

# The limits of constitutionalism in the Muslim world: History and identity in Islamic law

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## 1. Introduction

In the fields of constitutional law and human rights, protection from discrimination on religious grounds is a significant concern. Constitutions around the world protect religious liberty and conscience, as do various human rights documents. However, sometimes these same constitutions have limiting phrases that also raise human rights concerns. For example, constitutions in the Muslim world, while protecting religious freedom and conscience, also state that no law can violate Shari'a principles. If one defines Shari'a to include the historical tradition that discriminated on religious grounds,<sup>1</sup> a conflict arises between upholding Shari'a and protecting religious freedom. While the rights provisions

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<sup>1</sup> For varying studies of the historical Islamic legal treatment of non-Muslims, see generally 'ABD AL-KARIM ZAYDAN, *AHKAM AL-DHIMMIYYIN WA AL-MUSTA'MININ* (Mu'assasat al-Risala 2d ed. 1988); Yohanan Friedman, *Classification of Unbelievers in Sunni Muslim Law and Tradition*, 22 *JERUSALEM STUD. IN ARABIC & ISLAM* 163 (1998); Clifford Edmund Bosworth, *The Concept of Dhimma in Early Islam*, in 1 *CHRISTIAN AND JEWS IN THE OTTOMAN EMPIRE: THE FUNCTIONING OF A PLURAL SOCIETY* 37 (Bernard Lewis & Benjamin Braude eds., Holmes & Meier Publishers 1982); Muhammad Hamidullah, *Status of Non-Muslims in Islam*, 45 *MAJALAT AL-AZHAR* 6 (1973).

reflect an integrationist approach to religious diversity, the constitutional incorporation of Shari'a accommodates the dominant religious group to the point of undermining, both in theory and often in practice, the integrationist effort to protect vulnerable minorities. To resort to theories of accommodation or integration, by themselves, in order to resolve tensions in pluralist societies, arguably does not adequately address the roots of the tension or offer constructive modes of resolution.

This tension arises, in large measure, because of how Shari'a is sometimes defined, namely, in terms of premodern rules of law.<sup>2</sup> One might wonder, perhaps, why the historical tradition of Islamic law should matter in the twenty-first century. Why not leave it in the past? In the wake of postcolonial nationalist movements in regions such as the Muslim world, some have argued that a "time paradox" has arisen, which makes the past substantively relevant for the construction of modern national identity.<sup>3</sup> In the case of Muslim nations, that might mean incorporating premodern Shari'a rules explicitly into the legal framework, in part, as a symbol of national identity. Such societies, arising out of the ashes of colonialism, seek nationalist definitions that distinguish them from their former colonial masters, establish an authentic identity, and, at the same time, facilitate their participation in a global market and in diplomatic engagement with former colonial powers. The need to be authentic—distinct from prior masters—and, simultaneously, to be participants in a global environment creates a tension in how a relatively new state can distinguish itself without, at the same time, isolating itself from the global stage.<sup>4</sup>

In looking to the past for a sense of identity, Muslim states certainly had options to draw on from the Islamic intellectual tradition. Perhaps Sufism, with its mystical tradition, could be a source of national identity.<sup>5</sup> Similarly, the Islamic philosophical tradition raised considerable questions about religion, politics, and identity that could have been harnessed for creating a sense of the political self. But such substantive modes most likely lack a determinacy that might give comfort to one seeking a source of identity.

If determinacy in tradition is important for defining and anchoring identity, then the rules of Islamic law (*fiqh*) can provide an easy and efficient option for Muslim states. The determinacy of these rules provides an anchor or reference

<sup>2</sup> See Anver M. Emon, *Conceiving Islamic Law in a Pluralist Society: History, Politics and Multicultural Jurisprudence*, 2006 SING. J. LEGAL STUD. 331 (2006), for a historical discussion of the political provenance of this particular conception of Shari'a.

<sup>3</sup> Anne McClintock, *Family Feuds: Gender, Nationalism and the Family*, 44 FEMINIST REV. 61 (1993).

<sup>4</sup> See ROXANNE EUBEN, *ENEMY IN THE MIRROR: ISLAMIC FUNDAMENTALISM AND THE LIMITS OF MODERN RATIONALISM: A WORK OF COMPARATIVE POLITICAL THEORY* (Princeton Univ. Press 1999), on the way Islamic fundamentalism anchors disputes on political identity.

<sup>5</sup> Historians have noted how Sufi movements have provided an impetus for independence drives against colonial occupation. See, e.g., ITZHAK WEISMANN, *TASTE OF MODERNITY: SUFISM, SALAFIYYA, AND ARABISM IN LATE OTTOMAN DAMASCUS* (Brill 2001).

point for creating a thick sense of identity against the perceived anemia of the liberal, atomistic individual.<sup>6</sup> Muslim states have often incorporated Islamic law into their legal systems, in part, to offer a fixed source for their legal systems and, thereby, for their national identity.<sup>7</sup> For the purposes of this chapter, then, Shari'a as political symbol involves the use of historical rules to give substantive content to the political identity of the nation at both the domestic and international level.<sup>8</sup>

