
The Challenges of Islamic Law Adjudication in Public Reason

MOHAMMAD H. FADEL

I The Idea and Ideal of Public Reason and the Problem of Islamic Law Adjudication

John Rawls explains his turn to political liberalism¹ as motivated by the need to give a more satisfying account of what he comes to see as a defining sociological feature of a democratic society governed by free institutions: the enduring “fact of reasonable pluralism.” The fact of reasonable pluralism is based on the assumption that when a well-ordered society is governed by free institutions that guarantee the familiar liberties, including freedom of thought, even reasonable citizens will be divided by incompatible religious, moral, and philosophical doctrines. Accordingly, the central question posed in *Political Liberalism* is how a well-ordered constitutional democracy, one that is effectively regulated by fair principles of justice guaranteeing both democracy and individual liberty, such as Rawls’s own principles, could endure over time, given the persistence of these deep doctrinal divisions.²

Rawls argues that such a society can only be well-ordered and stable if the citizens, despite their doctrinal divisions, share a common political conception of justice that governs their basic structure. In order for such a political conception to arise and endure, however, Rawls argues that it must be a free-standing conception of political justice. By this, he means that the political conception cannot be justified by reference to the terms of any particular comprehensive doctrine, such as comprehensive liberalism; rather, it must be appropriately limited, both in its scope and its metaphysical claims, so that the adherents of any reasonable comprehensive doctrine could endorse it, using resources internal to their own comprehensive doctrines.

¹ J. Rawls, *Political Liberalism* (New York: Columbia University Press, 1996).

² *Ibid.*, p. xx.

The free-standing nature of the political conception flows from the requirement that the basic structure of the well-ordered society must be reasonably acceptable to all reasonable citizens. Rawls himself thinks that the best way to specify the content of this free-standing political conception would be to determine what principles of justice, and terms of cooperation, representatives of free and equal citizens would agree to in an original position from behind a veil of ignorance. Insistence on the veil of ignorance ensures that the parties cannot privilege themselves or their preferred comprehensive doctrines in the basic structure of the political conception. Given this condition, Rawls argues that they would only choose principles of cooperation that all reasonable persons could endorse and would reject any political conception derived from, and acceptable to, only a particular comprehensive doctrine.

Such an agreement would not amount to a full rational consensus, but would result, in Rawls's analysis, in a political conception supported by an "overlapping consensus" of the citizens. Where an overlapping consensus on a political conception of justice exists, a majority of the politically active members of the citizenry adhere to the principles of justice, either because they see the principles of justice as continuous with their respective comprehensive doctrines or, at a minimum, not in conflict with them. Justification based on this overlapping consensus, Rawls argues, makes it possible for political justification to be based on reasons that no reasonable citizen could reasonably reject, in spite of the persistence of reasonable pluralism.³

The overlapping consensus accounts for why the political conception can remain stable despite continued disagreements on ultimate questions, and why it is sufficient to generate enduring trust and civic friendship among the otherwise divided citizenry. The sociological balance of power among the followers of different doctrines becomes a matter of political indifference because a critical mass of citizens endorses the principles of justice for moral reasons internal to their own conceptions of the good. The polity's principles of justice will not change if the balance of power among society's different comprehensive doctrines changes.

In this chapter I show that Rawls's political liberal idea of public reason offers a way of thinking about what the place of Islamic law can be in the judicial system of a democratic society. When Muslims endorse

³ Rawls refers to this mode of political justification, in the abstract, as "the idea of public reason," and when citizens and public officials manifest it in their political practice, he refers to it as "the ideal of public reason." J. Rawls, "The Idea of Public Reason Revisited," *University of Chicago Law Review*, 64 3 (1997), 768–769.

conceptions of Islam that are reasonable from a Rawlsian perspective, or at least as reasonable as adherents of other religious and nonreligious comprehensive doctrines, Muslims and non-Muslims will see that Rawlsian political liberalism provides an important framework for showing how Islam can be compatible with liberal democracy and thus counter irrational fear of Islam and Muslims that has spread in many democratic societies.

The compatibility of Islam and Rawls's interpretation of liberal democracy may not seem obvious. Rawls's conception of a well-ordered democracy requires it to be effectively governed by principles that all reasonable citizens can reasonably endorse. Only some citizens in a well-ordered society governed by Rawls's principles of justice, however, will be Muslims. Yet, orthodox Islam sees Islamic law as the true measure of justice that, from a moral perspective at least, binds all of humanity. Yet, under the conditions of a well-ordered society, it is unreasonable to expect that every citizen would agree to be bound by the entirety of Islamic law. Religion, even when reasonable, is for Rawls a paradigmatic case of a controversial doctrine that cannot be used for political justification because its doctrines are not shared by all reasonable citizens. It seems obvious, therefore, that there cannot be a political or legal place for Islamic law in a liberal democracy in Rawls's ideal theory,⁴ except to the extent that Islam and Islamic law may play a legitimate role in the personal and associational lives of Muslim citizens of a well-ordered society.

It is an empirical fact, however, that numerous states incorporate elements of Islamic law in their formal legal systems. Some states do so as part of their constitutional law, while others may adopt elements of Islamic law in particular statutes. Even courts in liberal democracies without a Muslim majority are sometimes required to apply Islamic law norms, such as in cases involving principles of private international law, or when the parties appearing before the court have incorporated Islamic law norms in their private agreements. This chapter explores, from the perspective of nonideal theory, how a public reason-minded judge should approach issues of Islamic law. I argue that Rawls's idea of public reason can play an important role in guiding how public reason-minded judges should apply Islamic law when the rules of their legal system require them to do so. When they resolve legal questions related to Islamic law in this fashion, their decisions will manifest the ideal of

⁴ Rawls, *Political Liberalism*, p. 213 (describing public reason as an ideal, representing "how things might be").

public reason and, in the context of nonideal theory, will serve to resolve or reduce any tensions, real or perceived, between the substantive requirements of public reason and historical doctrines of Islamic law.

The chapter proceeds as follows: I begin with a discussion of the content of public reason, its relationship to the judiciary in nonideal theory generally, and Rawls's claim that the judiciary has a special duty to uphold the principles of public reason. I then discuss the relationship between public reason and Islamic law, understood as a historical body of metaphysical principles and substantive legal rules. I will then argue that because Islam as a comprehensive doctrine distinguishes between metaphysical commitments and the political values vindicated by particular rules of law, courts can legitimately distinguish between Islamic theological commitments and the political values implicit in the substantive rules of Islamic law. Moreover, I argue that coercive application of a substantive rule of Islamic law is consistent with public reason if the political value vindicated by Islamic law is otherwise consistent with the norms of public reason. I then proceed to discuss, briefly, a series of cases from different jurisdictions where courts, when called on to construe either particular rules of Islamic law, or Islamic law generally, failed to manifest the ideal of public reason in their decisions, with negative results. A brief conclusion follows.

II Public Reason and the Role of the Judiciary in Nonideal Theory

In Rawls's ideal theory, reasonable citizens are motivated to limit themselves to arguments that satisfy the requirements of public reason. However, in the real world, the world of nonideal theory, citizens and politicians frequently stray from the ideal of public reason. Rawls is not always clear as to whether the idea of public reason applies only to "constitutional essentials and matters of basic justice"⁵ or whether it applies also to "ordinary" political decisions and ordinary citizens in the polling station.⁶ Whatever ambiguity Rawls presents with respect to

⁵ Ibid., p. 214 (describing limits of public reason as applying only to "political essentials").

