure a diversity of viewpoints. Individuals would accept and follow the opinion of a jurist to whom they brought their question. As they would have followed a jurist's opinion in a private setting, they are expected to accept the opinions of these appointed jurists.[65]

This pragmatic solution helps to ensure that the law is compliant with *Sharīʿa*. However, its shortcoming is that the outcome remains up to the discretion of the jurists who are neither expected nor typically equipped with tools to assess their preferred views against modern sciences.

B. IS STATE LAW EVER ISLAMIC (ENOUGH)?

The twentieth-century codes in recently modernized Islamic states faced the same challenges as Islamic constitutions. Modern Islamic codes typically combine one preferred opinion from classical Islamic law with transplanted laws. Codification itself is a new phenomenon and scholars see it as an attempt to make the law "more deterministic, uniform, and predictable."[66] This modern approach to lawmaking based on Islamic law faces serious criticisms: First, codification of law created "a compilation of deterministic commands" that lacked the "coherent system of authoritativeness and

64. Only jurists who master methodology and knowledge of deducing laws from the sources of law under classical Islamic law achieve the level of a scholar-jurist (*mujtahid*) and gain the authority to issue their legal opinions (*ijtihad*). *See, e.g.*, WAEL B. HALLAQ, SHARĪʿA: THEORY, PRACTICE, AND TRANSFORMATIONS 72, 75–77, 82 (2009); Ahmed Fekry Ibrahim, *Rethinking the Taqlīd-Ijtihād Dichotomy: A Conceptual-Historical Approach*, 136 J. AM. ORIENTAL SOC'Y 285, 297–98 (2016).

65. Under classical Islamic law, lay people, jurists, and judges have to refer to a leading scholar-jurist (*mujtahid*) to find the rules that govern their everyday life or in order to adjudicate cases. The practice of following the views of a leading scholar-jurist is called "*taqlīd*" and is accepted in all Islamic schools of law. *See, e.g.*, L. Clarke, *The Shīʿī Construction of Taqlīd*, 12 J. ISLAMIC STUD. 40, 42–48 (2001); Mohammad Fadel, *The Social Logic of Taqlīd and the Rise of Mukhtasar*, 3 ISLAMIC L. & SOC'Y 193, 198–99 (1996); Sherman A. Jackson, *Taqlīd, Legal Scaffolding and the Scope of Legal Injunctions in Post-Formative Theory Muṭlaq and ʿĀmm in the Jurisprudence of Shihāb al-Dīn al-Qarāfī*, 3 ISLAMIC L. & SOC'Y 165, 169–71 (1996); Ahmed El Shamsy, *Rethinking "Taqlīd" in the Early Shāfiʿī School*, 128 J. AM. ORIENTAL SOC'Y 1, 2–8 (2008).

66. KHALED ABOU EL FADL, REASONING WITH GOD: RECLAIMING SHARI'AH IN THE MODERN AGE liii (2014).

legitimacy" that classical Islamic law entailed.[67] Second, codification ended a history of flexibility and diversity of views that Muslims enjoyed under *Sharīʿa*.[68] Third, and most importantly, the resulting codes are not themselves Islamic, notwithstanding speculation that the drafters followed Islamic law compliant procedures to deduce laws.[69]

Modernist intellectuals in Muslim countries have been blamed for their lapse in judgment in creating these codes. The most famous and debated example is: "Abd al-Razzaq al-Sanhuri (d. 1391/1971), probably the most prominent jurist in the Arab world . . . who played a critical role in promulgating the Egyptian Civil Code of 1949 and in drafting the civil codes of Iraq, Jordan, Syria, and Libya and the commercial code of Kuwait."[70] Khaled Abou El Fadl, professor of Islamic law at UCLA School of Law, raises the example of Sanhuri's work to illustrate his claim of the absurdity and un-Islamic nature of the laws produced by such a method.[71] Abou El Fadl argues that "Sanhuri tried to infuse imported French laws with an artificial nativity by assimilating Islamic law to French law. Although Sanhuri claimed that he successfully incorporated Islamic law into the provisions of his civil code, in reality he superimposed the categories and structure of the civil law onto Islamic law."[72] Abou El Fadl is one of many scholars who explore the questions of (1) how Islamic Sanhuri's codes were, (2) how to measure their level of compliance with Islamic law, (3) who judges their compliance, and even (4) whether such an evaluation is a subjective or an objective one.[73] These are all important and practical inquiries into the modern practice of lawmaking in Muslim countries and should be addressed.

Nevertheless, the drafting history of the Iranian Civil Code,[74] drafted and promulgated before the Egyptian Civil Code, shows that maintaining a traditional Islamic legal system was not an option. Iran wanted to attract foreign investments as well as to maintain its identity and to protect its nationalist pride. Modern practices of international trade and foreign direct investment necessitated that the government of Iran, and other governments in the region, enter into treaties with the West exempting European and American businesses from the jurisdiction of national courts and

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67. *Id*.

68. *See* Asifa Quraishi-Landes, *The Sharia Problem with Sharia Legislation*, 41 OHIO N.U. L. REV. 545, 563–64 (2015).

69. GUY BECHOR, THE SANHURI CODE, AND THE EMERGENCE OF MODERN ARAB CIVIL LAW (1932 TO 1949) 75–79 (2007).

70. ABOU EL FADL, *supra* note 66, at 342.

71. *See id*. at 341–42.

72. *Id*. at 342.

73. Enid Hill, *Islamic Law as a Source for the Development of a Comparative Jurisprudence: Theory and Practice in the Life and Work of Abd Al-Razzaq Ahmad Al-Sanhuri (1895–1971)*, *in* ISLAMIC LAW: SOCIAL AND HISTORICAL CONTEXTS 146, 166–68 (Aziz al-Azmah ed., 1988); J.N.D. Anderson, *The Shari'a and Civil Law*, 1 THE ISLAMIC Q., Apr. 1954, at 29–46; Amr Shalakany, *Between Identity and Redistribution: Sanhuri, Genealogy and the Will to Islamise*, 8 ISLAMIC L. & SOC'Y 201, 217–18 (2001).

74. The Iranian Civil Code, which is still in force with few modifications, was promulgated in three parts: The sixth Parliament passed the first part that consisted of articles 1 to 955 on May 8, 1928, the ninth Parliament passed articles 956 to 1206 in 1935, and the tenth Parliament passed articles 1207 to 1335 in 1935. The first part regulates contracts, property, inheritance, and wills as well as the law of citizenship. The second part is on family law. The third and final part covers evidence. QANUNI MADANI [CIVIL CODE] Tehran 1307 [1928], 1313 [1935], 1314 [1935] (Iran).

enforcement of local laws.[75] This cluster of treaties—or unilateral grants of privileges that became known as "Capitulations," required, *inter alia*, that the host countries must recognize the jurisdiction of consular courts or special tribunals for settling commercial disputes and enforcing contracts.[76] Thus, the host countries with a traditional Islamic legal system would have to allow the application of foreign laws in the tribunals to settle the disputes between the foreign investors and their local partners.[77] Nationalist movements viewed these exemptions of foreigners from the reach of the local laws as an external effort to dominate them. In response, these movements initiated a modernization project aimed at reforming the judiciary and the laws. A modern judiciary and modern laws would then allow the country that signed the capitulation treaty to announce to the signatory states that its legal system now met the necessary criteria to enforce contracts and adjudicate commercial disputes under national law.[78] As such, the quest for economic growth and involvement in a global movement of capital required the states that governed Muslim-majority countries to abandon their traditional Islamic legal systems. Economic imperatives dictated the adaptation of their laws to modern circumstances. Some countries, like Iran, hired aliens to draft their laws.[79] Islamists could only push for a compromise relying on familiar arguments, i.e., nationalism and legitimacy of the laws, to maintain an Islamic aspect in the newly promulgated laws.

In the legislative deliberations leading to the drafting of the Civil Code, the Iranian parliamentarians proposed to hire a French lawyer to draft the Civil Code that would later be translated into Farsi.[80] That was the most appealing proposal on the floor until a parliamentarian, Dr. Mohammad Mossadegh—a French and Swiss-educated lawyer who later became Iran's first liberal and democratically elected Prime Minister before being overthrown by a foreign coup in 1953—opposed the proposal.[81] In 1927, he addressed Parliament before the start of the deliberations on a law extending the deadline for the ongoing reforms of the Iranian judiciary. He expressed

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75. *See* F.M. Goadby, *The Present Situation with Regard to the Privileges of Foreigners in the Near East*, 6 J. COMP. LEGIS. & INT'L L. 258, 258–71 (1924); Charles Issawi, *Iranian Trade, 1800–1914*, 16 IRANIAN STUD. 229, 237 (1983).

76. Philip Marshall Brown, *The Capitulations*, 1 FOREIGN AFF. 71, 72–74 (1923); M. B. Milne, *Trade Treaties and Capitulations in Morocco*, 5 J. BRIT. INST. INT'L AFF. 32, 33–34 (1926); *see* MAJID MOHAMMADI, JUDICIAL REFORM AND REORGANIZATION IN 20TH CENTURY IRAN: STATE-BUILDING, MODERNIZATION AND ISLAMICIZATION 42 (Nancy A. Naples ed., 2008); Erwin Loewenfeld, *The Mixed Courts in Egypt as Part of the System of Capitulations After the Treaty of Montreux*, 26 TRANSACTIONS GROTIUS SOC'Y 83 (1940).

77. HADI ENAYAT, LAW, STATE, AND SOCIETY IN MODERN IRAN: CONSTITUTIONALISM, AUTOCRACY, AND LEGAL REFORM, 1906–1941, at 24 (2013); Feroz Ahmad, *Ottoman Perceptions of the Capitulations 1800–1914*, 11 J. ISLAMIC STUD. 1, 6–7 (2000).

78. NIKKI R. KEDDIE, MODERN IRAN: ROOTS AND RESULTS OF REVOLUTION 90 (Yale Univ. Press rev. ed., 2006); Michael Zirinsky, *Riza Shah's Abrogation of Capitulations, 1927–1928*, *in* THE MAKING OF MODERN IRAN: STATE AND SOCIETY UNDER RIZA SHAH, 1921–1941, at 84, 92–97 (Stephanie Cronin ed., 2003).

79. MOHAMMADI, *supra* note 76, at 82–83.

80. *See generally* Hamid Bahrami Ahmadi, *Tarikhchei Tadwin Qanuni Madani* [*The Drafting History of the Civil Code*], 24 IMAM SADIQ RES. Q. 33, 38 (1383 [2004]).

81. HOSSEIN MAKKI (ed.), DR. MOSSADEGH WA NUTQHAYE TARIKHI UOO: DAR DOREYE PANJUM AND SHISHUM TAQNINIEH [DR. MOSSADEGH AND HIS HISTORICAL SPEECHES: THE FIFTH AND SIXTH NATIONAL CONSULTATIVE PARLIAMENTS] 264 (1364 [1985]) (*Farsi*), http://ketabnak.com/book/82604/دکتر-مصدق-و-نطقهای-تاریخی-او-در-دوره-پنجم-و-ششم-تقنینیه

his support for the then-Minister of Justice and made it clear that he was very happy that an Iranian was appointed to the job of modernizing the judiciary; he posited that it would be preferable to "have Iranians and not Europeans build Iran even if Europeans would have done a good job."[82] He then recalled French lawyer Adolphe Perny, appointed to oversee the reform of the judiciary in 1923, who drafted the first Iranian Commercial Code in French and based on Napoleonic Code.[83] Dr. Mossadegh insisted that "an Iranian should be in charge of reforms and the Iranians should have an ideology: Without an ideology the failure of the state is very likely. Iran should preserve its Islamic identity and we should not destroy our country in order to modernize it."[84] He then recalled the experience of hiring Perny and speculated that following that path again would lead to any of these two outcomes:

> Either to have someone, like Perny who was paid a lot and at the end translated Napoleonic Code and gave it to us as our law, draft the civil code—in that case I can do a better job than him as he only knew French and I know both languages—or we would hire someone who would take charge of our affairs. That would be in clear contrast with the Shah's order to abolish Capitulations [to end the foreign domination over our legal system].[85]

Mossadegh was able to persuade the Minister of Justice to create a committee of jurists, working in collaboration with some foreign-educated lawyers, to draft the Civil Code. [86]

As the case of codification of law in the twentieth-century in Iran shows, the alternative option to having a mixed code was not to keep the traditional Islamic legal system but to adopt a translated version of a European code. Modernity was there to stay and the jurists (or most of them, anyway) knew that. The practice of borrowing from foreign laws or finding an opinion in Islamic law that is analogous to a well-established rule in an economically progressive country is no doubt a compromise for Islamic law and proponents of its absolute application to the people's lives. However, the alternative to this methodology could have been Islamic law's nonexistence

82. *Id*. at 298.