What this suggests is that, when analyzing protections of religious minorities in the constitutions of Muslim countries, one cannot ignore the fact that constitutional reference to Islamic law has a political dimension that can impede attempts to reform the law's tenets in accordance with human rights values. Consequently, when new constitutions in the region are heralded as steps forward in democracy, as was the case with the Afghan and Iraqi constitutions, a question necessarily arises about the extent to which religious minorities are sufficiently protected if Islamic law is also part of the constitutional legal order.<sup>9</sup>

Does this mean that Islamic law should not find a place in such constitutions? To suggest as much would be to limit, artificially, the democratic process of drafting constitutions. Rather, constitutions are only first steps in creating a constitutional legal order. They must be only so strong that they do not fail at the outset. By themselves, they can embody only as much meaning as the underlying culture permits. Where the fundamental cultural context is defined in a historical Shari'a-based language, more than a constitution will be required to ensure a constitutional culture that will respect religious freedom. The scope of constitutional argument likely will be limited by the constraining power of the prevailing normative framework for institutions of law and government. The challenge, therefore, is to recognize that immediate constitutional reform must

<sup>6</sup> EUBEN, *supra* note 4, writes about the communitarian logic underlying Islamic fundamentalism. Her important work is significant for understanding the role of tradition and its perceived continuity with the present as a basis for identity construction.

<sup>7</sup> In fact, the nineteenth-century Muslim reformer Muhammad Abduh argued that a nation's laws respond to its prevailing contexts, and he suggests, therefore, that the meaningfulness of law depends on whether it reflects the circumstances, mores, and identity of its people. Muhammad Abduh, *Ikhtilaf al-Qawanin bi Ikhtilaf Ahwal al-Ummah*, in *AL-'AMAL AL-KAMILA LI'L-IMAM MUHAMMAD ABUDUH: AL-KITABAT AL-SIYASIIYA* 309–315 (al-Mu'assasa al-'Arabiyya 1972).

<sup>8</sup> This is especially true in light of the fact that most Muslim countries do not use Islamic law throughout their legal systems but only in piecemeal fashion in areas like family law and, less often, in criminal law. See Wael B. Hallaq, *Can the Shari'a be Restored?*, in *ISLAMIC LAW AND THE CHALLENGES OF MODERNITY* 21 (Yvonne Yazbeck Haddad & Barbara Freyer Stowasser eds., Alameda Press 2005).

<sup>9</sup> This question was most prominently portrayed in 2006 when an Afghan man, Abdul Rahman, was tried in an Afghan court for abandoning the Islamic faith. M. Cherif Bassiouni, *Leaving Islam is not a Capital Crime*, CHI. TRIB., Apr. 2, 2006, at C9; Margaret Wente, *Death to the Apostate*, GLOBE AND MAIL, Mar. 28, 2006, at A19; Wesal Zaman & Henry Chu, *Afghan Case Dropped but not Closed*, L.A. TIMES, Mar. 27, 2006, at A14. *But cf.* IRAQ CONST. art. 2, § 1 (which provides that no law shall violate the established tenets of Islamic law, the principles of democracy, or the basic freedoms protected under the Constitution), arts. 39–41 (defining and guaranteeing protection of freedoms of thought, conscience, belief, and worship).

be accompanied by long-term efforts to understand those normative frameworks and to offer acceptable alternatives. This chapter is an initial attempt at offering a model for understanding, holistically, the doctrine and history of Shari'a and its role in modern state legal systems. The model offered incorporates historical and hermeneutic models of meaning and understanding, which I call a historicist jurisprudence of Islamic law. By no means is this the first effort at such an approach to Islam.<sup>10</sup> Nor is it alone in challenging the ways in which modern Muslim states use Shari'a to justify discriminating against religious minorities.<sup>11</sup> But its contribution, one hopes, will be in bridging the premodern and the modern contexts of Shari'a by relying on theoretical approaches to legal hermeneutics and by doing so in light of competing frameworks of governance, legislation, adjudication, and legal analysis.

## 2. Historicist jurisprudence: Manifesting the transcendent through law

The idea of a historicist jurisprudence of Islamic law embraces the claim that the doctrinal rules emerged from extralegal value systems manifest in history, which gave the rules meaning. By using a historicist lens to understand both the transcendent values and how they were manifested in the rules that expressed them, one can determine the extent to which the rules are products of a contextually based jurisprudential vision, and whether that vision resonates similarly in contemporary constitutional states immersed in the international system. If the normative values and context of the present substantially differ from those of the past (which I assume they do), then the continued authority and meaningfulness of the premodern rules may be questioned in light of the dissonances in meaningfulness they create in contemporary constitutional governments. I explicitly assume this historical shift in light of the move from an imperial Islamic past to

<sup>10</sup> See FAZLUR RAHMAN, *ISLAMIC METHODOLOGY IN HISTORY* (Islamic Res. Inst. 1984); ALBRECHT NOTH, *THE EARLY ARABIC HISTORICAL TRADITION: A SOURCE-CRITICAL STUDY* (Michael Bonder trans., Darwin Press 2d ed. 1994); TARIF KHALIDI, *ARABIC HISTORICAL THOUGHT IN THE CLASSICAL PERIOD* (Cambridge Univ. Press 1994); EBRAHIM MOOSA, *GHAZALI AND THE POETICS OF IMAGINATION* (UNC Press 2005), for a variety of historicist and hermeneutic approaches to Islamic studies.