⁶ Ibid., p. lvi (stating that "the outcome of a vote is to be seen as reasonable *provided* all citizens of a reasonably just constitutional regime sincerely vote in accordance with the idea of public reason) (emphasis added); Rawls, "The Idea of Public Reason Revisited," 769 (stating that citizens realize the ideal of public reason when they vote as though "they were legislators and ask themselves what statutes, supported by what reasons satisfying the criterion of reciprocity, they would think it most reasonable to enact").

the scope of public reason's applicability, he is absolutely clear that judicial bodies are duty-bound to manifest the ideal of public reason in their decisions interpreting the constitution,⁷ and that the idea of public reason thus applies in a special way to supreme court judges with constitutional review powers.⁸

Constitutional democracies distinguish between a higher constitutional law and ordinary law, which must be made in accordance with the procedures and values of the constitution. Rawls characterizes this type of regime as a dualist democracy that distinguishes "the higher law of the people from the ordinary law of legislative bodies."⁹ The written constitution of a constitutional democracy is seen as an expression of the will of a particular people and the political ideas and values that they share at a particular moment in time. It provides the specific content for the basic structure of their regime. Moreover, it also sets the conditions for the ordinary laws that govern society. Actual written constitutions, however, may not fully reflect the idea of public reason, either because some of its express provisions are inconsistent with the idea of public reason,¹⁰ or because certain basic liberties are insufficiently specified.¹¹ It is therefore of particular importance that supreme court judges who interpret and apply a written constitution that emerged from an actual constitutional bargain, rather than the original position, do so in a fashion that manifests the ideal of public reason.¹² According to

⁷ *Ibid.*, 767–768.

⁸ Rawls, *Political Liberalism*, p. 231 (a supreme court in a constitutional democracy is "the exemplar of public reason"). Rawls briefly mentions, but does not consider in any depth, the alternative models of Westminster parliamentary democracy, or German constitutional practice. *Ibid.*, pp. 234–235.

⁹ *Ibid.*, p. 233.

¹⁰ The bicameralism of the US Constitution, for example, is inconsistent with public reason's requirement that all citizens have an equal share in sovereignty insofar as it affords each state two votes in the senate, regardless of the state's population.

¹¹ The Bill of Rights of the US Constitution, from the perspective of public reason, is also deficient insofar as it underspecifies both certain political liberties by relying on vague references to concepts such as "due process of law," and is indifferent to issues of distributive justice.

¹² The differing approaches to the judicial understanding of "liberty" in the US Constitution makes this problem clear: Conservative justices such as the late Antonin Scalia insist on delimiting vague constitutional provisions, such as the notion of "liberty" or "cruel and unusual" to the historical uses of such terms at the time the relevant provision was first adopted, while a justice motivated by the idea of public reason would instead interpret such terms by consideration of the reasonable balance of political values such terms might mean from the perspective of parties in the original position rather than adopting solely the perspective of the provisions' authors.

Rawls, supreme court judges should appeal only to what they sincerely see as the most reasonable political values, values that they also “believe in good faith . . . that all citizens as reasonable and rational might reasonably be expected to endorse.”¹³ Rawls thinks that supreme court judges are well equipped relative to other branches of the government to manifest the ideal of public reason: Institutionally, their role is to give a coherent interpretation of the constitution and to protect its integrity, unlike other public officials who must incorporate in their decisions a range of other political considerations, and are more susceptible to the logic of power politics and electoral pressure.

Accordingly, they must be conscious of deciding cases and controversies solely on the basis of legal rules and political values acceptable to all reasonable citizens, not on the basis of nonpublic reasons, be they sincerely held comprehensive doctrines or venal, corrupt ones.¹⁴ If the ideal of public reason does not constrain ordinary citizens and politicians in day-to-day retail politics, it must be because if their exercise of political power strays beyond constitutional limits, construed in conformity with the idea of public reason, a properly motivated judiciary will invalidate their actions.¹⁵ When supreme court judges reliably and regularly decide cases and review ordinary laws in this fashion, they help realize the ideal of public reason, establish and deepen a reciprocally acceptable basis for the constitutional regime, and act as “exemplars” of public reason.¹⁶

Rawls’s description of the role of supreme courts makes most sense as part of his nonideal theory. Yet, his use of public reason to anchor the duties of courts makes it clear that, in *Political Liberalism* at least, he envisions courts as playing a crucial role in adopting, extolling, and entrenching, over time, reasonable political values among a constitutional democracy’s actual citizens, at least as compared to elected politicians. By publicly defending the political values of public reason, courts simultaneously protect the integrity of the constitutional order and instruct the citizens about the values of public reason. Even so, however, Rawls admits that even the most publicly motivated judiciary cannot stand in the face of a democratic majority determined to undermine one or more facets of public reason.¹⁷ The content of public reason, therefore, always exists beyond the practice of

¹³ Ibid.

¹⁴ Ibid., pp. 231–234.

¹⁵ Ibid., p. 235.

¹⁶ Ibid.

¹⁷ Ibid., p. 233.

ordinary politics, serving as a normative anchor to guide citizens and public officials moved by its values, but with no guarantees that even in constitutional democracies its values will actually prevail.¹⁸

I discuss my conception of the relationship between Islamic law and public reason in the context of judicial practice in the next section. My argument assumes a normative determinacy to public reason as determined by ideal theory, but also that this content is modulated in nonideal theory as a result of the unique constraints facing judges who operate in distinctive judicial systems where actual constitutional bargains force certain departures from the idea of public reason.

III Islamic Law, Courts, and Public Reason

Rawls's ideal theory clearly excludes religious reasons as admissible justifications for public law. Even though nonreligious reasons may also be inadmissible from the perspective of public reason due to their complexity or esoteric nature, it is nevertheless the case that religious reasons represent a paradigmatic case of what Rawls calls nonpublic reason. Religious reasons are nonpublic for at least two reasons: First, because of the comprehensive nature of many religions, Islam included, their claims go far beyond the domain of the political;¹⁹ and second,

¹⁸ Ibid. Rawls's account of the relationship of public reason to judicial practice in constitutional democracies, even if it is accepted that it is part of his nonideal theory, entails an understanding of public reason as essentially invariable and whose positive content is understood from the perspective of ideal theory. His discussion of public reason in "The Idea of Public Reason Revisited" seems to allow, however, for a certain kind of pluralism in the precise manifestations of public reason in different democratic polities. Rawls, "The Idea of Public Reason Revisited," 773–775. While he is careful to limit the possible plurality within public reason to political conceptions that satisfy the "criterion of reciprocity, viewed as applied between free and equal citizens, themselves seen as reasonable and rational," *ibid.*, 774, his inclusion of Israel and India as examples of states governed in a fashion broadly consistent with public reason is puzzling. See, e.g., Y. Peled and D. Navot, "Ethnic Democracy Revisited: On the State of Democracy in the Jewish State," *Israel Studies Forum*, 20 1 (2005), 3–27, 4 (arguing "that the Israeli state has been evolving from a state resembling non-democratic ethnocracy, through ethnic democracy, toward non-democratic majoritarianism"); O. Yiftachel, "Democracy or Ethnocracy," *Middle East Research and Information Project*, 28 (1998), available at www.merip.org/mer/mer207/democracy-or-ethnocracy; and A. Mishra, "India's Non-Liberal Democracy and the Discourse of Democracy Promotion," *South Asian Survey*, 19 1 (2012), 35 (arguing that although India had liberal democratic aspirations at independence, its subsequent political evolution has produced a nonliberal democracy).

¹⁹ Rawls describes moral/philosophical conceptions as comprehensive when they include conceptions of what is valuable in human life, ideals of personal character, etc., with the limit being the entire range of values in human life. Rawls, *Political Liberalism*, p. 13. As

even when a religion's claims are properly political, they are likely to be justified on metaphysically controversial grounds that are not reasonably accessible to all reasonable citizens.²⁰ For these reasons, liberal theorists tend to be particularly vigilant with respect to the possible intrusion of illegitimate religious reasons into the public sphere, even though nonreligious comprehensive moral and philosophical doctrines, including political ideologies, can also undermine the liberal public sphere.²¹

Political liberals' historical wariness of religion in the political sphere makes it that much more difficult to situate Islamic law in a judicial system that Rawls expects to act as the final barrier against unreasonable politics. Whatever objections public reason might raise to the public enforcement of Islamic law in ideal theory, however, Islamic law has historically been one of the most important of the world's legal systems, and has been recognized as such.²² Islamic law continues to be salient in various Muslim-majority²³ and non-Muslim-majority jurisdictions

noted by Andrew March, Islam might be considered, in Rawlsian terms, a "comprehensive ethical doctrine' *par excellence*." A. March, "Islamic Foundations for a Social Contract in Non-Muslim Liberal Democracies," *American Political Science Review*, 101 2 (2007), 236; See, also, Ibn Khaldūn, *An Introduction to History: The Muqaddimah*, translated by F. Rosenthal, abridged and edited by N. J. Dawood (London: Routledge and Kegan Paul, 1967), p. 155 (contrasting the regime of the Islamic caliphate to one based on rational politics in that the caliphate secures human happiness in both this life and the one to come, while a regime based on rational politics aims to secure human happiness only in this life).