83. Adolphe Perny initially signed a contract with the Iranian government on January 23, 1917. Parliament extended his contract for an additional three years in 1923 by promulgating a specific piece of legislation. *See Judicial and Legal Systems v. Judicial System in the 20th Century*, ENCYCLOPEDIA IRANICA, http://www.iranicaonline.org/articles/judicial-and-legal-systems-v-judicial-system-in-the-20th-century (last updated April 17, 2012); Law Extending Monsieur Perny's Contract with the Ministry of Justice of 18 June 1923, RUZNAMAHI RASMI [IRANIAN OFFICIAL JOURNAL], http://www.dastour.ir/brows/?lid=6658 (Iran).

84. MAKKI, *supra* note 81, at 301–02.

85. *Id*. at 304.

86. *Id*. Roy Mottahedeh characterizes Mossadegh's response: "Mossadegh, in his book of 1914 [entitled IRAN AND CAPITULATIONS OF RIGHTS TO NON-IRANIANS], had seen these capitulations as the ultimate humiliation that had been imposed on Iran, since they denied Iranians control of law and administration, the instruments of national well-being he most cared about." ROY MOTTAHEDEH, THE MANTLE OF THE PROPHET: RELIGION AND POLITICS IN IRAN 122–24 (2000).

A somehow similar proposal—simply adopting the Napoleonic Code—was presented in the Civil Code Committee in Egypt. That proposal was not adopted either, but for a different reason: the members of Committee explained that "three-fourths of the Code must be amended." BECHOR, *supra* note 69, at 74.

altogether, marginalizing it, and limiting it to the theoretical discussions in the seminaries.[87]

III. COMPATIBILITY THEORY

Compatibility of laws with local norms is necessary for economic growth. Laws are compatible with local norms if they are capable of fulfilling people's expectations as determined by *belief-based* sources, i.e., religion and tradition. To ensure compatibility of laws with *belief-based* sources, lawmakers consult their people's values to measure, test, and approve one potential law over others. In that sense, the laws that are derived from *knowledge-based* sources—social and natural sciences—are evaluated against people's beliefs to ensure harmony in their coexistence.[88]

Compatibility of a legal system with local norms makes it conducive to economic development via three main mechanisms. First, a legal system that is compatible with local customs empowers the local population, businesses, and experts to produce laws that meet their needs at their own level of sophistication. Such a legal system enables democratic participation in the lawmaking process and modification of laws to the demands of local actors. The familiarity of the local economic actors with the introduced laws and the lawmaking process induces economic growth by providing them the chance to shape laws to meet the degree of complexity of their economic institutions. As a result, the laws that are necessary for the local economic activities would be adopted and enforced as long as they remain necessary in the areas that they are most needed.[89]

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87. That being said, evaluating modern Islamic *state law* does not provide us with an accurate understanding of what the analogous *Islamic law* is. This a common mistake among scholars interested in learning about particular points of Islamic law. Some would study Islamic law as applied in a modern state that is mixed with foreign transplants, state policies, and local custom to answer a research question on Islamic law. This approach is substantively and methodologically questionable. For an example, see generally LAWRENCE ROSEN, THE ANTHROPOLOGY OF JUSTICE: LAW AS CULTURE IN ISLAMIC SOCIETY (1998) (studying the courts in modern Morocco and attributing the laws that the courts apply to Islamic law without differentiating between state law and classical Islamic law). There is a wide gap between what jurists have developed and what is adopted in the state laws as the preferred opinion. That is mainly because there is no procedure to determine which, among the various (even conflicting) opinions that exist in Islamic treatises (*fiqh*), should be adopted in the lawmaking process. Adopting a procedure and criteria by which the state can choose the soundest and most popular opinion from among the available variety of opinions in Islamic law could help fill in this gap. A suggestion is to use "the public good" as the criterion for such a selection because *Sharīʿa* required the historical equivalent of the modern state "to serve the public good." Quraishi-Landes, *supra* note 68, at 556. Another suggestion is to use "reasonableness" as the guide which is defined as "the effort and ability to negotiate legal determinations within the framework of accepted cultural norms and socially recognized conceptions of justice." ABOU EL FADL, *supra* note 66, at 52. Whatever the procedure is, secularization is not the answer. Neither is the claim that Islamic law is merely philosophy, or theology: Jurists have legal burdens even in the context of being governed by the modern states. I strongly believe in the jurists' legal duty and the need for their active involvement in the lawmaking process contrary to Abou El Fadl's claim that "[i]n the age of the nation-state, the interpreters of the Shari'ah play a fundamentally different role—they are no longer the maintainers of law . . . because they are no longer the representatives of that principle of law and order." *Id*. at 365. I reject Abou El Fald's portrayal of jurists as "being theologians and moral philosophers [rather] than lawyers." *Id.* In contrast with his view, I believe that jurists are and should be still responsible for the law that governs Muslim-majority countries. The legal system that governs the affairs in Muslim-majority countries should be *compatible* with their religious convictions.

88. This theory is highly inclusive because it argues that any legal system, religious or secular, democratic or authoritarian, traditional or modern, has the potential and the capacity to contribute to economic development if it promulgates laws in a consistent manner and considers societal norms.

89. Daniel Berkowitz et al., *Economic Development, Legality, and the Transplant Effect*, *in* LEGAL ORIGIN THEORY 390, 400–20 (Simon Deakin & Katharina Pistor eds., 2012).

Second, compatibility is required to guarantee democratic representation and the legitimacy of the state, thereby inducing compliance with laws by creating a legal system that represents and respects the values that the population abides by.[90] This legitimacy argument requires the legal system to consider both religious convictions and collective demands. Accordingly, if the experts find that religion has to prevail in some instances, trumping other principles and concerns, that finding must be justifiable on the grounds that it fulfills legitimacy and guarantees democracy.

Finally, if laws are familiar to the locals, people are more likely to obey the law and enforce them privately and informally against others.[91] Further elaborations on this mechanism should include three caveats. First, contemporary laws, especially business laws, are generally complicated and sophisticated enough that individuals consult legal experts in their interactions with the law—at least in modern societies. It does not matter how familiar the laws are to the individuals; they will not rely on it or refer to it independent of the lawyers. Second, there is a distinction between familiar law and favored law. Law that is familiar may or may not be favored. Only a law which is both familiar and favored has legitimacy. Third, if it is easy to inform people about the content of the laws, they will become familiar with the laws regardless of whether the laws conform to local values.

A well-known theory in comparative law that has addressed the issue of compatibility of the legal system with local norms is the "legal transplants" theory. The legal transplants theory does not directly test compatibility, but it indirectly addresses the impact of local norms on a legal system and studies the outcomes of transferring legal norms to a new environment. The legal transplant theory supports the compatibility theory and its consequences and shows why Muslim countries need to adopt laws that are compatible with their local religious norms.

A. The Legal Transplants Theory

The practice of borrowing from relatively more developed or more successful legal systems is an old one. There are various such cases, from the ancient example of the influence of Roman law on laws developed in other territories, to the modern case of the role of English common law in the development of American common law. Commentators have named them "legal transplants" or "legal transfers."[92] The legal transplants theory provides evidence of the importance of the contexts in which a legal system develops. It highlights the persistence of the forms and ideologies that create a legal system, even when the legal system is transferred to another country. What is relatively new is the study of the economic impact of experiencing legal transplants and how the process influences economic growth in the

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90. Bo Rothstein & Marcus Tannenberg, Expertgruppen för Biståndsanalys (EBA), Making Development Work: The Quality of Government Approach, http://eba.se/wp-content/uploads/2015/12/Making_development_work_07.pdf (last visited Oct. 15, 2018).

91. Robert D. Cooter, *The Rule of State Law and the Rule-of-Law State: Economic Analysis of the Legal Foundations of Development*, *in* Annual World Bank Conference on Development Economics 1996, at 191, 195 (Michael Bruno & Boris Pelskovic eds., 1997).

92. Michele Graziadei, *Comparative Law as the Study of Transplants and Receptions*, *in* The Oxford Handbook of Comparative Law 441, 444–53 (Mathias Reimann & Reinhard Zimmermann eds., 2006).

recipient country. Berkowitz et al. conducted a comprehensive empirical study to answer these questions. They highlight the original process of transplantation of a legal system into the host's legal system as the most important factor in its success and show that it is not the form of the transplanted legal system but, rather, the way a legal system was originally transplanted that is the main indicator of whether and to what degree transplantation will be conducive to economic development.[93] Berkowitz et al. argue that a transplanted law is implemented well if individuals understand it based on their own cultural heritage. If individuals understand and follow the transplanted law, they are more likely to ask lawyers and courts to enforce and develop a newly-introduced law more efficiently.[94]

The underlying reason for the success of a transplant that is familiar to the locals is its compatibility with the already existing tradition. Such compatibility makes laws accessible and calculable, and as a result makes them easy to follow, develop, and adapt. A legal system that is not compatible with local cultural and religious convictions would not induce economic growth because the population would not be able to understand and utilize the laws in their transactions effectively or to transform, modify, and shape the laws to the specific needs of their businesses. Similar to the drafting and legislative process, the process of transplantation is an opportunity for the law to assimilate the specific characteristics and expectations of the people it would eventually govern. When we simplify these two ways of creating laws, we would, logically and intuitively, take steps to ensure the closeness of the newly introduced law with the local social and cultural structures. However, the principle of compatibility is somehow forgotten in the complicated and burdensome process of lawmaking that is usually done in different stages and with the involvement of various groups of experts (and non-experts).

In a world where there could be a ban on the transfer of ideas about law, each society would have to develop its own ideas and strategies. Under such an isolation, it is only logical to assume that when people have the freedom and access to resources to determine their destiny and actually change things for better, they would opt for a path of shaping their laws and institutions in a way that works best for them. The tailoring of legal reform to social circumstances and local context is a welcomed idea among law and development scholars and has been popular for several decades.[95] In light of

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93. Berkowitz et al., *supra* note 89, at 390–95.

94. *Compare id*. at 391–92 (focusing on the original process of transferring laws to the host country), *with* Peter Grajzl & Valentina Dimitrova-Grajzl, *The Choice in the Lawmaking Process: Legal Transplants vs. Indigenous Law*, 5 REV. L. & ECON. 615, 635–37 (2009) (considering the original process along with the possibility of reform in laws as their shortcomings become clear after enforcement. Grajzl & Dimitrova-Grajzl argue that transplants are more cost-effective when laws are promulgated, but they are costlier to reform as time passes, whereas legislating using indigenous laws entails more cost in spite of being less costly to amend).

95. Kerry Rittich, *The Future of Law and Development: Second-Generation Reforms and the Incorporation of the Social*, *in* THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL 203, 207–09 (David M. Trubek & Alvaro Santos eds., 2006); David M. Trubek & Alvaro Santos, *Introduction: The Third Moment in Law and Development Theory and the Emergence of a New Critical Practice*, *in* THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL, *supra*, at 1, 6–12.