<sup>11</sup> See ZAYDAN, *supra* note 1, for an analysis of the historical rules of Shari'a as well as critiques of how Muslim states use Shari'a to discriminate against non-Muslims; see also ABDULLAH AHMED AN-NA'IM, *TOWARD AN ISLAMIC REFORMATION: CIVIL LIBERTIES HUMAN RIGHTS, AND INTERNATIONAL LAW* (Syracuse Univ. Press 1990); Ahmad Dallal, *Yemeni Debates on the Status of Non-Muslims in Islamic Law*, 7 *ISLAM & CHRISTIAN-MUSLIM REL.* 181 (1996); Fazlur Rahman, *Non-Muslim Minorities in an Islamic State*, 7 *J. INST. MUSLIM MINORITY AFF.* 13 (1986); Ghazi Salahuddin Atabani, *Islamic Shari'ah and the Status of Non-Muslims*, in *RELIGION, LAW AND SOCIETY: A CHRISTIAN-MUSLIM DISCUSSION* 63 (Tarek Mitri ed., WCC Publ'n 1995); Ismail R. Al-Faruqi, *The Rights of non-Muslims under Islam: Social and Cultural Aspects*, in *MUSLIM COMMUNITIES IN NON-MUSLIM STATES* 43 (Islamic Council Eur. 1980).

an international system of states, institutions, and multilateral relations, all of which offer alternative normative systems of limits and boundaries that hinder the imperial mode.<sup>12</sup> I will offer some examples to illustrate how the modern context has changed in ways significant for historicist jurisprudence of Islamic law. However, this study is not the place for an in-depth analysis of the normative frameworks of modern Muslim states.

This is not to suggest that a historicist jurisprudence assumes the constitutional state is inherently normative. Rather, the historical reality is that Muslims live in state systems, that such states are often organized constitutionally, and that the states interact amid international norms and treaties, and it is this situation that contributes to my assumption of change and the existence of a different normative framework of governance, community, and identity.<sup>13</sup> A historicist jurisprudence is concerned with how these facts compel reflection on the meaningfulness of premodern Islamic norms in a context of changed political institutions and modes of identity.

Islamic law at the doctrinal level is considerably diverse. Early Muslim jurists debated the significance of this diversity and what it meant for notions of legal authority, the objectivity of law, and the space for creativity in juristic interpretation.<sup>14</sup> However, the way Islamic law is conceptualized today in the popular press and in political discourse as rigid and unchanging often prevents significant modification of the tradition without engendering conflict at various levels of society.<sup>15</sup> This contemporary depiction of Islamic law also impedes efforts to rethink Shari'a as a rule-of-law system that can be meaningful within constitutional

<sup>12</sup> The same international system brings into question the new American imperialism, in which "democracy" is promoted as the new universal value to be disseminated throughout the world, potentially, even by means of coercive military engagement.

<sup>13</sup> For enlightening philosophical accounts of how fundamental values or conceptions of identity can and do change over time, see ALASDAIR C. MACINTYRE, *WHOSE JUSTICE? WHICH RATIONALITY?* (Univ. Notre Dame Press 1989); CHARLES TAYLOR, *SOURCES OF THE SELF: THE MAKING OF THE MODERN IDENTITY* (Harvard Univ. Press 1992).

<sup>14</sup> In early Islamic legal theory treatises, jurists asked whether every jurist is correct (*hal kullu al-mujtahid mustab*). This question incited a significant debate about the nature of authority and objectivity in the law, and whether the jurist's role is, formalistically, to discover or find the law or, instead, to function as an active participant in the construction of Islamic rules of law: 2 ABU BAKR AL-JASSAS, *AL-FUSUL FI AL-USUL* 400–440 (Dar al-Kutub al-'Ilmiyya 2000); 4 SAYF AL-DIN AL-AMIDI, *AL-IHKAM FI USUL AL-AHKAM* 178–197 (2d ed. al-Maktab al-Islami 1981); KHALED ABOU EL FADL, *SPEAKING IN GOD'S NAME: ISLAMIC LAW, AUTHORITY AND WOMEN* 147–150 (Oneworld Publ'n 2001).

<sup>15</sup> The conflict between Muslim states and the international community is evident when Muslim countries adopt reservations and conditions favoring deference to an ambiguous and seemingly ahistorical Shari'a when ratifying various human rights treaties. See, e.g., ANN ELIZABETH MAYER, *ISLAM AND HUMAN RIGHTS: TRADITION AND POLITICS* (2d ed. Westview Press 1995); Ann Elizabeth Mayer, *Internationalizing the Conversation on Women's Rights: Arab Countries Face the CEDAW Committee*, in *ISLAMIC LAW AND THE CHALLENGES OF MODERNITY*, *supra* note 8, at 133. But a conflict between the state and domestic Islamist parties can also arise, thereby complicating a government's reformist agenda, as in the history of Morocco's family-law reform. Ilhem Rachidi, *After Struggle, New Equality for Moroccan Women*, *CHRISTIAN SCI. MONITOR*, Oct. 24, 2003, at 9.