²⁰ R. Audi, "The Separation of Church and State and the Obligations of Citizenship," *Philosophy and Public Affairs*, 18 3 (1989), 276 (quoting John Locke on the temptation to claim revealed authority in support of a position when attempts at rational justification fail). For a more nuanced taxonomy of religious reasons, and their relationship to political liberalism, see A. March, "Rethinking Religious Reasons in Public Justification," *American Political Science Review*, 107 3 (2013), 523–539.

²¹ Indeed, nonreligious comprehensive doctrines, e.g., market fundamentalism or ethnic nationalism, may today be a much greater threat to liberal democracy than religious politics.

²² E. Hill, "Al-Sanhūrī and Islamic Law: The Place and Significance of Islamic Law in the Life and Work of 'Abd al-Razzaq Ahmad al-Sanhuri, Egyptian Jurist and Scholar, Part II" *Arab Law Quarterly*, 3 1 (1988) 35; G. A. Bermann, et al., "Comparative Law: Problems and Prospects," *American University International Law Review*, 26 4 (2011), 951 (noting that the First Hague Congress of Comparative Law in 1932 adopted a resolution recognizing Islamic law as a source of comparative law).

²³ T. Stahnke and R. C. Blitt, "The Religion-State Relationship and the Right to the Freedom of Religion or Belief: A Comparative Textual Analysis of the Constitutions of Predominantly Muslim Countries," *Georgetown Journal of International Law*, 36 (2005), 947–1078. Even where Islamic law is not formally enshrined in a constitution, Islamic law may nevertheless form the basis for important portions of civil law, particularly family law.

with significant historical Muslim minorities,²⁴ and with increasing Muslim migration and conversion to Islam in western liberal democracies, also in jurisdictions without a long tradition of inclusion of Muslim citizens.²⁵ Nonideal theory, therefore, must come to terms with the existence of Islamic law and its likely continued role in the governance of Muslim communities, whether in majority or minority contexts.

While most states that incorporate parts of Islamic law into their legal systems, whether Muslim majority or not, are not liberal democracies, it may very well be that some judges in these states aspire to the ideals of political liberalism and desire to nudge their respective legal systems, even if only on the margins, toward a more politically liberal regime. At the same time, the judiciaries of jurisdictions that have not historically had large Muslim communities, such as Europe and North America (or if they did have Muslim communities, they did not recognize them as equal citizens), are increasingly coming into contact with Islamic law, either in situations where litigants themselves wish to have Islamic law apply to their disputes voluntarily, or by virtue of the rules of private international law (e.g., family law and commercial law), or where the state seeks to regulate some kind of behavior, and the Muslim target of the regulation wishes to avoid the regulation (e.g., controversies regarding appropriate dress at school, or the regulation of the slaughter of animals for consumption). Public reason-minded judges, whether in liberal regimes with relatively new Muslim populations, or in nonliberal regimes with well-established Muslim communities, might also believe that applying Islamic law in a manner consistent with political liberalism – if it can be done – can be a way to reduce religious-based tension within their own jurisdiction. This in turn could advance a broader liberalizing project or

²⁴ This would include, for example, ethnic Turkish Muslims in Greece, Muslims in India, and Muslims in Singapore, to name only a few.

²⁵ This needs to be qualified to the extent that many liberal states, such as Great Britain and France, governed large numbers of Muslims as subjects of their respective colonial empires, and in that capacity their judiciaries developed some experience with Islamic law. The British judiciary in colonial India, for example, developed a hybrid form of law called Anglo-Muhammadan law, which represented a blend of common law and Islamic law principles. See, e.g., A. A. A. Fyze, *Outlines of Muhammadan Law*, 4th ed. (Delhi: Oxford University Press, 1974). The French colonial rulers of Algeria also developed a codified version of Islamic law that they used to administer the family affairs of Algerian Muslims. O. Arabi, "Orienting the Gaze: Marcel Morand and the Codification of *Le Droit Musulman Algérien*," in *Studies in Modern Islamic Law and Jurisprudence* (New York: Kluwer Law International, 2001), pp. 121–146.

protect a previously consolidated liberal political culture from populist backlash, stemming, at least in part, from the recent migration of large numbers of Muslims to their societies. Accordingly, giving an account of the place of Islamic law in public adjudication from the perspective of public reason in nonideal theory is a pressing task.

What the idea of public reason demands in nonideal settings is contextual and may very well differ depending on the nature of the issue at stake, and whether the issues arise in a constitutional democracy that reasonably approximates the principles of justice, in an authoritarian Muslim or non-Muslim state, or a democratic state governed by a constitutional rather than an overlapping consensus.²⁶ In nonideal theory, this means that the application of the idea of public reason may vary in particular polities as a result of the unique constraints that face judges in the specific jurisdictions in which they operate. In all cases, however, the duty of a public reason-minded judge who is required to apply Islamic law is always the same: to seek to interpret Islamic law in a fashion that reconciles as far as possible its historical rules with the “criterion of reciprocity, viewed as applied between free and equal citizens, themselves seen as reasonable and rational,”²⁷ and thus also with the political values of seeing citizens as free and equal. The public reason-minded judges should resist attempts to apply Islamic law merely on the grounds of its asserted revealed or metaphysical truth, or simply in its historical form without regard to the substantive demands of public reason. On the other hand, such a judge must also refrain from criticizing Islamic law on nonpolitical grounds, regardless of whether or not the judge is a believing Muslim. Cases involving Islamic law, like other cases, must be resolved in a political vocabulary and with reference to political conceptions of justice, while avoiding deeper doctrinal disagreements that separate citizens. This also means refraining from dismissing others as politically unreasonable because they have a different comprehensive doctrine and criticizing these doctrines as long as the political implications of their doctrines are reasonable or can be made to be reasonable if appropriately interpreted. This latter aspect of the idea of public reason is especially crucial in contemporary circumstances where the issue of Islamic doctrines has become a lightning rod for various antidemocratic and xenophobic movements across the globe.

²⁶ Rawls, *Political Liberalism*, pp. 158–159.

²⁷ Rawls, “The Idea of Public Reason Revisited,” p. 774.

When public reason-minded judges apply and interpret Islamic law, they must first determine the political content of the Islamic rule that is to be applied. If that political value can be applied consistently with public reason, the judge can do so without fear of violating the requirements of public reason. Judges must resist, however, any attempt to adopt a perspective internal to Islamic law that would claim to determine the “true” content of Islamic law as a matter of divine law. Such an effort would cause the judge to go beyond the political and enter the theological. One might object that even properly motivated judges are not capable of distinguishing Islamic law’s public reason-compatible political values from its theological or politically unreasonable (from the perspective of public reason) doctrines. It would be tempting, therefore, for a judge who has the discretion to give, or not give, effect to a rule of Islamic law to adopt an exclusionary strategy, and categorically refuse to give effect to any rule of Islamic law, on the theory that its rules are reflections of a metaphysically controversial doctrine and therefore should never be coercively enforced.²⁸ Alternatively, when the positive legal order requires the judiciary to recognize Islamic law, the public reason-minded judge might conclude that he should interpret the jurisdictional terms authorizing or mandating the use of Islamic law narrowly, but when it does apply, he should assume that the rule reflects the nonpolitical values of religion, and so therefore refuse any call to adjust the historical norm, whatever the consequences may be for Muslim citizens of that particular state.