The evolution of the meaning of development in reform movements over time also reflects the change in the general perceptions about the role of law in development. *Compare* H. W. ARNDT, ECONOMIC DEVELOPMENT: THE HISTORY OF AN IDEA 9–49 (1987) (arguing that development has been known for a

this understanding, acknowledging the need to consider religious convictions in designing a legal system should come as no surprise. Islam is famous for encompassing a large body of legal, theological, and spiritual norms and mandates to address different scenarios and could inspire a constructive governance.[96] The power of people's religious devotion and obedience would make it more likely for them to follow and adopt the strategies developed within the framework of Islamic mandates. In a Muslim country, the compatibility of laws with Islamic law would facilitate the process of evolving laws into problem-solving tools for hard social and economic struggles.

A challenging part of the *compatibility* theory for modern Islamic legal systems is to effectively balance all the required elements when promulgating laws. In such a system, the question is whether religious convictions should be above all other considerations. If lawmakers in a religious state would knowingly and voluntarily ignore a pressing issue that has economic or social implications—that would have otherwise addressed by a transplanted rule—in order to fulfill religious requirements under the state's formal religion, such a state would be choosing religion over all other factors, i.e., custom, economy, democracy, and public interest. That is a decision that one can hardly approve of if there is no overarching theory or policy justifying it.

B. COMPATIBILITY IN MODERN HYBRID ISLAMIC LEGAL SYSTEMS

The introduction of a modern state to a Muslim society that has been governed by Islamic law as its ultimate normative order raises concerns about the ways to reconcile the old legal system with a modern process of promulgating laws. An Islamic state introduced into a (partly or fully) secular legal system faces a similar challenge. In both cases, the state must choose its concept of law.[97] This challenge is not unique to modern Islamic states; many states have to deal with customary laws and define how they interact with official state law. The complication for a Muslim society is that Islamic law exists parallel to state and customary laws. Islamic law differs from official state law in that it is an informal system of law, not promulgated by the state. It is also different from customary laws in that it did not evolve organically from the informal practices of the population and their preferences of how to govern their lives among themselves. A great number of experts (i.e., jurists) from different regions and a number of sects, developed a vast body of law over fourteen centuries that is now known as

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long time as "industrialisation," "modernisation," "Westernisation," [sic] and even "colonialism" until after the end of World War II that the new notion of "growth" as the meaning of development was introduced), *with* ARTURO ESCOBAR, ENCOUNTERING DEVELOPMENT: THE MAKING AND UNMAKING OF THE THIRD WORLD 10 (1993) (defining development as a process through which the knowledge and technology of people in a society increases under the supervision or regulation of the state), *and* Duncan Kennedy, *Three Globalizations of Law and Legal Thought: 1850–2000, in* THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL, *supra*, at 19 (David M. Trubek & Alvaro Santos eds., 2006) (arguing that such a definition of development "politiciz[es] our understanding of development"), *and* David M. Trubek & Marc Galanter, *Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States*, 1974 WIS. L. REV. 1062, 1062–1103 (1974) (defining development as "social, economic and political changes").

96. *See* HALLAQ, *supra* note 20.

97. *See generally* ERWIN I. J. ROSENTHAL, ISLAM IN THE MODERN NATIONAL STATE (1965) (explaining the challenge of secularizing a legal system that is intertwined with religious ideology).

Islamic law, using jurisprudential principles, methodologies, canons, and the core original texts of Islam.[98] Thus, Islamic law has not evolved in a way that a typical customary law system does. In addition, Islamic law has authority and regulates people's everyday lives on the basis of its religious status. People find themselves obliged to enforce it and follow it voluntarily. It can be and has been a source of mediation and adjudication between parties in disputes, but outside that, its enforcement is voluntary just like customary laws.[99] Thus, pluralism in a modern Islamic state includes a minimum of three parallel legal systems: official state law, customary laws, and Islamic law, each of which must define its existence, scope, and relations with one another.

The focus of my compatibility theory in modern Islamic states is the relationship between Islamic law and the official state law because the two regimes claim almost the same level of authority. In the three-fold pluralism in modern Muslim societies, there are three actors in play: people, jurists, and the ruling power. People, including both individuals and businesses, manage their day-to-day activities in relation to others on the basis of their customs. The jurists are the officials for Islamic law, guarding it and, in most areas, enforcing it.[100] The ruling power governs the everyday life of people with its orders and determines the limits of the applicability of customs as well as the authority of jurists. In spite of the overlapping scope of customs, jurists' law, and official state law, the demands and interests of these actors are not always aligned. People would want to be democratically represented through a parliamentarian institution, the jurists responding to their duties as the guardians of Islamic law would want to enforce Islamic law, and the ruler would want to have the bureaucratic or monarchial power to enact laws disregarding either people's or the jurists' wishes or both. Nevertheless, the state law is aware that it functions in a society with a high level of respect for Islamic law. The same is true for Islamic law: in the modern era, Islamic law is interpreted and enforced with a conscious awareness of the existence and the force of the state law.

Modern Islamic states may adopt different conceptual views concerning Islamic law and its relation to the official state law: a Hartian view or a

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98. This is not to say that no part of the development of Islamic law was achieved in an attempt to answer questions raised by the people and to address social concerns. To the contrary, see WAEL B. HALLAQ, AUTHORITY, CONTINUITY, AND CHANGE IN ISLAMIC LAW 174–80 (2001) (arguing that *fatwā*s (jurist-scholars' legal opinions) did not have hypothetical origins referencing "the dictum that no *fatwā* should be issued with regard to a problem that has not yet occurred in the real world") (citation omitted). *Id.* at 179.

99. I call Islamic law a "semi-official" legal system: Islamic law in modern time is not an official state law (under a positivist view) but it is not a body of customary laws either. Jurists have been in charge of the process of its creation, and this lack of direct involvement of the people in developing it excludes it from the area of informal rules. Islamic law belongs to a group of rules that are in between state official law and people's informal rules. Still, Islamic law benefits from an authority—religious consequences and belief in God's will and punishment—that guarantees its enforcement beyond (and stronger than) the voluntary compliance that informal rules enjoy. The authority of religious consequences is not as strong as the state's threat of enforcing laws against disobeyers but is not as weak (for the lack of a better term) as informal rules. These formation and enforcement elements make Islamic law "semi-official."

100. ROGER COTTERRELL, LAW, CULTURE, AND SOCIETY: LEGAL IDEAS IN THE MIRROR OF SOCIAL THEORY 36–38, 161–62 (2006).

Fullerian view.[101] Under the Hartian view, the state may adopt a positivist view to law and define it as state-enacted law only. In this approach, the state may adopt a rule of recognition in the constitutional structure or in ordinary laws recognizing the applicability of Islamic law as the same as customary laws. Another approach under this view could be incorporating Islamic law into the official lawmaking process by recognizing Islamic law as a source of law at the legislative stage. This approach is different from the former in that Islamic law is only applicable to the society to the extent that it is formally adopted and passed by the state lawmaking process. An alternative mechanism could be using the judicial review based on Islamic law at the adjudication stage to ensure the constituents' satisfaction with the law. That is, citizens would be allowed to bring cases to a high court with the authority to review the state laws for their compliance with Islamic law. If someone believes that a conflict exists between the mandates of the two parallel legal systems, she can ask a high court to resolve the tension.

An example of adopting a Hartian positivist view is the Iranian legal system, which only recognizes the authority of Islamic law that is incorporated into the official state law. The 1979 Iranian Constitution designates Islamic law as *a* source of law, includes an Islamic law non-contradiction clause, and favors the rules of the *Shī'ī* legal school.[102] The Constitution only allows the judicial incorporation of Islamic law in cases where the laws passed by Parliament are silent, vague, or contradictory.[103] In a nutshell, the process of ensuring the compliance of laws with Islamic law is institutionalized, and the legitimacy of the law is not based on the piety of jurists but on their institutional authority. Islamic law is as authoritative as the official state law is and allows it to be.

Another conceptual view that a modern Islamic state may prefer about the relationship between Islamic law and state law is a Fullerian view of law which recognizes Islamic law as a legal system that is enforceable without a formalization process and adoption into the state law. With this approach, Islamic law would be considered an official positive law with a law-like

101. For a comparison between Hart's theory and Fuller's, see Jeremy Waldron, *Legal Pluralism and the Contrast between Hart's Jurisprudence and Fuller's*, *in* THE HART-FULLER DEBATE IN THE TWENTY-FIRST CENTURY 135, 135–56 (Peter Cane ed., 2010).

102. Islamic law is not "the" source of law. Articles 72, 91, 94 and 96 of the 1979 Constitution as Amended in 1989 require laws not to infringe Islamic law. The legislature must ensure the compliance of laws with both Islamic law and the Constitution. Under Article 4 of the 1979 Iranian Constitution, "[a]ll civil, penal, financial, economic, administrative, cultural, military, political, and other laws and regulations must be based on Islamic criteria (*mawāzīn-i Islam*). This principle applies absolutely and generally to all articles of the Constitution as well as to all other laws and regulations." THE 1979 IRANIAN CONSTITUTION, *supra* note 13. Nevertheless, religious minorities may follow their own legal schools in personal status, family law, and inheritance law.

103. In such cases, the judge may only refer "to settled Islamic sources or settled jurists' legal opinions (*fatwas*) and legal principles which are not in contradiction with *Sharīʿa*." Even if a judge is a classically trained jurist who holds the authority to issue his own opinion, i.e., a scholar-jurist (*mujtahid*), he is not allowed to adjudicate based on his own opinion if he disagrees with the law. Instead, he has the right to excuse himself and refer the case to another judge to decide. Article 167 of the 1979 Iranian Constitution and Article 3 of *Qanuni Aini Dadresi Dadgah-hayi Umumi Wa Inghilab Dar Umuri Madani* [Civil Procedure in General and Revolutionary Courts Act] 1379 [2000] provide: "[t]he Judges must decide cases and settle disputes according to law. If the laws are not complete, clear or are in conflict with each other or in cases that there is not any law on the issue, judges should decide the case according to settled Islamic sources or settled *fatwas* (Muslim jurists' legal opinions) and legal principles which are not in contradiction with *Sharīʿa*. If the judge is a scholar-jurist (*mujtahid*, a classically trained jurist who holds the authority to issue his own opinion) and finds the law to be in contradiction with *Sharīʿa*, he must refer the case to another court."

structure and function. Under this framework, Islamic law is parallel—not subordinate—to the state-sponsored law. Saudi Arabia's recognition of Islamic law as the law of the land is the most clearly established case of a Fullerian conception of Islamic law among the modern Islamic states. Saudi judges enforce Islamic law directly as the law of the state.[104]

Either of these views would require the interaction of Islamic law with people's demands and such interactions may result in conflict. Conflict arises either in the lawmaking process or in the enforcement stage, depending on whether the first or the second view is adopted. This is because of the diversity of views that may exist in society: one group believes that they live and are bound by Islamic law and the other strongly believes in knowledge-based laws. Any triumph for Islamic law or knowledge-based laws over the other is a win for one and a loss for the other. When such a conflict is resolved in the lawmaking process with no possibility of an ex post review, the law is certain and calculable. Nevertheless, in the enforcement stage, under either the Hartian or Fullerian view, if someone sympathizes with a view based on Islamic law that was not picked in the legislative or judicial lawmaking process, she would feel resentment against the legal system.

One solution to this plausible problem is to create a system of checks and balances in the lawmaking process to oversee and ensure that lawmakers (the legislature or the courts) consider all factors and weigh them "reasonably" in each bill or case.[105] This solution is not peculiar to states that face the dilemma of dealing with religion along with other considerations; in fact, it is relevant to any state that faces the question of how to balance one interest, like the economy, with others, like politics, customs, social values, and culture. Nevertheless, the difficulty is drawn into particularly sharp focus in Islamic states because their lawmakers need to deal constantly with two very important dimensions when regulating for economic development (or indeed any other social or political goal): the law must be both Islamic, to fulfill the divine duties, and conducive to economic development, to satisfy material needs. These objectives are difficult to reconcile when people have strong religious convictions but are also desperate for economic progress.