societies that espouse liberal commitments.<sup>16</sup> Consequently, when constitutions refer to Shari'a as a source of law, the "Shari'a" that is often invoked is a premodern tradition of law contained in treatises centuries old.<sup>17</sup> These doctrinal sources contain rules regarding religious practice and social order at both the public and private levels. But these rules are not transparently derived from fundamental scriptural sources such as the Qur'an and the traditions of the Prophet. Rather, premodern Muslim jurists imaginatively read and interpreted them in order to reach a rule of law.<sup>18</sup>

Given the role jurists played in interpreting Islamic law, rules such as those concerning the treatment of religious minorities necessarily reflect the historically conditioned values of those jurists. Those values operate as "background factors", or, in the words of Charles Taylor and Jürgen Habermas, respectively, "moral frameworks" or "lifeworlds" that influenced how premodern jurists interpreted texts and manifested fundamental values in rules of law that were expressed in the shared, technical, and ultimately coercive language of the law. This is not to say that the rules of law espoused in legal texts differed from region to region, or from author to author, due to idiosyncratic shifts in value. Certainly, one notices, for example, that Shafi'i rules of law articulated in legal texts generally were similar across regions of the premodern Muslim world. Rather, I suggest that while the continuity of the rules may reflect a need for determinacy in law, akin to the common law doctrine of *stare decisis*, the specific precedents themselves arose out of a process of interpretation in light of normative background values about social and political ordering. By taking a critical historicist perspective, one can come to understand how and why certain values became manifest in rules of law, while also questioning the efficacy and substantive justice of those rules in a contemporary state where background norms and rule-of-law institutions have considerably changed.

The idea that the law reflects underlying normative frameworks that influence legal interpretations is not new to the field of legal theory and hermeneutics. This chapter in no way attempts to survey the field of hermeneutic philosophy. Rather,

<sup>16</sup> Emon, *supra* note 2; EUBEN, *supra* note 4.

<sup>17</sup> In his commentary on the 1949 Egyptian Civil Code, 'Abd al-Razzaq al-Sanhuri wrote that the Shari'a can be a source of law if the code or custom gives no guidance for a particular matter. He defines Shari'a as the rules of law in books of *fiqh*, or, in other words, the premodern rules of law. He is careful, though, to articulate two caveats in utilizing the Shari'a. First, no particular school of law should be preferred over the others; and, second, any derived rule from the *fiqh* cannot violate any general principle established in the Civil Code. 1 'ABD AL-RAZZAQ AL-SANHURI, AL-WASIT FI SHARH AL-QANUN AL-MADANI AL-JADID 44–50 (Dar al-Nahda al-'Arabiyya no date).

<sup>18</sup> The concept of juristic interpretation is captured by the Arabic term *ijtihad*. Considerable scholarly work has been devoted to understanding this term, while reformist literature has argued for the need to engage in a new *ijtihad*. For studies of this term and its place in Islamic legal theory, see Wael Hallaq, *Was the Gate of Ijtihad Closed?*, 16 INT'L J. MIDDLE E. STUD. 3 (1984); Joseph Schacht et al., *Ijtihad*, in 3 ENCYCLOPAEDIA OF ISLAM 1026 (P.J. Bearman et al. eds., 2d ed. Brill 1960–2005); Shaista Ali-Karamali & Fiona Dunne, *The Ijtihad Controversy*, 9 ARAB L.Q. 238 (1994).

certain theorists offer insights that can help explain the way in which a historicist jurisprudence assesses the law while remaining sensitive to the needs (theoretical and otherwise) of a rule-of-law system. A historicist jurisprudence can aid in understanding the law, provide a mechanism for critique, and suggest alternative orderings or distributions that may not be visible from within prevailing paradigms of Shari'a.

For instance, in his theory of "communicative action", Jürgen Habermas asserts that individuals share normative meaning through a language medium that expresses values and commitments that are not idiosyncratic but, rather, are understood as *separate and distinct* from people. For Habermas, one's relationship to reality through language "contains a reference to something independent of us and thus, in this sense, *transcendent*".<sup>19</sup> Communication is possible because fundamental norms are rendered objective, determinate, and shared within a community; in other words, because of these public norms, meaning can be accessed by and communicated among individuals. One may make a normative claim that is certainly subject to critique. However, what makes the claim potentially meaningful is the fact that a community shares and commits to values that are understood as transcendent but that are manifested in the world of experience.<sup>20</sup>

For Habermas, these shared norms help constitute a lifeworld that allows context-transcending values to find expression in the phenomenal world of daily existence. According to Habermas, "communicative acts are located within the horizon of shared, unproblematic beliefs; at the same time, they are nourished by these resources of the *always already familiar*. The constant upset of disappointment and contradiction, contingency and critique in everyday life crashes against a sprawling, deeply felt, and unshakable rock of background assumptions, loyalties, and skills".<sup>21</sup>

Charles Taylor also relies on a concept of background ideals that inform the way we construct meaning in community through language. One's background values constitute, in Taylor's terms, a "moral framework" from which we see and understand the world around us. According to Taylor, "to think, feel, judge within such a framework is to function with the sense that some action, or mode of life, or mode of feeling is incomparably higher than the others which are more readily available to us...".<sup>22</sup> Furthermore, these frameworks are essential to our existence. In fact, Taylor argues that:

doing without frameworks is utterly impossible for us; otherwise put, that the horizons within which we live our lives and which make sense of them have to include these strong qualitative discriminations. Moreover, this is not meant just as a contingently true psychological fact about human beings, which could perhaps turn out one

<sup>19</sup> JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY 14 (MIT Press 1998) (emphasis added).