Rawls’s notion of “reasoning from conjecture,” however, suggests another way forward. We reason by conjecture when we adopt the position of another party and then attempt to demonstrate that it can reasonably be made to be consistent with a reasonable political conception, despite an initial appearance of incongruence.²⁹ While it would not be appropriate for a public reason-minded judge to conjecture about the ultimate, theological significance of a particular rule of Islamic law, that

²⁸ This categorical posture of noninterference has been adopted by some judges in other contexts involving the intersection of religious law and state law. See, e.g., *Braker v. Marcovitz*, [2007] 3 S.C.R. 607, 2007 SCC 54 (Deschamps, dissenting).

²⁹ Rawls, “The Idea of Public Reason Revisited,” 783. For more on reasoning from conjecture and its relationship to public reason, see M. Schwartzman, “Reasoning from Conjecture: A Reply to Three Objections,” in T. Bailey and V. Gentile (eds.), *Rawls and Religion* (New York: Columbia University Press, 2014), pp. 152–169. For the use of conjecture in the particular context of Islamic law and liberal citizenship, see A. March, *Islam and Liberal Citizenship: The Search for an Overlapping Consensus* (New York: Oxford University Press, 2009).

judge, having identified the political values vindicated by that rule, should engage in conjecture that seeks to specify how the political value embedded in that rule or case can be appropriately specified or adjusted so as to produce a politically reasonable outcome in the case before him. This more limited form of conjecture can be understood as a good faith attempt to extrapolate from a historical, nonpublic reason-conforming rule, a new rule that vindicates the political value embedded in the historical rule while respecting the strictures of public reason.

Some might object that proceeding in this fashion imposes an unreasonably demanding task on judges. But as I shall argue in greater detail in the sections that follow, it is often the case that a judge can successfully identify the political values embedded in a particular rule of Islamic law (even if that requires the assistance of the parties' counsel and outside experts). When such values are otherwise compatible with public reason, or may become so through extrapolation, the judge should not hesitate to give effect to those rules. I now turn to explain why Islamic law authorizes distinguishing between its political values and its theological claims, and thus enables the political method of conjectural extrapolation described in this section.

IV Islamic Law and the Distinction between the Theological/Metaphysical and the Political

The central principle of legitimacy in political liberalism is that all exercises of coercive political power must be justifiable on the basis of political values that can be shared by all reasonable citizens, regardless of their particular comprehensive doctrines. When the political conception is supported by an overlapping consensus among reasonable comprehensive doctrines, citizens can see the political conception as internally supported from within their comprehensive doctrines, or not in conflict with it, or most plausibly, some combination of both.³⁰ The fact that a comprehensive doctrine enshrines a certain rule or standard of conduct as representing a true conception of justice does not disqualify it from being legitimate from the perspective of public reason. But such a rule can only be recognized in public reason if it represents a reasonable balance of political values without regard to its metaphysical truth.

In many cases it may be difficult for an external observer to disentangle a doctrine's political values from its metaphysical ones, and attempts to

³⁰ Rawls, *Political Liberalism*, pp. 147–148.

do so might in fact radically distort that doctrine beyond what its own adherents could reasonably recognize. Yet, this is not the case with the Sunni Islamic tradition. This tradition reflects, quite self-consciously, a reasoned attempt to distinguish among its various substantive commitments and rank them according to an internal hierarchy of moral and ethical value. As I have argued elsewhere, this means that we are able, without much difficulty, to distinguish Sunni metaphysical doctrines from political commitments.³¹ That does not mean that historical Islamic political commitments are reasonable from the perspective of political liberalism; however, it does mean that an external observer is capable of reasonably distinguishing fundamental Islamic theological/metaphysical commitments from merely political ones through a careful analysis of internal Muslim debates.³² Accordingly, public reason-minded judges need not fear that in adjudicating an issue of Islamic law, they are illegitimately, from the perspective of both Muslims and political liberals, entering the metaphysically contested terrain of truths internal to a comprehensive doctrine, rather than adjudicating political values.

It is easy enough to find claims that Islam makes no distinction between political values and theological/metaphysical ones,³³ but upon closer inspection, those claims really amount to no more than the recognition that Islam, as a comprehensive doctrine, aspires to provide its followers with an outlook on the entire range of possible human activities. From this perspective, there is no space for human action that is not potentially subject to some kind of moral regulation from the perspective of divine law.³⁴ That aspiration, however, does not mean

³¹ M. Fadel, "The True, the Good and the Reasonable: The Theological and Ethical Roots of Public Reason in Islamic Law," *Canadian Journal of Law and Jurisprudence*, 12 1 (2008), 5–69.

³² See M. Fadel, "Public Reason as a Strategy for Principled Reconciliation: The Case of Islamic Law and International Human Rights Law," *Chicago Journal of International Law*, 8 1 (2007), 1–20 (giving illustrations of how to resolve tensions between historical norms of Islamic law with public reason on political rather than metaphysical grounds).

³³ For purposes of this essay, I am using "Islamic political values" to refer to those rules found in historical Islamic law that were amenable to coercive enforcement, while my reference to "theological/metaphysical commitments" refers to doctrines that make truth claims about God, either with respect to God's essence (theology) or to God's command (theological ethics).

³⁴ Islamic ethics recognizes five ethical categories: the obligatory, the prohibited, the recommended, the disfavored, and the indifferent. The default ethical status of human actions, however, is indifference. Accordingly, the category of human actions that are governed by obligatory or prohibitive rules is limited.

Muslims have historically believed that all rules of divine law have demanded public enforcement. Yet, there is another way in which an outside observer may be confused and conclude that Muslims fail to distinguish between the political and the theological/metaphysical, and that is the direct connection between political justice and divine law: Because a central tenet of Islamic theology is that God, at the end of time, will judge human beings for their actions, and hold those who have violated the rights of others accountable for their unjust acts, just and unjust political conduct have an incidental relationship to the metaphysical problem of salvation. For example, if A misappropriates property from B, A has not only committed a civil wrong giving rise to B's right to restitution, A's failure to return to B his property also constitutes a sin for which God will hold him accountable in the next life. The presence of divine judgment in the afterlife, however, means that Islamic jurisprudence prioritizes secular claims between and among human beings over God's claims against human beings.³⁵ There are other reasons to think that Islamic law distinguishes secular rules from religious ones. I shall briefly mention three structural features of Islamic law to support this conclusion. First, Islamic law is broadly divided into two parts: ritual law (*'ibādāt*) and transactional law (*mu'āmalāt*). These two legal categories are distinguished from one another in fundamental ways. Ritual law, for example, requires the subjective intent to draw close to God (*qurba*) through performance of an act specified by the revealed law. Transactional law, on the other hand, even if mentioned in revealed texts, may also be derived through creative acts of human interpretation and human convention. This is because, in contrast to ritual law, laws governing human interactions disclose an inner rationality that is instrumentally related to particularly human ends, such as the protection and enhancement of property. These rules can be extended to new cases by virtue of the fact that they are subject to a legal cause (*'illa*), which the properly trained legal mind can extract from revealed texts after careful

³⁵ Muslim theologians and jurists divide obligations into those that are owed to fellow human beings, and those that are owed to God. In many cases, obligations owed to God can be waived on the grounds that the true forum for their vindication is in the next life, while the claims of human beings, if they are not vindicated in this life, will never be vindicated. Accordingly, secular justice for humans is the primary mode of justice, while the just accounting of what we owe God takes place after we die. A. Emon, "*Ḥuqūq allāh* and *Ḥuqūq al-'Ibād*: A Legal Heuristic for a Natural Rights Regime," *Islamic Law and Society*, 13 3 (2006), 325–391. See also A. Zysow, "Rights in Islamic Law," in S. N. Katz (editor-in-chief) and B. Johansen (Islamic law ed.), *The Oxford International Encyclopedia of Legal History* (New York: Oxford University Press, 2009).

consideration of both the words of revelation and the ends of the natural persons that are the subjects of divine law. Finally, and unlike the case with ritual law, the validity or invalidity of transactions is not dependent upon a subjective intent to draw near to God. In fact, the actor need not have any specific intent at all, religious or otherwise.