In addition to measuring the dissatisfaction that would surface at the enforcement stage, a modern Islamic state may use the conflicts that arise during the promulgation of laws as a proxy. In other words, documenting the conflicts in the legislative or judicial lawmaking process helps the state understand the probability of people's dissatisfaction with laws in a hybrid Islamic legal system. The information about the level of dissatisfaction would help the state design a system of conflict resolution that has the ability to reconcile the mandates of Islamic law with the requirements for governing a modern state.

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104. Esther van Eijk, *Sharia and National Law in Saudi Arabia*, *in* SHARIA INCORPORATED: A COMPARATIVE OVERVIEW OF THE LEGAL SYSTEMS OF TWELVE MUSLIM COUNTRIES IN PAST AND PRESENT 139, 156–62 (Jan Michiel Otto ed., 2010); *see* Abdulaziz H. Al-Fahad, *Ornamental Constitutionalism: The Saudi Basic Law of Governance*, 30 YALE J. INT'L L. 375, 385–86 (2005).

105. Abou El Fadl developed the theory of reasonableness of interpreting and enforcing Islamic law-based rules in the modern time. I agree with him that it is absolutely necessary. *See* ABOU EL FADL, *supra* note 66, at 346–47.

IV. ADAPTABILITY THEORY

Recommending compatibility of a legal system with Islamic law does not mean that Muslim countries should abandon their quest for modernity and the need to address the current needs of their population. The laws have to be adaptable to the realities of the time and the place in which they function. Achieving sustainable economic growth in modern Islamic states will be more feasible if they are able to adapt existing legal systems based on Islamic law to modern realities. This seems to be intuitive—the kind of principle that any legal system would follow at any time. However, Islam (and Islamic law) has been criticized for impeding economic growth in Muslim territories because it failed to induce institutional innovations necessary for the modern economy of scale that organically developed elsewhere.[106] This thesis has been widely criticized and refuted with a variety of arguments.[107] However, it nonetheless poses a set of theoretical questions to Islamic law: is it Islamic to adapt the laws originating in Islamic law to changing circumstances? What are the criteria for adapting the classically developed body of Islamic law to modernity? What are the limits of adaptability of Islamic law? This section addresses these questions in a concise manner without engaging with the diverse views that exist in the primary sources in each Islamic school of law. The aim of this discussion is

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106. *See* TIMUR KURAN, THE LONG DIVERGENCE: HOW ISLAMIC LAW HELD BACK THE MIDDLE EAST 95–105 (2010). *See generally* Timur Kuran, *The Islamic Commercial Crisis: Institutional Roots of Economic Underdevelopment in the Middle East*, 63 J. ECON. HIST. 414 (2003); Timur Kuran, *Why the Middle East Is Economically Underdeveloped: Historical Mechanisms of Institutional Stagnation*, 18 J. ECON. PERSP. 71 (2004). Kuran's thesis is that the Middle East could not catch up with the economic growth in the West since the seventeenth century because Islamic law was not able to organically develop the institution of corporations. He argues that division of wealth after businessmen's death among a large number of ascendants due to legality of polygamy, dissolution of partnership agreements upon the death of one of the partners under Islamic law, and the inflexibility of laws of *waqf* (Islamic trust) are to blame for institutional stagnation and inability for businesses to accumulate capital to take advantage of the benefits of economy of scale.

107. *E.g.*, Eric Chaney, *Review Essay: Islamic Law, Institutions and Economic Development in the Islamic Middle East*, 42 DEV. & CHANGE 1465, 1465–66, 1469 (2011) (criticizing Kuran's thesis for being incomplete in explaining the mechanism through which "the institutions highlighted by Kuran stagnated" and posing a logical question: "Was the institutional equilibrium in the Middle East all that different from that in other advanced non-European regions?"); Anne McCants, *Did Law Hinder Economic Development in the Middle East?*, 44 HIST. METHODS: J. QUANTITATIVE AND INTERDISC. HIST. 177, 179 (2011) (book review) (criticizing Kuran's thesis for being unable to explain the features that "distinguish[] those institutions that in time prove to be vulnerable, and thus transformative of themselves, from others that self-reinforcing and thus dependent on an outside stimulus if they are ever to change"); Maya Shatzmiller, Book Review, 132 J. AM. ORIENTAL SOC'Y 336, 337 (2012) (arguing that Kuran does not accomplish the task of a deep study of either Islamic law or the economics of the period he is looking at); Zubair Abbasi, Comment, *God's Law v. Corporations: A Critique of Islamic Law Matters Thesis*, *in* OXFORD STUDENT LEGAL STUD. PAPER NO. 05/2012, 15–16 (2012) (refuting Kuran's thesis that the institutional aspects of Islamic law prevented the Middle Eastern population from developing corporations by conducting a detailed study of the evolution of English corporate law, to determine what factors led to the formation of corporations in England. Abbasi found that external factors to law induced the legal innovation of corporation in England).

The existing empirical studies on the relationship between a country's religion and its financial development only show that creditors receive more protection in Protestant countries than they do in Catholic countries. The same pattern was not observed in Muslim countries. Rene M. Stulz & Rohan Williamson, *Culture, Openness, and Finance*, 70 J. FIN. ECON. 313, 315–29 (2003). Stulz & Williamson's research pool includes seven Muslim countries: Turkey, Pakistan, Nigeria, Malaysia, Jordan, Indonesia and Egypt. Stulz and Williamson point out that their sample size is small and that the laws in most of these countries have been in force since the colonization, in case of Indonesia and Egypt, or modernization era, in case of Turkey, and are not modified over time to comply with Islamic law. Thus, it is not possible for them to observe the relationship between Islam and financial development in Muslim countries. *Id.* at 332.

to provide an overview of perspectives on modernity and the need to accommodate it among scholars of Islamic law.[108]

A. PRAGMATISM: ISLAMIC LAW IN A CHANGING WORLD

The evolution of rules in classical Islamic law shows that jurists have been aware and approve of the need to accommodate change, and that they have developed principles for the process. Jurists have interpreted the core texts over time so that the rules originating in them would meet the requirements of the modern life.[109] They even created maxims to the effect that the legal opinions (*fatwa*s) have to change as time passes.[110] The evolution of laws on particular issues related to different fields, from criminal law to the law of property, illustrates the evolving nature of rules and principles over different periods of time.[111] It is common to find collections of chains of commentaries by jurists from a more recent time on commentaries that other jurists wrote at an earlier time, adding new and more nuanced questions and answers. In addition to these intellectual endeavors, some jurists recorded and collected other jurists' opinions on a variety of issues into books, making it possible to track the evolution of opinions as each issue was raised in different times and places.[112]

Additionally, the jurists' discussion about the relationship between custom and the texts illustrates the live and dynamic nature of Islamic law. Universal custom—i.e., custom that is prevalent "throughout Muslim lands"—would influence Islamic rules, although the extent to which custom preempts an unambiguous authoritative text is disputed.[113] Acknowledging the legitimacy of relying on custom to issue opinions includes, *a fortiori*, acknowledging the endless nature of change in custom: as a new custom takes the place of an older one, an opinion premised on the older custom would need an update.[114] The argument is that even the original texts and the jurists' opinions in the founding period of Islam relied on the existing custom of the region to articulate the rules. A considerable part of what is known as the legal aspects of Islam was a mere adoption of the custom and traditional practices at the time.[115] In addition, jurists developed principles that would allow them to pick and choose from among the diverse views that exist in

108. This question is commonly asked about other divine laws, e.g., those of Christianity and Judaism, as well. *See, e.g.*, Silvio Ferrari, *Adapting Divine Law to Change: The Experience of the Roman Catholic Church (With Some Reference to Jewish and Islamic Law)*, 28 CARDOZO L. REV. 53 (2006). For theories on legal change in modern Islamic states, especially Malaysia, see Donald L. Horowitz, *The Qur'an and the Common Law: Islamic Law Reform and the Theory of Legal Change*, 42 AM. J. COMP. L. 543 (1994).

109. *See generally* Wael B. Hallaq, *Was the Gate of Ijtihad Closed?*, 16 INT'L J. MIDDLE E. STUD. 3 (1984) (discussing the progression of *ijtihad* after the metaphorical gate was considered closed).

110. HALLAQ, *supra* note 98, at 166.

111. For examples of sophistication and developments in criminal law in classical Islamic law, see INTISAR A. RABB, DOUBT IN ISLAMIC LAW: A HISTORY OF LEGAL MAXIMS, INTERPRETATION, AND ISLAMIC CRIMINAL LAW (2015). For examples of legal development in the area of property, see HIROYUKI YANAGIHASHI, A HISTORY OF THE EARLY ISLAMIC LAW OF PROPERTY: RECONSTRUCTING THE LEGAL DEVELOPMENT, 7TH–9TH CENTURIES (2004).

112. HALLAQ, *supra* note 98, at 194–95.

113. *Id*. at 218–22.

114. *Id*. at 231–32.

115. Mohsen Kadivar, *The Principles of Compatibility of Islam and Modernity*,MOHSEN KAVIDAR OFFICIAL WEBSITE (Oct. 7–8, 2004), https://en.kadivar.com/2004/10/08/the-principles-of-compatibility-of-islam-and-modernity-2/.

different schools of law within Islamic law in order to accommodate social and economic changes in their opinions.[116] The collection of these strategies and innovative legal methodologies reflects the awareness and the willingness of jurists to acknowledge the fact that laws change as the society transforms.

B. "REASONABLENESS" AND THE LIMITS OF CHANGE IN ISLAMIC LAW

Islamic jurisprudence approves of the interpretation of Islamic law in accord with the realities of modern life. The hard question is what criteria should be followed in the process of deriving laws capable of dealing with modern issues. Khaled Abou El Fadl proposes that the process of applying Islamic law to modern societies should ensure the "reasonableness" of any law promulgated based on classical Islamic law.[117] His standard of "reasonableness" is comprehensive enough to cover a large set of issues that should be considered when the state is applying classical Islamic law within the framework of a modern constitution. According to Abou El Fadl, "reasonableness is the effort and ability to negotiate legal determinations within the framework of accepted cultural norms and socially recognized conceptions of justice."[118] Considering cultural norms along with what fairness and justice would require is a crucial element in the process of interpretation of a set of rules that have developed over fourteen centuries in different places. "Moreover, reasonableness connotes the ideas of moderation and balance, or what is fair and sensible."[119] It is helpful to develop a clear standard for what would be counted as "reasonable."[120] However, this criterion would need to be complemented by overarching principles defining its limits: how far we can go in synchronizing Islamic law with modernity?

Scholars have criticized attempts at reinterpreting classical Islamic law in different areas of law to make it conform with the characteristics of a legal system that is able to reasonably govern day-to-day lives of people. Islamic banking, Islamic law on women's rights, and even, as discussed above, the practice of codification and introduction of new institutions into the modern

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116. AHMED FEKRY IBRAHIM, PRAGMATISM IN ISLAMIC LAW: A SOCIAL AND INTELLECTUAL HISTORY 105–25 (Peter Gran Series ed., 2015).

117. *See* ABOU EL FADL, *supra* note 66, at 51.

118. *Id*. at 52. "Unreasonable determinations are issued without regard either to their profound and turbulent social and cultural impact or to the internal cohesiveness and systematic application of a system of law." *Id*.

119. *Id*. at 346. Abou El Fadl distinguished "reasonableness" from "rationality." "Rationality refers to the correct use of reason and to logical thinking. Rational thought produces logical results that are the outcome of precise structural reasoning. Reasonableness is a subjective assessment about the boundaries of rationality in a given context. On any specific issue, rationality will generate divergent results only to the extent that the first (elementary) assumptions made by rational agents could be different; reasonableness is far less determinative, and it is always assessed in terms of the desired or intended objectives. Put differently, rationality is an evaluation or assessment regarding the process of reasoning, but reasonableness is a judgement about the ultimate determination or range of determinations." *Id*. at 347.