<sup>20</sup> *Id.* at 18.

<sup>21</sup> *Id.* at 22.

<sup>22</sup> TAYLOR, *supra* note 13, at 20.

day not to hold for some exceptional individual or new type, some superman of disengaged objectification. Rather the claim is that living within such strongly qualified horizons is constitutive of human agency, that stepping outside these limits would be tantamount to stepping outside what we would recognize as integral, that is, undamaged human personhood.<sup>23</sup>

For the purposes of this study, what links Habermas and Taylor is how they understand meaning as arising from shared, transcendent values made manifest as people live their lives together. The way those transcendent values manifest themselves in any given moment reflects the context of that moment and, thereby, opens the door to a historicist concern with context and change amid commitments to enduring values.

In the case of Muslim states that adopt Islamic law, I want to suggest that the meaning and significance of Shari'a-based rules, if subjected to a historicist critique, will illustrate how the meaningfulness of these rules is built upon certain normative frameworks (to modify Taylor's phrase) that manifest transcendent values in a historical moment in the form of laws. But that early historical context—I explicitly assume and shall show, in part—is different from the present. Until that difference is acknowledged, the resort to constitutional reform, or theories of accommodation/integration, will most likely fail to resolve the challenges facing non-Muslims in expressly Muslim states.

### 3. Muslim state constitutions and protections for religious minorities

Muslim majority countries often incorporate Islam or Islamic law into their constitutions while including express provisions concerning religious freedom and the treatment of religious minorities. Thus, these constitutions seem to display a tension between the definition and application of Islamic law, on the one hand, and how respect for Islamic law may conflict with provisions protecting religious minorities, on the other. The discussion below summarizes some trends in the constitutions of Muslim states and illustrates how the constitutions establish this tension between Shari'a, constitutionalism, and religious freedom without providing a solution.

Muslim countries may specify in their constitutions that Islam is the state religion,<sup>24</sup> although that is not always the case.<sup>25</sup> Some countries specifically establish that the government is secular, keeping religion and state law distinct.<sup>26</sup>

<sup>23</sup> *Id.* at 27.

<sup>24</sup> See for example BHR. CONST. art. 2; MAURITANIA CONST. art. 5; MALAY. CONST. art. 3; MOROCCO CONST. art. 6; SAUDI ARABIA BASIC LAW OF GOV'T, 1993 art. 1; YEMEN CONST. art. 2; TUNIS. CONST. art. 1.

<sup>25</sup> See for example ALB. CONST. art. 10.

<sup>26</sup> See for example ETH. CONST. art. 11; AZER. CONST. art. 7.

Aside from designating a state religion, some Muslim nations also assert that Islam is either "a source" or "the source" of law in the country, thereby bringing into sharp focus the constitutional significance of violating a precept of Shari'a law.<sup>27</sup>

To protect the interests of religious minorities, Muslim state constitutions may include nondiscrimination clauses to protect individuals from religious discrimination. For instance, the Bahrain Constitution reads that "[p]eople are equal in human dignity, and citizens shall be equal in public rights and duties before the law, without discrimination as to race, origin, language, religion, or belief".<sup>28</sup> Eritrea's Constitution provides that "[a]ll persons are equal before the law. No person may be discriminated against on account of race, ethnic origin, language, colour, sex, religion, disability, political belief or opinion, or social or economic status or any other factor. . . ."<sup>29</sup> Generally, the equality clauses are listed among the earliest provisions of "basic rights" and occur without limitation or restriction.

Additionally, Muslim countries may include rights provisions that protect one's religious freedom. Egypt's Constitution states that "[t]he State shall guarantee the freedom of belief and the freedom of practice of religious rites".<sup>30</sup> Indonesia's Constitution provides that "[t]he State guarantees all persons the freedom of worship, each according to his/her own religion or belief".<sup>31</sup> Other countries adopting this unrestrictive approach include Bosnia and Herzegovina, Eritrea, Malaysia, Mali, and Morocco.<sup>32</sup>

<sup>27</sup> See for instance BHR. CONST. art. 2; EGYPT CONST. art. 2; KUWAIT CONST. art. 2; OMAN CONST. art. 2; QATAR CONST. art. 1; SYRIA CONST. art. 3. For a sustained review of constitutions in the Arab world, see NATHAN J. BROWN, *CONSTITUTIONS IN A NON-CONSTITUTIONAL WORLD: ARAB BASIC LAWS AND THE PROSPECTS FOR ACCOUNTABLE GOVERNMENT* (SUNY Press 2001).

<sup>28</sup> BHR. CONST. art. 18.

<sup>29</sup> ERI. CONST. art. 14.

<sup>30</sup> EGYPT CONST. art. 46.