Second, according to Muslim jurists, courts only have jurisdiction over disputes involving a secular interest (*maṣlaḥa dunyāwiyya*) between particular individuals. They cannot determine whether specific acts of worship are valid or answer inquiries about the “true” content of divine law, the final resolution of which is a matter for the next life (*maṣlaḥa ukhrāwiyya*).³⁶

Third, Islamic law also distinguishes between the theological/metaphysical and the political in connection with defining Islamic law’s jurisdictional limitations. The substantive obligations of Islam as a religion (e.g., prayer, fasting, charity, etc.) and its moral prohibitions (e.g., the prohibition against consumption of intoxicants, adultery, gambling, etc.) apply universally as a matter of divine law. These are matters for which, as a matter of Islamic theology, all humans must account themselves before God in the next life.³⁷ However, the substantive rules of Islamic law (*fiqh*), particularly as a remedial system, only apply within a properly organized Islamic state to individuals having a rightful relationship with that state. Accordingly, Muslim jurists, and the Hanafis in particular, speak of the sources of the person’s inviolability as being a function of both common belief (*dīn*) and membership in a common polity (*dār*). Because of these different grounds for inviolability, non-Muslims could attain the political inviolability that a Muslim enjoys by virtue of entering into a pact with the Islamic state. Because such a pact is solely political, it is necessarily limited to the secular aspects of Islamic law. For that reason, the relationship of protection that regulates the relationship of non-Muslims to the Islamic state proceeds from the assumption that non-Muslims agree to abide by the provisions of Islamic law, but only such provisions that are secular in nature. This means that non-Muslims are not only exempt from Islamic ritual law, but that they are also exempt from Muslim rules that regulate marriage and divorce, among other things, insofar as these are understood to be matters that fall squarely within non-Muslims’ core religious commitments.³⁸

³⁶ S. al-Qarāfi, *The Criterion for Distinguishing Legal Opinions from Judicial Rulings and the Administrative Acts of Judges and Rulers*, translated by M. Fadel (New Haven: Yale University Press, 2017), pp. 62, 65.

³⁷ Fadel, “The True, the Good, and the Reasonable,” 62, note 254.

³⁸ *Ibid.*, 61–65.

Because Islamic jurisprudence already distinguishes the theological/metaphysical from the political and places the former outside the jurisdiction of courts, there is no reason for a court committed to public reason to assume, dogmatically, that any issue of interpretation involving Islamic law represents an interference in an Islamic theological debate. Yet, even if the rule of Islamic law in question is properly understood as reflecting a political value, and could therefore be viewed, at least in a *prima facie* sense, as consistent with public reason, the court might nevertheless fear that one of the Muslim litigants before it, or both, will see the court as enforcing a rule that necessarily includes resolution of a controversial theological question, even if only incidentally. One can then object that the court will necessarily interfere in a theological dispute between the litigants. Viewed from this perspective, whenever the court gives effect to one interpretation of Islamic law over another, it could be criticized as adjudicating a dispute on the basis of a rule that it knows is not reasonably acceptable to the other party.³⁹ I will try to address this concern in the next section of this chapter.

V Does Application of Islamic Law Always Entail the Application of a Controversial Metaphysical Doctrine?

The fundamental principle of legitimacy in political liberalism is that the coercive application of a rule can only be justified by appeal to reasons that one reasonably believes others will find reasonably acceptable. Accordingly, rules justified by appeal to controversial metaphysical doctrines cannot, consistent with this conception of legitimacy, be coercively applied.

Islamic law has historically recognized a certain degree of normative pluralism, based on recognition that different jurists have approached the problem of understanding divine law in different ways. From the perspective of Islamic moral theology, these differences take place both at the level of judgment (e.g., one jurist holds that the correct rule is A, while another holds that the correct rule is B) and at the level of method (e.g., when one jurist recognizes one source or method of reasoning as a legitimate argument in support of a rule, while another rejects that method of reasoning).⁴⁰ In light of this, one might take the position that

³⁹ For a version of this argument, see A. A. an-Na'im, *Islam and the Secular State: Negotiating the Future of the Shari'a* (Cambridge: Harvard University Press, 2008).

⁴⁰ Fadel, "The True, the Good, and the Reasonable," 43–50.

a court motivated by public reason cannot apply a rule of Islamic law, even when the rule itself is consistent with the political values of public reason, because it will inevitably give effect to a metaphysically controversial position regarding the “true” content of divine law.

In order to see why this argument is ultimately unpersuasive, it is useful to consider the logic of the overlapping consensus. The logic of the overlapping consensus is such that a particular value may, simultaneously, be part of a free-standing political conception and internal to, or at least acceptable to, a particular comprehensive doctrine. Indeed, doctrinal support from comprehensive doctrines is indispensable, at least for an important set of political values, if an overlapping consensus is ever to be achieved, and stability secured under the circumstances of reasonable pluralism. In order to achieve such an overlapping consensus, however, the coercive institutions of the state – in this case, the judiciary – must justify its decision on political grounds, not comprehensive ones. The connection between the political value affirmed in public reason and its grounding in a comprehensive doctrine therefore is to be made only by the citizen who subjectively recognizes that political value as internal to, or at least not in conflict with, his or her own comprehensive doctrine.⁴¹ This, however, invites the possible objection that if a judgment is justified only by reference to political values and not by reference to Islamic theological doctrines, it is not really Islamic at all. This objection is rooted in the mistaken assumption that the legitimacy of a judge’s decision in an Islamic system of adjudication depends on the extent that his judgment represents the true content of divine law in a particular case. In fact, while a ruling is not legitimate if it is not an Islamically reasonable understanding of divine law, the substantive theological reasonableness of a rule is not sufficient to make a judge’s ruling valid.⁴² A legitimate judicial decision also has to satisfy procedural requirements, including jurisdictional legitimacy, and rules of due process, including faithful adherence to the rules of evidence. If any of these procedural and jurisdictional prerequisites are not respected, the outcome would not be a valid judicial decision, even if the content of the decision is a reasonable or true reflection of divine law.⁴³ Just as important, the content of the judicial ruling is seen as limited to the conflict between the parties themselves, which, as previously mentioned, is

⁴¹ Rawls, *Political Liberalism*, p. 11.

⁴² Al-Qarāfi, *The Criterion for Distinguishing Legal Opinions*, p. 109.

⁴³ In such an event, the judge’s statement would be no more than a fatwa, an opinion about the content of divine law that lacks coercive force.

limited to the secular interest at stake, for example, whether the true owner of blackacre is the plaintiff or the defendant. Accordingly, even where a judge rules, using a controversial rule of substantive or procedural law, or uses a controversial method for the derivation of divine law, the judge, according to Muslim jurists, is not determining what the true content of divine law is, or the proper method for its derivation; rather, the judge is simply making a rule that resolves, conclusively, for this life and the next, the secular dispute between the two parties (e.g., that blackacre belongs to A and not B). That rule, however, does not purport to be the true understanding of divine law.⁴⁴ Likewise, even adjudication in a fully ideal Islamic state includes an important subjective element, namely the good faith of the parties themselves. Accordingly, a party is not morally entitled to act on a judgment if she either knowingly provides the court with false evidence or advances a theory of the law that she herself does not affirm.⁴⁵ This means that the validity of a judicial verdict, even in ideal Islamic theory, is a result of a balance of factors, at least some of which are political and some of which are subjective. As is the case with Rawls's theorization of the relationship between a comprehensive doctrine and an individual citizen's relationship to political and legal rules, the ideal is that the political or legal rule is justified by a reason that is fully continuous with the individual's comprehensive doctrine, yet mere noncontradiction suffices.⁴⁶ Moreover, it is the responsibility of the individual citizen to determine the relationship of his own comprehensive doctrine to the public rule.

From a practical perspective, a judge's ruling in Sunni law is considered a reasonable interpretation of divine law if it is based on a rule of substantive law promulgated by one of the four Sunni law schools: Hanafi, Maliki, Shafi'i, and Hanbali. This body of law, known as *fiqh*, represents the systematic conclusions provided by distinct traditions of legal thought to a broad set of paradigmatic legal questions. When a judge applies a rule found in one of these schools of law, he does not engage in

⁴⁴ *Ibid.*, pp. 101–102 (a judge's ruling in a controversial area of law preempts contrary views only with respect to that case) and pp. 109–110 (a judge's ruling based on a controversial rule of evidence, or based on a rule derived using a controversial method of interpretation, does not amount to a judgment that such methods are valid).