120. "[T]he episteme of reasonableness can be analyzed in terms of three evaluative categories. These three categories are (1) proportionality (*tanasub*) between means and ends; (2) balance (*tawazun*) between all valid interests and roles; and (3) measuredness (*talazum*) in that determinations are tailored to claims so as to preserve reciprocity between agents acting in a social setting. Each of these evaluative categories (*tanasub*, *tawazun*, and *talazum*) by itself is not determinative, but each is a methodological tool that helps ascertain whether a legal judgement, decision, or interpretation is balanced, fair, and relevant." *Id*. at 346–47.

Islamic legal systems face such criticism often.[121] There should be something, either procedural or substantive, that would distinguish an Islamic rule from a non-Islamic rule; no one can (or should be allowed to) merely claim: "I know it when I see it."[122]

Beyond the cases in which there are clear authoritative rules, there is a need to adopt a system of identifying rules that comply with Islamic law, especially in new cases and in the areas of law that are ambiguous. Traditionally, jurists have been in charge of this task of developing rules from the core texts using a special methodology which they would learn as part of their informal training. This expertise makes them an essential element of any process of deciding a case based on Islamic law. There are two alternative views on how the Islamic law compliance of the rules may be determined: either a rule is Islamic only if a jurist promulgates or applies it or, regardless of who enacts the law or judges the case, as long as the jurist refers to the available opinions, the law or the decision is Islamic law compliant. Until the reforms in the nineteenth and twentieth centuries in Muslims countries, the former view was prevalent. Jurists were in charge of issuing opinions, adjudicating cases, and writing scholarly collections of law. There was a minor caveat for judges, who were jurists, but they did not have to be at the level of a scholar-jurist (*mujtahid*) and could follow the opinions of scholar-jurists at the time.[123] Modern Islamic states introduced a more radical version of this arrangement: judges and lawmakers can have no training in classical Islamic law but would be bound to the rules originated and deduced by scholar-jurists based on classical Islamic law. Whom should these modern bureaucrats prefer and what are the limits of their intervention in the process of trimming a rule developed by scholar-jurists in order to apply it "reasonably" to the modern case at hand? The Supreme Court of Egypt came up with a practical solution of dividing rules into two classes: a "definitive" core that should remain intact and an "indefinite" remainder susceptible to change. According to the Court:

> definitive principles are Islamic norms that are not debatable with respect to either their source or their precise meaning. Such definitive norms must be applied. All other Islamic norms are indefinite in that they are susceptible to different interpretations and—because of their nature—changeable in response to the exigencies of time, place, and circumstances.[124]

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121. For arguments around *Sharīʿa*-compliance of modern Islamic finance practices, see MAHMOUD A. EL-GAMAL, ISLAMIC FINANCE: LAW, ECONOMICS, AND PRACTICE 175–89 (2006); *see also* IBRAHIME WARDE, ISLAMIC FINANCE IN THE GLOBAL ECONOMY 234–44 (2d ed., 2010). For challenges that modern egalitarian family laws based on Islamic law face in receiving *Sharīʿa*-compliance approval, see Ziba Mir-Hosseini, *Muslim Legal Tradition and the Challenge of Gender Equality*, *in* MEN IN CHARGE? RETHINKING AUTHORITY IN MUSLIM LEGAL TRADITION 13, 35–40 (Ziba Mir-Hosseini et al. eds., 2015).

122. Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

123. HALLAQ, ORIGINS AND EVOLUTION, *supra* note 1, at 79–101, 178–93.

124. Nathan J. Brown & Adel Omar Sherif, *Inscribing the Islamic Shari'a in Arab Constitutional Law*, *in* ISLAMIC LAW AND THE CHALLENGES OF MODERNITY, *supra* note 4, at 55, 71. Brown & Sherif continue: "Such flexibility reflects not a defect in the shari'a in the Court's eyes but a strength because it allows the principles to be adapted to changing realities and ensures their continued vitality and elasticity. Only in the realm of Islamic indefinite norms may the legislature intervene to regulate matters of common concern and achieve related interests. It must do so consistent with basic Islamic norms, the aim of which

Interestingly, this is a concern that classical jurists grappled with and entertained answering from a different perspective. They asked what would happen if jurists and all the sources disappear and people are left to themselves to live as Muslims without access to Islamic law?[125] Three sets of values are proposed as the core principles that Muslim communities have to follow. The first is the five legal maxims that are the interpretive tools and guidelines for deriving and applying laws: "1. Harm is to be removed . . . 2. Customs determines the legal disposition [of a case] . . . 3. Hardship brings about facilitation . . . 4. Certainty is not superseded by doubt . . . [and] 5. Acts are to be judged according to their intended purposes."[126] These maxims are also a method of conflict resolution between contradictory rules or where a rule is ambiguous. The second set of values are "Islam's 'five pillars'" which include "declaring belief in God and the prophethood of Muhammad, praying, paying *zakātzakat* [Islamic taxes], and performing the *hajj* pilgrimage" if and when one can afford the trip.[127] The third and more nuanced set of values are general principles that are necessary for the survival and livelihood of individuals as well as the community, that would help them flourish and realize their potentials individually and collectively. This is an open list, conditioned on the specific situations that arise and the scope and characteristics of the needs to be fulfilled.[128] The requirement to produce law that induces success and encourages improvements in society is general enough to raise the question of how we should achieve this goal and if there are minimum factors that such a law-making process should meet.

C. THE LEGAL PROCESS

Jurists have developed a theory similar to the "Legal Process" theory introduced by Hart and Sacks in American law to highlight the importance and value of the procedure of making law and its institutional requirements.[129] Legal Process theory partly argues that "law [should] be developed through a process of reasoned application of basic principle."[130] It follows therefrom that "law's role is 'to seek not final answers but an acceptable procedure for getting acceptable answers.'"[131] The process is a central matter of law because "[i]n a government of dispersed power and diverse views about substantive issues, frequently 'the substance of decision

is the preservation of religion, reason, honor, property, and the body. The legislature might develop different practical solutions to satisfy variable societal needs. The SCC regards the bulk of Islamic indefinite norms as highly developed, intrinsically in harmony with changeable circumstances, repulsive of rigidity, and incompatible with absoluteness and firmness. In no way may an Islamic indefinite norm that is fading—where because of time, place, or pertinent situations—be mandated by the Court or the constitution." *Id*.

125. *See generally*, Intisar A. Rabb, *Islamic Legal Minimalism: Legal Maxims and Lawmaking When Jurists Disappear*, *in* LAW AND TRADITION IN CLASSICAL ISLAMIC THOUGHT, *supra* note 3, at 145.

126. *Id*. at 154 (footnote omitted) (alteration in original).

127. *Id*. at 155.

128. *Id*. at 155–56.

129. *See* HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW (William N. Eskridge Jr. & Philip P. Frickey eds., 1994) (developing the legal process theory).

130. William N. Eskridge, Jr. & Philip P. Frickey, *The Making of the Legal Process*, 107 HARV. L. REV. 2031, 2036 (1993).

131. *Id*. at 2040 (citation omitted).

cannot be planned in advance in the form of rules and standards,' but 'the procedure of decision commonly can be.'"[132]

Islamic law is notorious for accommodating a diversity of views on almost any issue. In the absence of revelation and given the belief of the fallibility of all human beings (except the Prophet for *Sunni*s and the Prophet and Imams for *Shī'ī*s), including the jurists, there is no certainty of discovering *the* right rule. All a jurist may accomplish is to try his/her best in applying principles, maxims, interpretive knowledge of the text, and historical context to issue an opinion. As long as the jurists follow the procedure, any opinion that they discover or is available to them is as authoritative as it can be.[133]

V. CONSISTENCY MATTERS FOR DEVELOPMENT

An ideal model of a consistent legal system systematically follows a set of known general principles in lawmaking. The reliance of laws on principles ensures a logical and purposeful flow in lawmaking over time and across a wide range of subject matters. Generality guarantees uniform lawmaking with limited authority for exceptions in extreme circumstances, to wit: like rules for like issues. The need to achieve consistency is manifested in the reliance of legal systems on precedent, in the form of legislative (statutes and codes), judicial, and administrative precedents, as well as soft precedents (e.g., restatements). Also, guaranteeing consistency is an underlying reason for crafting structural and procedural features for promulgation of laws with tremendous care.

As an undeniable standard for lawmaking for both civil law and common law legal systems, consistency requires legal systems to be based on *knowledge-based* sources, i.e., social and natural sciences. General principles that underlie the lawmaking process should be supported by knowledge derived from sociology, political science, psychology, economics, and philosophy. They must also be rooted in natural sciences in regulations governing areas that have physical, chemical, or biological dimensions, like health, industries, and the environment. In any of these examples in which social and natural sciences are necessary to make laws, relying on tradition, mysticism, or religion in the process of promulgation is highly chastised.

Consistency as a fundamental feature of a lawmaking process is desirable for a wide variety of reasons, including but not limited to fairness and calculability. A consistent legal system is fair because it entails checks and balances over the lawmaking process to guarantee the promulgation of undiscriminating rules. Such a legal system is also calculable because it

132. *Id*. at 2044. "Procedure is important in three different ways. To begin, a procedure that 'is soundly adapted to the type of power to be exercised is conducive to well-informed and wise decisions. An unsound procedure invites ill-informed and unwise ones.' The suggestion that 'the best criterion of sound legislation is the test of whether it is the product of a sound process of enactment' epitomizes the legal process philosophy. Additionally, procedure is the means by which each part of the interconnected institutional system works together smoothly. Process not only defines the roles and duties of the different institutions, but also provides mechanisms for controlling discretion and for self-correction. Lastly, process is critical to law's legitimacy." *Id*. at 2044–45 (citation omitted).

133. Rabb, *supra* note 125, at 145, 146–49, 156–57.

treats similar issues in a logical manner, based on understanding of prior treatments of similar sets of facts. This feature ensures certainty and calculability of laws in the future and in unprecedented fact patterns. Calculability especially matters for economic growth. It brings certainty for individuals and businesses alike. A legal system is calculable if legal experts are able to estimate the possible processes and reasoning that the legislature or the court is likely to adopt when coming to a decision based on a known set of facts. The outcomes of such a calculable legal system would be predictable for laypeople as they would be able to make assumptions based on earlier legislations and adjudications they have experienced.[134]

Max Weber's ideal model of formality and rationality is the leading theory that articulates what it means for a legal system to be consistent and identifies the correlation between consistency and the emergence and persistence of capitalism. His theory inspired the Neo-Weberian theories and shaped legal reform policies around the world. Nevertheless, commentators have questioned the factual and historical accuracy of Weber's accounts of Islamic law. Critiques of Weber have provided evidence showing that formality and rationality existed in other legal systems as well but that Weber failed to spot and appreciate them.

A. WEBER'S THEORY

The main issues that Weber tried to tackle were what made (Western) Europe the right context for the rise of "industrial capitalism" and why the rise of capitalism did not happen simultaneously and organically in other regions.[135] Based on a comprehensive study of secular and theocratic legal systems, including Indian law, Chinese law, Islamic law (*Sunni* tradition), Persian Law (*Shī'ī* tradition), Jewish law, and Canon Law,[136] he concluded that the political structure, the formal and rational characteristics of "European law," and the legal mode of legitimization in Europe were essential elements in its acceleration compared to other nations.[137] Weber concluded that formality and rationality of a legal system are main features that are necessary for the rise and persistence of capitalism.[138] Rationality and formality of European law made it calculable and thus reduced the uncertainties of economic activities, contributing to economic development and the rise of capitalism in the region.[139]

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134. Professor Jeremy Waldron pointed out the distinction between calculability and predictability. He corrected the mistake of using "predictability" in the consistency theory as developed based on Weber's rationality argument. *See* ANTHONY T. KRONMAN, MAX WEBER 90 (1983) (explaining that "[i]n Weber's view, the more completely a legal order realizes the ideals of comprehensiveness and organizational clarity, the more calculable the consequences of every social action become . . . [S]ome calculability—perhaps even a significant degree—can be attained without the construction of a true legal system. Maximum calculability, however, cannot be achieved until the rules of the legal order have been arranged in a comprehensive and conceptually transparent fashion; no matter how great its calculability, a legal system can always be made more predictable by being systematized.").