<sup>31</sup> INDON. CONST. art. 29(2).

<sup>32</sup> See for example BOSN. & HERZ. CONST. 1995 art. 2, para. 3; ERI. CONST. art. 19; MALAY. CONST. art. 11; MALI CONST. art. 4; MOROCCO CONST. art. 6. However, the substantive protection these provisions provide religious minorities is subject to further speculation. For instance, although the Malaysian Constitution's article 11 grants all people the right to profess and practice their religion, the recent case involving Lina Joy suggests that the courts may abdicate their protective role. Lina Joy was born a Muslim woman and subsequently converted to Christianity. She sought to have her identity card changed from defining her as a Muslim Malay to Christian Malay. She appealed her case to the highest federal court in Malaysia, which stated that it had no jurisdiction to decide her case and that all matters involving Islamic law should be referred to the Shari'a court. In doing so, the federal court has seemingly undermined the real protection article 11 can provide. See, e.g., Baradan Kuppasamy, *Political Solution Demanded in Malaysia to Halt Concerns of Creeping Islamism*, S. CHINA MORNING POST, Jun. 1, 2007, at 8. See "Article 11: The Federal Constitution: Protection for All", for an example of Malaysian civil society groups advocating for greater article 11 protection, available at <<http://www.article11.org/>> (last visited July 30, 2007). Article 26 of the Eritrean Constitution allows for limits on the rights enumerated in the Constitution on the grounds of national security, public safety, economic well-being of the country, or the public morals and public order of the nation: ERI. CONST. art. 26.

But some Muslim countries also provide qualifying remarks concerning the scope of one's religious freedom. Bahrain's Constitution reads that "[f]reedom of conscience is absolute. The State shall guarantee the inviolability of places of worship and the freedom to perform religious rites and to hold religious processions and meetings *in accordance with the customs observed in the country*".<sup>33</sup> Kuwait's Constitution reads that "[f]reedom of belief is absolute. The State protects the freedom of practicing religion *in accordance with established customs, provided that it does not conflict with public policy or morals*".<sup>34</sup> Both examples illustrate how a statement of absolute freedom is coupled with ambiguous limiting language about "customs", "public policy", and "morals".

#### 4. Illustrating the tension at work: Saudi Arabia and Egypt

The constitutions of Muslim countries provide rights protection for religious minorities, although some have limiting clauses that are not uncommon in constitutions and human rights instruments around the world.<sup>35</sup> However, a constitution is but one step in creating a constitutional culture for a state emerging from sectarian violence, regional feuds, and postcolonial struggles for independence in an international environment. In the gaps between constitutional texts, legislated statutes, and judicial cases are a multitude of moments when social, cultural, and ideological factors may affect legal outcomes. These underlying extra-legal factors provide content to a constitutional culture and language that can limit the scope of judicial and legislative activity.<sup>36</sup> And the outcomes, when all is taken into account, may result in *de jure* discrimination against minorities, despite constitutional protections to the contrary.

For example, Saudi Arabia has no constitution but, rather, various "basic laws". According to the Basic Law of Government, Saudi Arabia "protects human rights in accordance with the Islamic Shari'ah".<sup>37</sup> The scope of human rights protection

<sup>33</sup> BHR. CONST. art. 22 (emphasis added).

<sup>34</sup> KUWAIT CONST. art. 35 (emphasis added).

<sup>35</sup> The Canadian Charter of Rights and Freedoms protects the freedom of conscience and belief, subject to section 1 restrictions "as can be demonstrably justified in a free and democratic society": Canadian Charter of Rights and Freedoms, part I of the Constitution Act, 1982, being Sched. B to the Canada Act 1982, ch. 11 (U.K.), § 1. Likewise, the European Convention on Human Rights (ECHR), art. 9, both protects the freedom of conscience while also acknowledging that it may be restricted by law as necessary "in a democratic society in the interests of public safety, for the protection of public order, health or morals, or the protection of the rights and freedoms of others". European Convention on Human Rights, art. 9.

<sup>36</sup> The idea that the extralegal cultural context may influence and delimit judicial analysis is the subject of considerable scholarly attention. See for example BRUCE A. ACKERMAN, *WE THE PEOPLE* (Harvard Univ. Press 1991); Reva B. Siegel, *Text in Contest: Gender and the Constitution from a Social Movement Perspective*, 150 U. PA. L. REV. 297 (2001).

<sup>37</sup> SAUDI ARABIA BASIC LAW OF GOV'T, 1993 art. 26. For an unofficial English translation of this provision, see the International Constitutional Law website on Saudi Arabia, available at <[http://www.servat.unibe.ch/law/icl/sa00000\\_.html](http://www.servat.unibe.ch/law/icl/sa00000_.html)> (last visited July 28, 2007).