⁴⁵ See B. Johansen, "Truth and Validity of the Qadi's Judgment: A Legal Debate Among Muslim Sunnite Jurists from the Ninth to the Thirteenth Centuries," *Recht van de Islam*, 14 (1997), 1–26; M. Fadel, "Forum, Exterior (Zahir), and Interior Forum (Batin)," in S. N. Katz (editor-in-chief) and B. Johansen (Islamic law ed.), *The Oxford International Encyclopedia of Legal History* (New York: Oxford University Press, 2009).

⁴⁶ Rawls, *Political Liberalism*, p. 11.

an act of scriptural interpretation; rather, he adopts a conclusion derived from an attempt to organize the law into a science that strives for consistency, coherence, and predictability and therefore is not simply an exercise in scriptural interpretation. These positive doctrines incorporate numerous political values that are uncontroversially consistent with public reason.⁴⁷

Were judges asked to engage in a free-wheeling interpretation of Muslim scripture in order to identify the true content of divine law, or to identify the rule of *fiqh* that represents the true conception of divine law, a public reason-minded judge would be right to object to doing so. But when a judge is asked to apply a rule of substantive law derived from the tradition of *fiqh*, however, he or she can do so simply by consulting the appropriate treatise explaining the particular rule and then determining whether it applies in the particular circumstance of the pending case, without making reference to scriptural references in the least. Nor should the fact that there are different conceptions of Islamic law give the judge pause: As long as the judge interprets these different doctrines from the political perspective of formal legal doctrine and does not make any theological claims, the judge cannot be reasonably accused of violating the strictures of public reason, either by interfering in the autonomy of religious doctrines or by coercively applying a controversial metaphysical doctrine. In such a case, as is true even in an ideal Islamic regime, it is the responsibility of the individual litigants to determine the connection between the rule applied by the judge and their own subjective understanding of divine law.

Consider the following example. In Islamic law, a woman can obtain a divorce by payment of some property to her husband. This procedure is known as a *khulʿ*. According to Islamic law, a husband is not entitled to accept property in consideration for divorce unless, in fact, he has not violated the terms of the marriage contract. In circumstances where the husband has violated the contract and is either unable or unwilling to perform his obligations toward his wife, he is under a moral duty to dissolve the marriage pursuant to his unilateral power of divorce, *ṭalāq*.

⁴⁷ Fadel, “Principled Reconciliation,” 7–9. Islamic theology affirms an overlapping consensus with respect to many reasonable political values through its theory of the universal purposes of the law (*al-maqāṣid al-kulliyā*), and the theological doctrine that divine law is ideally constituted to respond to the needs of the modal human being. See Fadel, “The True, the Good, and the Reasonable,” 54–57. See also S. Vasalou, *The Theological Ethics of Ibn Taymiyya* (New York: Oxford University Press, 2015), esp. Chapter 4, pp. 137–196, “The Aims of the Law and the Morality of God.”

Where he fails to do so, the wife might be willing to pay him money in exchange for a divorce, even though she is entitled to a divorce without compensation. The jurists refer to such a woman as *al-muḍāla*, one whose arm has been twisted into paying unjustly for a divorce. Malikis and Hanafis, while agreeing as a religious matter that it is sinful for a husband to extort property from his wife in exchange for a divorce, disagree whether such an agreement is enforceable as a valid contract. The Hanafis validate the contractual payment despite its immoral nature, while the Malikis view this contract as invalid and, if performed, authorize the wife to recover whatever property she paid her previous husband under a theory of unjust enrichment.⁴⁸ The important point from the perspective of public reason, however, is that the dispute between the Hanafis and the Malikis in this case can be comprehended entirely using conventional legal categories such as duress, capacity, and unjust enrichment without invoking a metaphysical conception of divine law.

The great twentieth-century Egyptian jurist ‘Abd al-Razzāq al-Sanhūrī bases his project of modernizing Islamic law on the premise that it is possible to distinguish systematically between Islamic jurisprudence conceived as a science, on the one hand, and Islamic jurisprudence as a part of dogmatic theology. Because he understands modern Islamic law to be a scientific – and not dogmatic – project, non-Muslim legal scholars are equal partners in discovering and elaborating the principles of Muslim legal science.⁴⁹ To the extent we adopt Sanhūrī’s conception of modernized Islamic law, it gives even greater justification to believe that Islamic law, understood as an artifact of juristic reasoning and legal science rather than theology, can be legitimately used by a judge committed to principles of public reason.

The next section discusses various contexts in which issues of Islamic law have presented themselves in courts from various jurisdictions. The results in each of these cases would have been more satisfactory had the

⁴⁸ M. Fadel, “Political Liberalism, Islamic Family Law, and Family Law Pluralism,” in J. A. Nichols (ed.), *Marriage and Divorce in a Multicultural Context* (Cambridge: Cambridge University Press, 2011), pp. 164–199, at p. 177.

⁴⁹ For more on Sanhūrī, see Hill, “Al-Sanhūrī and Islamic Law, Part I”; E. Hill, “Al-Sanhūrī and Islamic Law: The Place and Significance of Islamic Law in the Life and Work of ‘Abd al-Razzaq Ahmad al-Sanhuri, Egyptian Jurist and Scholar, Part II,” *Arab Law Quarterly*, 3 2 (1988), 182–214; A. Shalakany, “Between Identity and Distribution: Sanhūrī, Genealogy and the Will to Islamise,” *Islamic Law and Society*, 8 2 (2001), 201–244; and G. Bechor, *The Sanhuri Code, and the Emergence of Modern Arab Civil Law (1932–1949)* (New York: Brill, 2007).

court considered more carefully the relationship between Islamic law and the conception of public reason outlined in this chapter.

VI Islamic Law in Modern Courts

Islamic law in modern legal systems appears in various political and constitutional regimes. As can be expected, Islamic law has greatest relevance in states with Muslim majorities. Within these states, however, there is great variation with respect to the roles that both Islamic law and political liberalism play in their regimes. At one extreme are regimes that explicitly claim to be perfectionist Islamic regimes, such as the Kingdom of Saudi Arabia and the Islamic Republic of Iran. At another extreme we have had Turkey, which, for much of the past century, was committed to a militant form of *laïcité* with no place for Islamic law. Most Muslim-majority countries, however, lie between these extremes, with legal and constitutional systems that include at least nominal claims to both liberal and Islamic principles of legitimacy, with this hybridity resulting in political tension that may even be reflected in the state's institutions.⁵⁰ Islamic law also plays an important formal role in the legal systems of non-Muslim-majority states with substantial numbers of historical Muslim communities. These states include democratic states, such as Greece in the European Union,⁵¹ India, and Israel; “partly free” developed states, such as Singapore; and “partly free” developing states such as Kenya.⁵² In these cases, the continued salience of Islamic law is

⁵⁰ See, e.g., M. Fadel, “Judicial Institutions, the Legitimacy of Islamic State Law and Democratic Transition in Egypt: Can a Shift Toward a Common Law Model of Adjudication Improve the Prospects of a Successful Democratic Transition,” *Journal of International Constitutional Law*, 11 3 (2013), 646–665, 648–649 (discussing hybrid sources of legitimacy of the Egyptian state).

⁵¹ Whether Islamic law will continue to have a formal role regulating the personal status of ethnic Turkish Muslims in Greece has been called into question in the wake of a law passed in 2018 allowing Turkish Greek citizens to have their family law disputes resolved in national courts as opposed to Islamic law courts. Christina Maza, “Muslims in Greece, Ruled by Sharia Law for Almost 100 Years, Can Now Go to Secular Courts,” *Newsweek* (January 11, 2018), available at www.newsweek.com/greece-muslims-sharia-law-secular-778434 (last viewed November 3, 2019), and the 2018 ECtHR decision, *Molla Sali v. Greece* (Appl. No. 20452/14) (Grand Chamber 2018) (affirming the right of a Greek Muslim citizen to dispose of his estate by testamentary disposition under general principles of Greek civil law in contravention of Islamic law's limitation of testamentary freedom to one-third of the estate).