135. Trubek, *supra* note 9, at 720, 723–24, 731.

136. *See* MAX WEBER, ECONOMY AND SOCIETY: AN OUTLINE OF INTERPRETIVE SOCIOLOGY 816–31 (Guenther Roth & Claus Wittich eds., Ephraim Fischoff et al. trans., 1978).

137. *Id*. at 721–22; Trubek, *supra* note 9, at 722–25.

138. *See* KRONMAN, *supra* note 134, at 92–93.

139. Another factor that influenced the emergence of rationally formal law in Europe was the change in legal education: the view of law as having a professional standing and the new attitude of legal scholars, which viewed law as a science. *See generally* WEBER, *supra* note 136, at 735, 738–39 (providing examples of changes in European legal education).

In Weber's theory, "formality" has two meanings.[140] In the first meaning, a legal system is formal if it is "governed by general rules or principles."[141] In the second meaning, a legal system is formal if it is independent or self-contained—that is, the legal system is solely based on legal principles and free from non-legal principles, like political or ethical ones.[142] Rationality had an even wider range of meanings for Weber. A rational legal system would entail (a) autonomy, (b) generality, (c) universality[143] (as opposed to special laws), and (d) calculability.[144] Based on these meanings, Weber's rationality criterion distinguishes types of legal systems on three axes: "(1) legal systems that stress general rules and those that emphasize the particular decision; (2) legal systems that employ "the logical interpretation of meaning" and those that adhere to external characteristics of the facts; and (3) legal systems which keep law and morality separate and those which merge them."[145]

Weber also analyzed the impact of religion on law and argued that it is detrimental to capitalism because religion demands exemptions from the general applicability of law in order to fulfill the specific needs of a group or for "ethical" purposes.[146] He believed that law should supersede all forms of "social control," including religion and politics, in order to create a consistent, gapless, "autonomous" ruling system.[147] This priority of law would allow a state of "legalism" to emerge, in which the governed believe that laws are enacted and enforced rationally.[148] In addition, for Weber, capitalism could not emerge in a legal system based on a "theocratic" judicial system because such a judiciary would not submit to the rationality required for a sound economy.[149] As a result, for Weber, only Western European law would meet the requirements for "formal rationality."

The consistency theory promoted and initiated by Weberian theory would exclude religion from the lawmaking process for the same reason. The process of promulgation of laws should, Weberians say, be free from any special treatment and exceptions that are not justified under the accepted knowledge-based sources of law. Any compromises or modifications beyond what is approved by social and natural sciences are condemned because they would distort the logical relationships between actions and their subsequent consequences as well as between needs and tools to fulfill them. There is no room for tradition, religion, or mysticism in determining the regulations for

140. KRONMAN, *supra* note 134, at 92.
141. *Id*.
142. *Id.* at 92–93.
143. Universality is a very distinct feature that differentiates legal systems. The ability of a legal system to produce laws with universal and not special application makes it a very desirable one. Trubek, *supra* note 9, at 727.
144. In addition to developing these specific categorizations and vocabulary in order to compare different legal systems, Weber distinguished between the two phases of "lawmaking," as the step of drafting laws or deciding what laws to enact, and "lawfinding," as the stage of applying the laws already passed to specific cases. *Id*. at 728.
145. David M. Trubek, *Reconstructing Max Weber's Sociology of Law*, 37 STAN. L. REV. 919, 926–27 (1984) (book review) (citing KRONMAN, *supra* note 134, at 92–93).
146. WEBER, *supra* note 136, at 736–37.
147. *Id.*
148. *See* KRONMAN, *supra* note 134.
149. *Id*. at 823.

bridge clearances nor a place for these belief-based sources in criminal justice, the law of contracts, or property rights.

Among the categories of legal systems that Weber identified based on their degree of "formality" and "rationality," he categorized Islamic law as formally irrational because its lawmaking was based on "prophetic" sources or "revelation."[150] As part of his study of different legal systems, Weber studied the characteristics of Islamic law (*Sunni* tradition) and Persian law (*Shī'ī* law) and claimed that these legal systems were irrational because they involved judges, who were traditionally trained jurists, without any "fixed jurisdiction" and whose decisions lacked any precedential value.[151] Thus, according to Weber, Islamic law was irrational because the law in the Muslim-majority territories was not systematic, there was a lack of "legal unification and consistency," and the legitimation of the law originated in the piety of the jurists.[152]

The essence of Weberian theory becomes clearer when applied to the English common law system. Among the most important criticisms that Weber faced was the contention that, considering that common law insists on the case-by-case creation of law, Weberian theory would be unable to explain the early rise of capitalism in England. In response, Weber distinguished common law judge-centered lawmaking processes from traditional oracular judgments. Oracular judges decide arbitrarily without providing any reasoning and are never bound by any precedent. At common law, conversely, *stare decisis* binds judges. Also, judges must provide reasoning to justify their opinions, emphasizing the similarities of the facts of the case at bar to precedent cases in order to apply the same rule and distinguishing from precedent cases to adjudicate differently. Contrary to oracular adjudication, the rational reasoning expected from the common law judge makes it calculable *enough* to induce a market economy.[153] Common law is not "comprehensive," i.e., completely "gapless," but it does entail systematic adjudication that makes it significantly calculable.[154] Thus, for Weber, to induce economic growth, a legal system does not need a maximum and ultimate degree of calculability but simply requires just enough of it.[155]

150. *See id*. at 819. Weber's other three categories that legal systems belonged to were: substantively irrational, or, a legal system reliant on precedent based on specific cases in order to form general rules; substantively rational, or, a legal system that benefits from "general policies" rooted in external sources to law such as religion or politics; and finally, logically and formally rational, or, a legal system for which the main criterion is the existence of general rules in the determination of legal decisions. *Id*. at 729–30, 733. A formally rational legal system was the ideal form of legal system for Weber and the category into which he put European law. He believed that such a legal system would lead to general, universally applied rules. In this type of legal system, although the law is value-free because values cannot be rationally reasoned, there is still some value incorporated into law which is driven from the "unrestrained choices of individuals" or in other words "the value of individual freedom." David M. Trubek, *Max Weber's Tragic Modernism and the Study of Law in Society*, 20 LAW & SOC'Y REV. 573, 588 (1986).

151. *See* WEBER, *supra* note 136, at 823.

152. *Id*. at 822.

153. KRONMAN, *supra* note 134, at 87–88 (citing WEBER, *supra* note 136, at 787).

154. *Id*. at 90.

155. *See generally* Emmanuel Melissaris, *Is Common Law Irrational? The Weberian 'England Problem' Revisited*, 55 N. IR. LEGAL Q. 378 (2004) (explaining that although England did not have a civil law system that would provide the highest level of predictability for capitalism to thrive, institutional factors build into its common law system provided sufficient predictability to allow capitalism to develop)..

Achieving this equilibrium is jurisdiction-specific and is tailored to the specific characteristics of each legal system.

Thus, the standard consistency theory does not belong only to legal systems with strong legislative power. It also has an equivalent in common law legal systems manifested in the common law rule of consistency.[156] Weber's treatment of the English common law has implications for consistency theory. As long as a system has an internal form of systematic lawmaking, that legal system is consistent, even if its lawmaking process does not conform to the most rigorous possible standard of unified and systematic promulgation of laws.[157]

B. NEO-WEBERIAN THEORY

Weber's theory is still relevant to normative analysis of legal systems. Although Weber did not make any normative claim about how law should be promulgated, Neo-Weberian theorists[158] used Weber's ideal models and his other empirical-historical works to determine future best practices and policies.[159] These scholars skipped over his complex and nuanced analysis, simplified his theory, and created theoretical shortcuts to create functional and policy-oriented legal advice for developing countries. The result was the adoption of the "One-Size-Fits-All" rule in reform policies based on the "ideal types of governance" in Weber's *Economy and Society*. Also, Weber's theory inspired the theories on "modernization" of societies, which are based on his argument about the impact of Protestant values on Europeans' actions and the impact of those values on the rise of capitalism. Furthermore, the current belief about "the correlation between modernity and democracy" is based on Weber's theory about the importance of modern bureaucracy.[160]

Neo-Weberian developmental efforts claim that they brought consistency to developing legal systems by introducing modern processes of lawmaking to traditional legal systems. These theories became the bases for the law and development movement, as well as newer attempts at good governance policies by developmental agencies, such as the World Bank, in the post-colonization era.[161]

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156. In common law systems, it is necessary to make a distinction between consistency in enforcement of law and consistency in making law. When a judge applies a rule to cases, she should treat like cases similarly. This is the rule of consistency in application of law. However, when a higher court judge modifies or overrules prior holdings based on a series of changes in the society or the context within the framework dictated by the precedent, she is following the rule of consistency in lawmaking. Even though they both are in place to fulfill the calculability of law, they differ in that consistency in applying a rule is also supported by egalitarian and moral aspirations about law. Consistency in lawmaking is forward-looking and is in place to ensure the calculability of the law in future cases.

157. *See generally* Sally Ewing, *Formal Justice and the Spirit of Capitalism: Max Weber's Sociology of Law*, 21 LAW & SOC'Y REV. 487 (1987) (reconciling the success of capitalism in non-civil law contexts).

158. Talcott Parsons (1902–1979) and Walter Rostow (1916–2003) were two of the most important Neo-Weberian scholars. Thomas, *supra* note 9, at 33–77.

159. Thomas concludes that these interpretations should be avoided. *Id.* at 113–15. She calls for re-reading Weber in the field of law and development. *See generally* Chantal Thomas, *Max Weber, Talcott Parsons and the Sociology of Legal Reform: A Reassessment with Implications for Law and Development*, 15 MINN. J. INT'L L. 383, 424 (2006).

160. Thomas, *supra* note 159, at 416–22.

161. *See* DAVID M. TRUBEK, *The "Rule of Law" in Development Assistance: Past, Present, and Future*, *in* THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL, *supra* note 95, at 74.

C. Legal and Historical Accuracy About Consistency in Non-Western Legal Systems

Scholars have extensively objected to Weber's characterization of Islamic law as arbitrary, unsystematic, non-unified, and inconsistent.[162] These scholars advance three main arguments. First, Weber's account of Islamic law was what he "imagined" Islamic law to be—an ultimately "fictitious" characterization of Islamic legal systems.[163] Weber was not alone in depicting Islamic law as an arbitrary legal system. He followed Richard Schmidt (1862-1944) who was the first to call Islamic law *kadi* (judge) *justice*, but Weber was the one who popularized the term.[164] Other scholars, including critics of Chinese orientalism, have also criticized this extensive reliance on orientalist accounts of non-Western legal systems that Weber presented and utilized to develop his ideal type.[165]

Second, Weber dismissed the *Mecelle* (*al-Majalla*), the Ottoman Empire codification of already existing opinions in Islamic law (*Hanafi* tradition), as not being a real code, writing that: "the Turkish Codex, which began to be promulgated in 1869, is not a Code in the true sense, but simply a compilation of Hanafite norms."[166] Thus, like other Islamic legal traditions, Weber characterized it as irrational. The Ottoman Empire legal system consisted of a mix of modern institutions and classical Islamic law, which indeed applied a codified body of law, albeit one based on Islamic law. According to Weber, Islamic law does not meet the characteristics of a rational formal law even if the state compiles it in the form of a code.[167]

Third, Weber failed to grasp rationality of Islamic law. Contrary to Weber's contention, Islamic law is "a prime example of innovative logically formal rationality."[168] For instance, the jurist-enabled evolution of contract law in Islamic law over time illustrates this characteristic. In the formation period of Islamic law, contracts transformed from oral announcements to "a juristic act created by an offer and acceptance formulated in the past tense and backed by intelligence (*'aql*) and will (*qasd*)." Later jurists developed each of the elements of innovative contract rules to provide a tool for

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162. *See* Intisar Rabb, *Against Kadijustiz: On the Negative Citation of Foreign Law*, 48 SUFFOLK U. L. REV. 343, 358, 361 (2015). Rabb argues that American judges, since the late twentieth century, refer to Kadijustiz for two purposes, neither of which are respectful: the first reference to Kadijustiz comes when a judge condemn the use of "interpretive discretion" to validate her own "textualist" approach; the second reference is to unconstitutional judicial activism indicating "substance-over-procedure decision-making." Both uses, she contends, are based on the belief that *Qadi* justice in Islamic law was arbitrary, valuing justice over law as well as substance over procedure.