of individual equality, liberty, and freedom will depend significantly on how one understands the scope and content of Shari'a. In Saudi Arabia, premodern Shari'a rules (in other words, *fiqh*) govern the majority of cases involving tort, property, and contract.<sup>38</sup> The history of Saudi Arabia's incorporation of Sunni Islam and Shari'a, in particular the Wahhabist strain, as part of its national ethos has been addressed in numerous studies in recent years. Historians have shown that the early resort to Islam, as a defining feature of the Saudi state, was instrumental in forming a political identity that transcended regional and tribal networks.<sup>39</sup> The institution of law, as an ordering and coercive feature of the government, imparts an Islamic content that has facilitated the development of a distinctive Islamic society. Notably, in Sunni Islamic law, there are four doctrinal schools (*madhab*; singular: *madhhab*) concerning the specific details of law. The doctrinal schools are equally orthodox but often differ from each other on similar points of law. In Saudi Arabia, the Hanbali school generally provides the rules of Islamic legal decision.<sup>40</sup>

The tension embedded in article 26 between Shari'a rules and rights to equality, for instance, is illustrated by rules governing the measure of wrongful-death damages in Saudi Arabia.<sup>41</sup> According to the Indian consulate in Jeddah, Saudi Arabia, the families of Indian expatriates working in the kingdom can claim wrongful-death compensation pursuant to a schedule of fixed amounts. However, the amounts vary depending on the victim's religious convictions and gender. If the victim is a Muslim male, his family can claim SR100,000. However, if the victim is a Christian or Jewish male, the family can claim only half that amount, namely, SR50,000. Further, if the victim belongs to another faith group, such as Hindu, Sikh, or Jain, his family can claim only approximately SR6,667. The family of a female victim can claim half the amount allowed for her male coreligionist.<sup>42</sup>

It seems that Saudi Arabia patterns its wrongful-death compensatory regime on early Hanbali rules of tort liability. For example, premodern Muslim jurists held that the *diyya*, or wrongful-death compensation, for a free Muslim male is one hundred camels.<sup>43</sup> However, if the victim is a Jew or Christian male, his family

<sup>38</sup> FRANK E. VOGEL, *ISLAMIC LAW AND LEGAL SYSTEM: STUDIES OF SAUDI ARABIA* 175, 291 (Brill 2000).

<sup>39</sup> MADAWIAL-RASHEED, *A HISTORY OF SAUDI ARABIA* (Cambridge Univ. Press 2002); KHALED ABU EL FADL, *THE GREAT THEFT: WRRESTLING ISLAM FROM THE EXTREMISTS* (Harper 2007); Ibrahim Karawan, *Monarchs, Mullas and Marshalls: Islamic Regimes?* 524 *ANNALS AM. ACAD. POL. & SOC. SCI.* 103 (1992); Joseph A. Kechichian, *The Role of the Ulama in the Politics of an Islamic State: The Case of Saudi Arabia*, 18 *INT'L J. MIDDLE E. STUD.* 53 (1986).

<sup>40</sup> *Id.* at 10.

<sup>41</sup> SAUDI ARABIA BASIC LAW OF GOV'T, 1993 art. 26.

<sup>42</sup> See Consulate General of India, Jeddah: Basic Legal Information for Indian Workers in the Kingdom of Saudi Arabia—Death Compensation of Deceased Indians, available at <<http://www.cgijeddah.com/cgijed/publication/basiceng/complete.htm#dcomp>> (last visited Aug. 20, 2007).

<sup>43</sup> ABU HAMID AL-GHAZALI, *AL-WASIT FI AL-MADHAB* 4:64 (Dar al-Kutub al-'Ilmiyya 2001); ABU ISHAQ AL-SHIRAZI, *AL-MUHADHDHAB FI FIQH AL-IMAM AL-SHAFI'I* 3:210 (Dar al-Kutub al-'Ilmiyya 1995).

can only claim a percentage of that amount. The Shafi'is held that the family is entitled to one-third of what a free Muslim male's family would receive.<sup>44</sup> But the Malikis and Hanbalis granted them one-half of what a Muslim's family could obtain.<sup>45</sup> Furthermore, Sunni and Shi'ite jurists held that if the victim is a Magian (*majus*) his family receives even less, namely, one-fifteenth of what a free Muslim male is worth.<sup>46</sup> More importantly, one-fifteenth of SR100,000 is approximately SR6,667—a figure precisely corresponding to the wrongful-death compensation offered by Saudi Arabia for Hindus, Sikhs, or Jains.

Egypt has often been criticized for abuses in connection with its Coptic Christian citizens.<sup>47</sup> According to the Egyptian Constitution, Islam is the official state religion, and Shari'a is the principle source of law in the country.<sup>48</sup> Article 46 provides in unqualified language that the state guarantees freedom of

<sup>44</sup> MUHAMMAD B. IDRIS AL-SHAFI', *KITAB AL-UMM* 3:113 (Dar al-Fikr 1990); AL-MAWARDI, *AL-HAWI AL-KABIR* 12:308 (Dar al-Kutub al-'Ilmiyya 1994); AL-GHAZALI, *supra* note 43, at 4:64–67; MUHYI AL-DIN AL-NAWAWI, *RAWDAT AL-TALIBIN WA 'UMDAT AL-MUPTIN* 9:258 (al-Maktab al-Islami 1991); SHIHAB AL-DIN AL-RAMLI, *NIHAYAT AL-MUHTAJ ILA SHARH AL-MINHAJ* 7:320 (Dar Ihya' al-Turath al-'Arabi 1992); AL-SHIRAZI, *supra* note 43, at 3:213.