⁵² I am borrowing the concept of “partly free” from Freedom House's *Freedom in the World 2018: Democracy in Crisis* report, available at <https://freedomhouse.org/report/freedom-world/freedom-world-2018> (last viewed November 3, 2019).

a concession to historical Muslim communities permitting them a certain degree of self-governance, but it is usually limited to internal communal affairs, including, most prominently, family law. In liberal democracies, questions of Islamic law may arise in connection with private agreements that incorporate one or more provisions of Islamic law by virtue of the norms of private international law, which result in a court being forced to apply Islamic law to a case over which it has exercised jurisdiction, and also in cases of public regulation in which a Muslim citizen seeks an exemption, either from public law or from a condition of employment.

Although the challenges arising from Islamic law for a public reason-minded judge differ in their particularities from jurisdiction to jurisdiction, the foregoing analysis suggests that in all cases, public reason counsels judges to proceed in the following manner: First, identify the political value implicit in the relevant historical doctrine; second, determine whether that political value is consistent with a reasonable political conception; and finally, if it is not, propose a new rule using reasonable conjecture and extrapolation from historical doctrines that vindicates both the Islamic political value and public reason.⁵³

Courts, whether they are in a Muslim-majority jurisdiction, reviewing the exercise of self-determination rights of Muslim minorities, or courts in a liberal democratic regime reviewing issues arising out of Islamic law in private law or private international law, have sometimes approached questions of Islamic law as though they are theological/metaphysical questions that the court should answer, not only as if it were doing so from the internal perspective of Islamic law, but also as if it were qualified to answer the ultimate theological question at stake. This tendency to adopt a theological approach to Islamic law often stems from a reformist impulse that seeks to reconcile Islamic law with modernity or liberalism; nevertheless, there are good Islamic reasons, as well as reasons grounded in public reason, for a court, whenever possible, to refrain from proposing theological justifications for its interpretations of Islamic law and instead limit itself to more narrow political interpretations.

Egyptian courts' interpretation of Article 2 of the Egyptian constitution, which states that Islamic law is the principal source of legislation for the Egyptian state, reflects this pitfall. The Egyptian Supreme Court interprets Article 2 so that state legislation is always found to be in conformity with it so long as the legislation does not

⁵³ March, *Islam and Liberal Citizenship*, p. 78, (proposing a similar approach to analyzing and reconciling historical Islamic doctrines with politically liberal positions).

violate incontrovertible texts of revelation.⁵⁴ Because the Egyptian Supreme Court has not articulated any positive understanding of the content of Islamic law, it retains for itself (and ultimately the Egyptian state) maximum interpretive flexibility in upholding the constitutionality of the state's legislation.⁵⁵ While this is helpful in allowing the Egyptian state to introduce legislation to bring Egypt into conformity with certain of its obligations under international human rights law, it does nothing to identify political values implicit in Islamic law that are aligned with the values of public reason.⁵⁶ The Egyptian Supreme Constitutional Court's conception of Islamic law in Article 2 effectively neuters it as a possible source of reasonable political values that could be of service in democratizing and liberalizing Egypt's political sphere.⁵⁷

The Indian Supreme Court has also interjected itself controversially in matters of Islamic family law. With almost 180 million Muslims, India has one of the largest Muslim populations in the world. Part of British colonial policy, continued by post-independence India, is to permit India's various religious communities to exercise a certain degree of communal self-governance, and in the case of the Indian Muslim community, the right to govern family affairs, as well as matters related to inheritance and the administration of the law of trusts, in accordance

⁵⁴ C. B. Lombardi and N. J. Brown, "Do Constitutions Requiring Adherence to Shari'a Threaten Human Rights? How Egypt's Constitutional Court Reconciles Islamic Law with the Liberal Rule of Law," *American University International Law Review*, 21 (2006), 379–435.

⁵⁵ Fadel, "Judicial Institutions," 654–655.

⁵⁶ The case *Minister of Health v. Badri*, Supreme Administrative Court of Egypt, Case no. 5257 of Judicial Year 43 (December 28, 1997), is illustrative of the problems that arise from this approach. See Fadel, "Judicial Institutions," 661–663 (criticizing it for recognizing the plaintiff's standing in the case, despite the fact that the plaintiff was essentially seeking no more than a religious opinion as to the status of the practice of female circumcision under Islamic law). For a detailed discussion of this case, see K. Bälz, "Human Rights, the Rule of Law and the Construction of Tradition: The Egyptian Supreme Administrative Court and Female Circumcision (Appeal no. 5257/43, 28 December 1997)," in E. Cotran and M. Yamani (eds.), *The Rule of Law in the Middle East and the Islamic World: Human Rights and the Judicial Process* (New York: I. B. Tauris Publishers, 2000).

⁵⁷ For an argument explaining how premodern Islamic law could provide a basis for democratization in the Muslim world (if not for outright liberalism), see M. Fadel, "Islamic Law Reform: Between Reinterpretation and Democracy," *Yearbook of Islamic and Middle Eastern Law*, 18 (2013–2015), 44–90 (arguing that Islamic law includes an implicit model of political legitimacy based on an ideal of representation derived from a model of politics taken from principal-agent law).

with Islamic law.⁵⁸ The *Shah Bano*⁵⁹ case raised the issue of whether Section 125 of the Indian Code of Criminal Procedure, which punished an ex-husband of sufficient means who failed to maintain his indigent ex-wife until such time as she remarried, was consistent with Section 2 of the Muslim Personal Law Act. That statute guarantees that all questions of family law involving Muslims would be adjudicated pursuant to Islamic law. Section 125's imposition of an ongoing obligation upon an ex-husband to maintain an indigent ex-wife created a conflict between this provision and Islamic law, which relieves a husband of his obligation to maintain his wife once her divorce has become final. The Indian Supreme Court upheld the applicability of Section 125 despite the Muslim Personal Law Act; however, the backlash among the Indian Muslim community was so severe that the Indian parliament was forced to overturn the decision by statute, passing in its place The Muslim Women (Protection of Rights on Divorce) Act, 1986.⁶⁰ That latter act of parliament in turn became the subject of vehement criticism.⁶¹ The practical effect of the Indian Supreme Court's decision, and then parliament's subsequent statutory repeal of the decision, was to harden sectarian divisions.

The Indian Supreme Court's reasoning was, from the perspective of public reason, both impermissibly theological and unnecessarily provocative in its open disdain for historical Islamic law.⁶² First, the court took it upon itself to determine the true position of the Koran with respect to the maintenance of ex-wives and concluded that, properly read, it

⁵⁸ The Muslim Personal Law (Shariat) Application Act (1937), available at <https://indiankanoon.org/doc/1325952/> (last viewed November 3, 2019).

⁵⁹ 1985 AIR 945, 1985 SCR (3) 844.

⁶⁰ Available at http://legislative.gov.in/sites/default/files/A1986-25_1.pdf (last viewed November 23, 2019).

⁶¹ A. F. Shelke, "Revisiting 'The Muslim Women (Protection of Rights on Divorce) Act, 1986,' in Light of Its Impact Over Legal and Jurisprudential Principles," *Symbiosis Contemporary Law Journal*, 2 1 (2014), 167–180 ("The piece of legislation remains the biggest mishap to secular democracy in India"); see also L. Carroll, "The Muslim Women (Protection of Rights on Divorce) Act 1986: A Retrogressive Precedent of Dubious Constitutionality," *Journal of the Indian Law Institute*, 28 3 (1986), 364–376 (criticizing the Act, for among other things, poor drafting that will lead to unintended consequences, creating a bad precedent, and being unconstitutional). Other scholars, however, have argued that the statute had a positive effect on Muslim women in India. F. Agnes, "Shah Bano to Shabana Bano: The Many Small Victories for Muslim Women's Rights," *The Indian Express* (December 15, 2009), available at <https://indianexpress.com/article/opinion/columns/shah-bano-to-shabana-bano/> (last viewed November 22, 2019).