163. *Id*. at 346. Said confirms this point: "Although he never thoroughly studied Islam, Weber nevertheless influenced the field considerably, mainly because his notions of type were simply an "outside" confirmation of many of the canonical theses held by Orientalists, whose economic ideas never extended beyond asserting the Oriental's fundamental incapacity for trade, commerce, and economic rationality." EDWARD W. SAID, ORIENTALISM 259 (1978).

164. *See* Rabb, *supra* note 162, at n.40 (citing BABER JOHANSEN, CONTINGENCY IN A SACRED LAW: LEGAL AND ETHICAL NORMS IN THE MUSLIM FIQH 48–49 (1999)).

165. *See, e.g.*, JEDIDIAH J. KRONCKE, THE FUTILITY OF LAW AND DEVELOPMENT: CHINA AND THE DANGERS OF EXPORTING AMERICAN LAW 200–01 (2016); TEEMU RUSKOLA, LEGAL ORIENTALISM: CHINA, THE UNITED STATES, AND MODERN LAW 12, 47 (2013).

166. WEBER, *supra* note 136, at 822.

167. *Id*.

168. John Makdisi, *Formal Rationality in Islamic Law and the Common Law*, 34 CLEV. ST. L. REV. 97, 98 (1985). *See generally* Jedidiah J. Kroncke, *Substantive Irrationalities and Irrational Substantivities: The Flexible Orientalism of Islamic Law*, 4 UCLA J. ISLAMIC & NEAR E. L. 41 (2005) (criticizing Weber's shallow conception of formal rationality in the context of Islamic law).

determining the validity of a contract in a variety of situations, including "the legal effect of incapacity," "non-serious declaration made as a joke," and "a contract formed under the threat of violence."[169] "A system governed by extrinsically formal rationality would not have attempted to reconcile the legal effects of these declarations . . . Terms were defined and redefined until a structure was finally evolved in which the elements of the formation of a [contract] were satisfactorily settled."[170] In a nutshell, Weber did not use the right methodology; otherwise he would have been able to observe the rationality of Islamic law.[171]

VI. THE CONFLICT THEORY AND THE CRITERIA FOR CONFLICT RESOLUTION MECHANISMS

Tension is unavoidable because of the pluralistic nature of modern hybrid Islamic legal systems: traditional norms exist parallel to the new expectations and demands of the society. Unless there is a mechanism managing the interactions between these two realms, the matter would be left to the discretion of the legislature or the courts to handle ad hoc. In the absence of a set of standards for tackling the conflicts, the body in charge will have the ultimate power to decide the outcome of the fundamental issues that implicate the people's religious convictions on the one hand and their prosperity and welfare on the other. No one should be trusted with such unfettered discretion. An absolute authority over the outcome of tensions between tradition and modernity with no minimum substantive or procedural requirement would create a chance of corrupting the system; the governing entity could ignore one interest in favor of the other with no method by which they could be held accountable.

Consistency of a legal system in managing the elements that are required to guarantee compatibility of its laws with local norms and their adaptability to change helps the state safeguard its legitimacy and the legitimacy of its laws. There are two dimensions to the modern Islamic state's quest for legitimacy: A modern Islamic legal system is in dire need of a credible system of checks and balances to ensure that its acts comply with Islamic law. It must also adopt a *reasonable* system of enforcing Islamic law to be able to survive in a world in which extremism and the denial of minimum rights, either social and economic or political and cultural, are frowned upon and would inevitably lead to people's dissatisfaction with their legal system. A transparent system that is able to balance and weigh these two sets of considerations sensibly and soundly against each other is indeed a must. Otherwise, a modern Islamic state compromises its growth by risking people's non-compliance with laws.

All legal systems experience some form of legal pluralism, from early modern empires, like the Ottoman Empire, and colonized communities, like

169. Makdisi, *supra* note 168, at 109–11.

170. *Id.* at 112.

171. *See* Patricia Crone, *Weber, Islamic Law, and the Rise of Capitalism*, *in* MAX WEBER & ISLAM 247, 255–56 (Toby E. Huff & Wolfgang Schluchter eds., 1999). *But cf.* BRYAN S. TURNER, WEBER AND ISLAM: A CRITICAL STUDY 120 (1974) (agreeing with Weber that Islamic law did not have formal rationality, but criticizing Weber's ultimate conclusion, arguing that "it is not clear whether rational law is a necessary pre-condition of capitalism or merely a common pre-condition").

Native Americans, to the laws of the colonial powers and the post-colonial American legal systems.[172] Legal pluralism, defined "as a situation in which two or more legal systems coexist in the same social field," even existed in indigenous laws that have experienced and were shaped by the influence of different legal orders.[173] Coexistence of different legal regimes clarifies neither what their relationship to one another is nor how they are to be treated in relation with each other. Repugnancy clauses in colonial laws were a way of solving the problem of the uncertain relationship between parallel legal regimes. Repugnancy clauses allowed local laws to be enforced unless they were in contradiction with the recognized fundamental values of the colonial powers, including justice and fairness.[174]

The rules of hierarchy of legal regimes that coexist in a society define the scope of each regime and set a conflict resolution mechanism in case a tension arises. The ex-ante rules of hierarchy should be open to debate because they determine the values that law protects in a legal system and determines the legal philosophy and doctrines that shape it. One of the extreme forms of controlling the regimes that exist parallel to the state law could be adopting a Hartian positivist view of law that only recognizes the authority of "other" legal regimes if they are formally incorporated into the state law or govern areas in which people and the courts are authorized by the state to follow them.[175] For example, the Iranian legal system adopted a Hartian positivist view, only recognizing the authority of Islamic law that is incorporated into the official state law or in rare cases where the law is silent or vague.

The dominance of the state law in a pluralist legal system has been associated with failure of development efforts mainly because of people's lack of respect and compliance with the state law and failures of "the rule of law" projects in recognizing the influence of non-state legal regimes on people's everyday lives.[176] The logical solution would be to adopt the approach that *any* developmental effort should consider the existing informal legal regimes that govern the affairs on the ground. However, that has proven to be complicated and inefficient.[177] In the absence of an internal mechanism for managing the relationship between different legal regimes, it is difficult to deal with a pluralist legal system, especially in areas in which two or more

172. Lauren Benton, *Historical Perspectives on Legal Pluralism*, *in* LEGAL PLURALISM AND DEVELOPMENT: SCHOLARS AND PRACTITIONERS IN DIALOGUE 21, 22–25 (Brian Z. Tamanaha et al. eds., 2012); Sally Engle Merry, *Legal Pluralism*, 22 LAW & SOC'Y REV. 869, 872–74 (1988).

173. Merry, *supra* note 172, at 870.

174. *Id*.

175. *See supra* Section III.B.

176. Gordon R. Woodman, *The Development "Problem" of Legal Pluralism: An Analysis and Steps toward Solutions*, *in* LEGAL PLURALISM AND DEVELOPMENT: SCHOLARS AND PRACTITIONERS IN DIALOGUE, *supra* note 172, at 129, 130 (arguing that legal pluralism is not problematic for development efforts, but it requires international development agencies to engage with the entirety of a legal system). *See generally* Stephan Haggard et al., *The Rule of Law and Economic Development*, 11 ANN. REV. POL. SCI. 205, 205–34 (2008) (explaining the influence of formal and informal institutions on the rule of law); Helene Maria Kyed, *Introduction to the Special Issue: Legal Pluralism and International Development Interventions*, 63 J. LEGAL PLURALISM & UNOFFICIAL L. 1, 1–23 (2011) (introducing the core of the articles in the special issue to be "a critical stance towards state-centric and legalistic models of intervention and reform" explaining the changes in the attitudes of international agencies towards legal pluralism).

177. Woodman, *supra* note 176, at 131–32.

regimes are (or are perceived to be) applicable.[178] That is why the state should be held accountable to adopt a system of conflict resolution if its population is keen to preserve its traditional norms while achieving economic growth.

Understanding how pluralist legal systems handle the conflicts they experience could be a good starting point for modern Islamic states.[179] In addition, in order to flesh out the nuances of conflict resolution and how they might affect individuals and businesses, it is helpful to compare and contrast systems relying on conflict resolution as part of the legislative process with those that choose a judicial review system.[180] It is also important to note that a state may never be able to eradicate conflict: how well a legal system manages conflict matters for its economic growth. The first criteria that a conflict resolutions system must meet is efficiency.[181] An efficient system settles conflicts in a timely manner within a reasonable number of attempts. Also, in order to ensure the desirability of the outcomes of the conflict resolution mechanism, it is important to safeguard its accountability. Accountability allows for representation of people in the process as well as responsiveness of the legislature or courts that are in charge of handling the conflicts.[182]

178. Another aspect of the relationship between legal pluralism and religion is dealing with the case of individuals' rights to religion in secular legal systems or the right to have *Sharīʿa* courts in a non-Muslim or a diverse country. Amina Hussain, *Legal Pluralism, Religious Conservatism*, *in* RELIGION AND LEGAL PLURALISM 151, 151–160 (Russell Sandberg ed., 2015).

179. *See generally* Paul Schiff Berman, *Jurisgenerative Constitutionalism: Procedural Principles for Managing Global Legal Pluralism*, 20 INDIANA J. GLOBAL L. STUD. 665 (2013) (developing a series of principles for constitutions to follow when resolving conflicts in a pluralist legal system: an important principle is to develop "procedural mechanisms, institutions, and practices for managing pluralism").

180. I only engage with the conventional legislative and judicial lawmaking processes. I simplify the models of lawmaking available to Islamic states to examine the necessary criteria for incorporation of Islamic law into a legal system; not to exclude the "unorthodox" lawmaking processes. For examples of the common "unorthodox" lawmaking processes, see generally Abbe R. Gluck et al., *Unorthodox Lawmaking, Unorthodox Rulemaking*, 115 COLUM. L. REV. 1789 (2015) (arguing that the lawmaking processes are evolving and becoming more "unorthodox," i.e., non-traditional, and examining a variety of examples of the trending and popular processes). For a discussion of presidential lawmaking as an example of "unorthodox" lawmaking processes, see Abner S. Greene, *Checks and Balances in an Era of Presidential Lawmaking*, 61 U. CHI. L. REV. 123, 123–96 (1994). For an analysis of the challenges that the courts face in interpreting laws deduced through unorthodox lawmaking processes, see Abbe R. Gluck, *Imperfect Statutes, Imperfect Courts: Understanding Congress's Plan in the Era of Unorthodox Lawmaking*, 129 HARV. L. REV. 62, 62–111 (2015).

181. *Cf.* Mario J. Rizzo, *The Mirage of Efficiency*, 8 HOFSTRA L. REV. 641 (1980) (arguing that determining efficiency in any area of law and lawmaking is almost impossible due to the high volume of information that is necessary to make such a determination in each case). *See generally* Brooke D. Coleman, *The Efficiency Norm*, 58 B.C. L. REV. 1777 (2015) (advocating for efficiency in litigation and legislation, as well as differentiating it from cost).

182. *Cf.* Cynthia L. Fountaine, *Lousy Lawmaking: Questioning the Desirability and Constitutionality of Legislating by Initiative*, 61 S. CAL. L. REV. 733, 733–76 (1988) (arguing that individual's direct involvement in lawmaking, i.e., direct democracy, is harmful because it undermines lawmaking for the purpose of enhancing the public interest). *See generally* Lisa O. Monaco, *Give the People What They Want: The Failure of "Responsive" Lawmaking*, 3 U. CHI. L. SCH. ROUNDTABLE 735, 737–44 (1996) (distinguishing between representation and responsiveness and arguing that the Framers preferred representative democracy over responding to individual's direct demands, which is a popular method in the Congress now, known as "phone call democracy").

A. CONFLICT IN LEGISLATION V. ADJUDICATION: EX ANTE REVIEW V. EX POST REVIEW

Modern Islamic states have the option of incorporating Islamic law into their legal systems through either a legislative mechanism or a court (either the highest court or a court with subject-matter specialization) with the authority to review compliance of laws with Islamic law on a case-by-case basis. Determining which system would be "more successful" would require a comprehensive comparative study of the legal systems of the countries that have adopted each mechanism.[183] That line of inquiry is not the subject of this project. Instead, this project focuses on fleshing out the challenges that hybrid Islamic states face. Nevertheless, it is informative to highlight the advantages and disadvantages of each of these models of incorporation of Islamic law.

Having a legal system with a legislative incorporation of Islamic law has two advantages. First, conflicts would be settled in the lawmaking process and the promulgated laws are certain and final. It is easier for the lawyers to calculate the reasoning and options available to the court in case a dispute arises among individuals about an ambiguous piece of legislation. Certainty and calculability of such a system facilitate meeting the consistency requirement.[184] Second, democratic representation in the legislature makes the process of ensuring compatibility and adaptability more democratic and open. People and different interest groups get the chance to lobby for their preferences, especially if the process of determination of compliance of laws with Islamic law is conducted by a democratically elected group of experts who have the chance to deliberate openly and transparently and to negotiate with other members of the legislature.[185]

Nevertheless, a legislative process has its disadvantages. The first downside is that in the absence of an ex post review system, it is harder for individuals and businesses to challenge a piece of legislation in a fast and effective manner. They would have to persuade the legislature to modify the law or pass a new law, which can be costlier and harder depending on the political structure and the constitutional checks and balances in place.[186] The second disadvantage is that the changes in the law usually occur much more slowly than changes in society.[187] There could be a huge gap between the

183. Modern Islamic states are no longer new to making constitutions. They have access to the knowledge and experiences of other systems and should benefit from them. For a note on limitations that people usually face when making a constitution, see Donald L. Horowitz, *Constitution-Making: A Process Filled with Constraint*, 12 REV. CONST. STUD. 1, 1–17 (2006) (identifying "the knowledge problem" as one of the main obstacles in drafting "reasonably apt" constitutions).

184. *See supra* Part V.

185. *See generally* Jeremy Waldron, *Representative Lawmaking*, 89 B.U. L. REV. 335 (2009) (arguing that legislatures enjoy more legitimacy than judges in their lawmaking. Waldron identifies four features of legislatures that put them in a better position than judges: legislatures are democratic institutions, have transparent dedication to lawmaking, consist of large numbers of individuals involved in the lawmaking process, and are representative assemblies).

186. For a discussion on the possible consequences of stalemate in the legislature, see generally Josh Blackman, *Gridlock*, 130 HARV. L. REV. 241 (2016); Michael J. Teter, *Congressional Gridlock's Threat to Separation of Powers*, 2013 WIS. L. REV. 1097, 1097–1160 (2013); Michael J. Teter, *Gridlock, Legislative Supremacy, and the Problem of Arbitrary Inaction*, 88 NOTRE DAME L. REV. 2217, 2217–32 (2013).

187. Environmental law has been an area in the American legal system that has been affected by the legislative gridlock. *See, e.g.*, Thomas O. McGarity, *Avoiding Gridlock Through Unilateral Executive Action: The Obama Administration's Clean Power Plan*, 7 WAKE FOREST J. L. & POL'Y 141 (2017)

level of religiosity of individuals or the community or their willingness to adhere to the non-determinate rules of Islamic law on the one hand and what the state positive laws reflect on the other. This is especially a challenge in ensuring compatibility of the laws with Islamic law as practiced and believed by the community at the time.

Conflict resolution through a system of judicial review is another option for a modern Islamic state. There is an advantage to allowing the courts to review the compliance of laws with Islamic law. An institutional separation between the entity in charge of ensuring compatibility of laws with Islamic law and the body that should guarantee their adaptation to modern realities allows for more robust Islamic law review, giving Islamic law more authority and independence from the state law.[188] The legislature would be in charge only of promulgating laws as any other lawmaking body would: considering public policy and the interests of people. The judiciary would have the authority to review instances of alleged contradiction of laws with Islamic law, allowing the courts to develop precedent by judicial review and direct involvement of individuals.[189] There is an important disadvantage to such a system, however. The judiciary is not well equipped to address policy issues that need a holistic review of expert opinions.[190] In the absence of a deliberative process that the legislatures usually provide, complex questions of policy might be sacrificed in favor of dominance of religious conviction or vice versa, depending on the composition of the court.

One suggestion to elide the two options could be to have a dual system of incorporating Islamic law into the legal system through the legislative power but allowing judicial review by the highest court in cases of either individuals' disagreement with the legislature or individuals' claims that the law has infringed upon Islamic law values or principles. Such a dual system would be able to benefit from the advantages of both systems, especially if its institutional structure and the scope of authority of each institution are designed with utmost care for all these considerations.[191]

The procedure of resolving the conflicts should be efficient and the outcomes should be fair. To achieve fairness, the state should guarantee

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(identifying this problem and explaining the unsustainability of relying on presidential lawmaking to address the regulatory needs in this area). For a discussion on the Congress's solution to its gridlock in areas that require quick policy and legal responses, see Michael J. Teter, *Recusal Legislating: Congress's Answer to Institutional Stalemate*, 48 HARV. J. LEGIS. 1 (2011) (arguing that the U.S. Congress has developed "recusal legislating" processes to expedite lawmaking in certain areas by delegating legislation to non-administrative agencies established by Congress for the specific purpose of legislation and developing a particular policy).

188. *See* MOUSTAFA, *supra* note 29, at 106–11, 118–77 (illustrating how the independence of the Supreme Constitutional Court of Egypt—also in charge of hearing "Islamic challenges to secular laws"—from the state facilitated its role in boosting economic growth in Egypt by protecting property rights).

189. *See, e.g.*, Christa Rautenbach & Willemien du Plessis, *African Customary Marriages in South Africa and the Intricacies of a Mixed Legal System: Judicial (In)*novatio *or* Confusio*?*, 57 MCGILL L.J. 749 (2012) (examining the judicial innovations in South Africa to settle conflicts between transplanted and indigenous marriage laws. According to Rautenbach & du Plessis, the courts rely on legal positivism, common law principles, and transformative constitutionalism that allow judges to use progressive interpretation of constitutional provisions to protect individual rights to manage the conflicts).

190. *See generally* Kimberly L. Wehle, *Defining Lawmaking Power*, 51 WAKE FOREST L. REV. 881 (2016) (discussing the relationship between administrative agency rule-making and judicial review).

191. In such a system, higher courts are in charge of overseeing the lower courts. *See* Amnon Lehavi, *Judicial Review of Judicial Lawmaking*, 96 MINN. L. REV. 520, 526–83 (2011) (expanding on the role of courts as lawmakers in the American legal system and arguing that superior courts protect judicial lawmaking from "judicial wrongs").

accountability of the system in the process; to safeguard the efficiency of the system, the process should be able to resolve the conflicts within a reasonable amount of time and at a reasonable pace.

B. ACCOUNTABILITY

A hybrid Islamic legal system should ensure the accountability of its conflict resolution system in the process of resolving conflicts.[192] In this context, accountability entails responsiveness of the process to two social factors: one, the variation of views among different segments of the society, and two, the changes that people experience in their level of religious conviction over time. A gap between constituents' views and the state's desire to adhere to religious mandates endangers compatibility of the laws with local values. That is why the Islamic state must consider the diversity of views among the Muslim population as well as the views of its religious minority populations.[193] Similarly, if a shift in people's beliefs is not reflected in the laws, the laws lose their compatibility with indigenous norms. If the population is becoming secularized or more religious, the state's insistence on retaining the same level of adherence to religious norms will lead to divergences between the laws and local values.[194] The conflict resolution mechanism should be able to capture these variations and remain in line with them over time.

C. EFFICIENCY

Efficiency is an important factor in resolving the conflicts and is one way through which conflicts may affect economic growth. Delay in promulgating a much-needed law in order to resolve disagreements over its compliance with Islamic law is detrimental to economy, considering the rapid succession of events in modern-time economy. Thus, part of the design of a successful conflict resolution system is the efficiency of the process. The time and the number of attempts it takes for a tension to be settled are the two key elements; the system should be able to manage the conflicts within a reasonable period of time and without excessive repetition.[195]

A common reaction to the push for alacrity in settling the conflicts is that spending more time and deliberating longer, especially over hard cases, could mean that the body in charge is doing its job with more scrutiny and care. Scrutiny and care are valuable approaches and should be adopted by any institution charged with such a crucial duty. However, the conflict resolution body should not *always* sacrifice time and resources for the sake of scrutiny. Both efficiency and scrutiny are valuable, and each must be balanced against the other.

In evaluating the efficiency of a conflict resolution system with an ex post review, it is easier to observe the number of cases and the time it takes

192. *See generally* Glen Staszewski, *Reason-Giving and Accountability*, 93 MINN. L. REV. 1253 (2009) (identifying different types of accountability, i.e., political and deliberative accountability, and the consequences of safeguarding each for individual rights).

193. *See supra* Section III.B.

194. *See* ABOU EL FADL, *supra* note 66, at 52.

195. For a general discussion on the desirability of efficiency, see Alvin B. Rubin, *Bureaucratization of the Federal Courts: The Tension Between Justice and Efficiency*, 55 NOTRE DAME L. REV. 648, 648–59 (1980).

the court to decide them. In a system with an ex ante review, depending on how transparent the process of lawmaking is, it might be tricky to observe and record the conflicts and how long it takes to resolve them.[196] This difficulty is mainly due to the fact that there might be several objections in the process at different stages of drafting and deliberations over a law that delay the process without being recorded. To make it easier to observe and keep a record of objections, the body in charge of an ex ante review to ensure compatibility of laws with Islamic law should be independent.[197]

VII. CONCLUDING REMARKS

Hybrid Islamic legal systems are prone to conflicts that arise between traditional norms and modern realities in their laws at the legislative or adjudicative stage. In a state with economic aspirations, the obligation to safeguard compatibility of laws with Islamic law, as well as their adaptability with modern considerations, restrains the state from ignoring one consideration in favor of the other. Additionally, in order to ensure calculability, the laws created as the result of weighing and balancing these considerations should be consistent, in the sense that they should systematically follow certain known principles. The requirement of consistency of the laws prevents the state from arbitrarily resolving conflicts without regard for like cases. An Islamic state would need to design a conflict resolution system in order to be able to guarantee consistency of its legal system while ensuring its compatibility with Islamic law and adaptability of its laws with modernity. Also, any tension between traditional norms and modern realities that is not immediately and clearly settled and is left to further speculation and ambiguity threatens consistency of the legal system. To achieve the optimum results and prevent delay of responses to economic demands, such a conflict resolution mechanism should be efficient, settling the tensions within a reasonable period of time and with as minimal effort as possible. It should also produce fair laws by adopting an accountable process that has the capability to represent variations in religious devotion among Muslims and religious minorities as well as the changes in religious observance in society over time.

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196. For a discussion on the costs associated with transparency in governance, see generally Andrew Keane Woods, *The Transparency Tax*, 71 VAND. L. REV. 1 (2018).

197. This institutional arrangement is similar to that of a bicameral legislature, like the United States Congress. For a discussion on the "values and purposes" of a bicameral Congress, see Neomi Rao, *Why Congress Matters: The Collective Congress in the Structural Constitution*, 70 FLA. L. REV. 1, 45–50 (2018) (arguing that bicameralism, *inter alia*, offers a greater and more diverse representation, separate and more elaborate deliberations on each bill as well as an internal system of checks and balances between different interests in policymaking).