⁶² M. Nussbaum, *The Clash Within: Democracy, Religious Violence, and India's Future* (Cambridge: Harvard University Press, 2007), pp. 146–147.

imposed on divorcing husbands an open-ended obligation to maintain their ex-wives until their remarriage, despite the absence of any Islamic legal authority for such a proposition.⁶³ Second, the Indian Supreme Court accused Muslims of failing to understand the sources of their own religion properly, openly associated Islam with the degradation of women, and accused Muslims of upholding laws of divorce that were “ruthless in [their] inequality.”⁶⁴ Finally, when the All India Muslim Personal Law Board pointed out to the court that Islamic law, which imposes responsibility for the economic needs of a divorced woman on her natal family, already provided adequate means to provide for indigent divorcées, the Indian Supreme Court casually and, in conclusory fashion, dismissed its suggestion as “a most unreasonable view of law as well as life.”

The *Shah Bano* case’s tragic political consequences for India could have been easily averted had the Indian Supreme Court, instead of using the case as an opportunity to voice its displeasure with Islamic law, focused its analysis on the overlapping concern between the Indian state and Islamic law for the care of divorced women, and that the only disagreement was with respect to the most effective means to achieve that result: Should primary liability fall to the ex-husband or to the divorced woman’s natal family? Having reduced the dispute to one of conflicting, though reasonable, political judgments, the Indian Supreme Court could have pointed to a solution that neither called into question Indian Muslims’ commitment to state law nor the Indian state’s commitment to protecting Muslims’ right to self-governance in family law. By elevating the stakes of the case, the Indian Supreme Court needlessly transformed the dispute into one of sectarian versus national identity.

Courts in liberal jurisdictions, such as the United States, Germany, and the European Court of Human Rights, meanwhile, have sometimes failed to understand the relevant rules of Islamic law that applied to the case before them or made sweeping, stereotyped, and reductive claims about the nature of Islamic law as a “religious law,” or done both. In what

⁶³ In reaching this conclusion, the Indian Supreme Court relied on *al-Baqara*, 2:241, which provides “for divorced women an honorable provision – an obligation upon the reverent.” S. H. Nasr, et al. (eds.), *The Study Quran* (New York: Harper One, 2015), p. 105.

⁶⁴ “There can be no greater authority on this question than the Holy Quran . . . Verse[] . . . 241 . . . of the Quran show[s] that according to the Prophet, there is an obligation on Muslim husbands to provide for their divorced wives These [verses] leave no doubt that the Quran imposes an obligation on the Muslim husband to make provision for or to provide maintenance to the divorced wife. The contrary argument does less than justice to the teaching of the Quran.”

should have been a relatively simple breach of contract claim between two sophisticated commercial parties, a US district court offered an extremely implausible reading of the contract law of Saudi Arabia that resulted in the plaintiff receiving an extremely small award relative to what it would have received under ordinary principles of damages for breach of contract under the common law.⁶⁵ The court lost its bearings primarily as a result of its decision to treat Islamic law as theological doctrine rather than as contract law.

When a court's deviates from public reason in a private commercial dispute, the injury to the political culture of a democracy is relatively limited. Yet, if a court errs in this fashion in the context of public law litigation, the results can be severe. The European Court of Human Rights' jurisprudence with respect to Islam and Muslims has failed to respect the limits of public reason and to exercise restraint about Islam as a comprehensive doctrine. The result is that European Muslims enjoy substantially less religious freedom than other European religions.⁶⁶ While many cases could be cited in support of this conclusion, the most egregious example of the Court's failure to observe the restraint public reason requires in judges is found in the *Welfare Party* case.⁶⁷

⁶⁵ National Group for Communications and Computers Ltd. v. Lucent Technologies International Inc., 331 F 2d 290 (D. New Jersey, 2004).

⁶⁶ Ronan McCrea, "Limitations on Religion in a Liberal Democratic Polity: Christianity and Islam in the Public Order of the European Union," LSE Legal Studies Working Paper No. 18/2007 and Islamic Law and Law of the Muslim World Paper No. 08–09, University College London, February 6, 2008, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1033332 (last viewed November 3, 2019).

⁶⁷ Case of Refah Partisi (the Welfare Party) and Others v. Turkey (Appl. Nos. 41340/98, 41342/98, 41343/98 and 41344/98) (Grand Chamber 2003). In *Refah* and other cases involving Muslim human rights claimants, such as *Dahlab* and *Şahin*, the European Court of Human Rights formally adhered to the ordinary analytical framework for the adjudication of individual rights' claims. It is indisputable, however, that the ECtHR's reasoning in these cases went beyond the controversial application of an otherwise legitimate framework of legal analysis to include categorical statements about Islam as a religion and its relationship to democracy in a fashion completely unrelated to the particular facts and circumstances of each claimant. At times the ECtHR's language suggested that it was Islam itself that was the subject of the litigation rather than the issue raised by the particular claimant. See, e.g., *Dahlab v. Switzerland*, Appl. No. 42393/98 (February 15, 2001) (rejecting the right of a female Muslim schoolteacher to wear a headscarf while teaching, and commenting in its opinion that the Islamic headscarf was a "powerful external symbol . . . that was hard to reconcile with the principle of gender equality," and "that wearing the Islamic headscarf could not easily be reconciled with the message of tolerance, respect for others and, above all, equality and non-discrimination."), and *Layla Şahin v. Turkey*, Appl. No. 4474/98 (November 10, 2005) (upholding Turkey's decision to expel a female student from medical school who wore a headscarf, in part on the grounds that the

There, the Court states that “[Islamic law] is fundamentally incompatible with democracy,” claiming that “[Islamic law] . . . faithfully reflects the dogmas and divine rules laid down by religion, [and therefore] is stable and invariable.”⁶⁸ One scholar even notes, given the Court’s further claim that only democratic movements are fully protected under the European Convention of Human Rights,⁶⁹ that the Court’s reasoning in *Welfare Party* could be read as allowing the prohibition of even the “peaceful advocacy of the tenets of Islam.”⁷⁰

VII Conclusion

Islamic law appears in court cases in jurisdictions that have radically different constitutional orders. Sometimes, Islamic law appears in non-democratic Muslim-majority states, such as Egypt, which has formally adopted Islamic law as part of its legal system while simultaneously espousing commitments to democratic ideals. At other times, it appears in the form of a qualified right to self-rule given to a numerically large historical Muslim minority, as is the case in India. It also shows up in various circumstances in western liberal democracies which, although lacking large historical Muslim minorities, have witnessed a large increase in Muslim residents and citizens in the post-World War II era. Judges who are committed to the ideals of public reason might be reluctant to adjudicate cases that raise questions of Islamic law on the grounds that to do so would constitute illegitimate interference in religious doctrines, or it would amount to the coercive application of a controversial theological/metaphysical norm. I have argued that these concerns can be obviated to the extent that the judge, guided by the idea of public reason and armed with a good faith understanding of Islamic law as developed through the science of jurisprudence, is able to rely on the substantive political values vindicated by the rules of Islamic law and, where necessary, bring them into harmony with the content of public reason via reasoning by conjecture. The promise of public reason is that by focusing on political values and removing theological/metaphysical disputes from the domain of political discourse, it is possible for an

Islamic headscarf potentially intimidated women who did not wear it, without any evidence that the claimant herself had threatened anyone).

⁶⁸ *Ibid.*, § 123.

⁶⁹ *Ibid.*, § 99.

⁷⁰ K. Boyle, “Human Rights, Religion and Democracy: The Refah Party Case,” *Essex Human Rights Review*, 1 (2014), 1–16, 12.

overlapping consensus to emerge around a political and broadly liberal conception of justice. The all-too-common failure of courts to follow this course when it comes to adjudication involving Islamic law has predictably resulted in greater social division and conflict around Islamic law. By focusing on the political values implicit in Islamic law and attempting to reconcile them with the political values vindicated by public reason, courts can play an important role in reducing political and social conflict around Muslims, Islam, and Islamic law.