<sup>45</sup> MALIK B. ANAS, *AL-MUWATTA'* 2:434–435 (Dar al-Gharb al-Islami 1997), related that 'Umar II decided that the *diyya* for a killed Jew or Christian is half the *diyya* for free Muslim male. See also IBN RUSHD AL-JADD, *AL-MUQADDIMAT AL-MUMAHHIDAT* 3:295 (Dar al-Gharb al-Islami 1988); IBN RUSHD AL-HAFID, *BIDAYAT AL-MUJTAHID WA NIHAYAT AL-MUQTASID* 2:604–605 (Dar al-Kutub al-'Ilmiyya 1997); SHIHAB AL-DIN AL-QARAFI, *AL-DHAKHIRA* 12:356 (Dar al-Gharb al-Islamiyya 1994); IBN QUDAMA, *AL-MUGHNI* 7:793–794 (Dar Ihya' al-Turath al-'Arabi no date), who said that Ahmad b. Hanbal held the amount was one-third, but then changed his position to half; ABU 'ABD ALLAH B. MUFLIH, *AL-FURU'* 6:16 (Dar al-Kutub al-'Ilmiyya 1997), also indicated some would provide the Muslim *diyya* for *dhimmis* if the latter were killed intentionally. However, Maliki and Hanbali jurists held that in personal injury cases (*jirahat*), the *diyya* for the injury is whatever a free Muslim male would get. MALIK B. ANAS, *AL-MUWATTA'* 2:434–435; SAHNUN B. SA'ID, *AL-MUDAWWANAH AL-KUBRA* 6:395 (Dar Sadir no date); IBN QUDAMA, *AL-MUGHNI* 7:795; MANSUR B. YUNIS AL-BAHUTI, *KASHSHAF AL-QINA' AN MATN AL-IQNA'* 6:23–24 (Dar al-Kutub al-'Ilmiyya 1997).

<sup>46</sup> AL-SHAFI', *supra* note 44, at 3:113; AL-GHAZALI, *supra* note 43, at 4:67; AL-MAWARDI, *supra* note 44, at 12:311; AL-NAWAWI, *supra* note 44, at 9:258, who said that the *majus* get *shulha' ushr* of the *diyya* for a free Muslim male; AL-RAMLI, *supra* note 44, at 7:320; AL-SHIRAZI, *supra* note 43, at 3:213; MALIK B. ANAS, *supra* note 45, at 2:435; SAHNUN, *supra* note 45, at 6:395; IBN RUSHD AL-JADD, *supra* note 45, at 3:296; AL-QARAFI, *supra* note 45, at 12:357; IBN QUDAMA, *supra* note 45, at 7:796; AL-BAHUTI, *supra* note 45, at 6:24. Notably, Ibn Qudama related a minority opinion held by al-Nakha'i and others who equated the *diyya* for the *majus* and free Muslims because both are free and inviolable human beings (*adami hurr ma'sum*). IBN QUDAMA, *supra* note 45, at 7:796. The Ja'farite AL-MUHAQQIQ AL-HILLI, *SHARAH AL-ISLAM FI MASAIL AL-HALAL WA AL-HARAM* 2:489 (Markaz al-Rasil al-'Azam 10th ed. 1998), related three views, namely that Jews, Christians, and Magians are valued at 800 *dirhams*, or all enjoy the same *diyya* as Muslims, or that Christians and Jews are entitled to four thousand *dirhams*. According to the Ja'farite AL-HURR AL-'AMILI, *WASA'IL AL-SHIA' ILA TAHSIL MASAIL AL-SHARI'A* 19:141–142 (Dar Ihya' al-Turath al-'Arabi no date), the *diyya* of a free Muslim male is roughly 10,000 *dirhams*, while the *diyya* of a *dhimmi* Jew or Christian is 4,000 *dirhams*, and the *diyya* of the *majus* is 800 *dirhams*, roughly 40 percent and 8 percent respectively of the *diyya* for a free Muslim male.

<sup>47</sup> For studies on the situation and treatment of Egypt's Coptic Christians, see Randall P. Henderson, *The Egyptian Coptic Christians: The Conflict between Identity and Equality*, 16 *ISLAM & CHRISTIAN MUSLIM REL.* 155 (2005); HUM. RTS. WATCH, *WORLD REPORT*, 2006, at 439 (2006).

<sup>48</sup> EGYPT CONST. art. 2.

belief and religious practice.<sup>49</sup> Nevertheless, article 41 states that one's freedoms might be curtailed in the interest of public security.<sup>50</sup> By themselves, these provisions set up a similar framework of tensions found in constitutional documents around the world. But the implications of the Egyptian system are problematic, chiefly because of the prevailing conceptions of Islam and Islamic law that also inform the nation's constitutional culture. For instance, according to its 2006 International Religious Freedom Report, the U.S. State Department reported that Egypt partially applies a nineteenth-century Ottoman decree that requires non-Muslims to seek government approval before building or repairing places of worship:

The contemporary interpretation of the 1856 Ottoman Hamayouni decree, partially still in force, requires non-Muslims to obtain a presidential decree to build new churches and synagogues. In addition, Ministry of Interior regulations, issued in 1934 under the Al-Ezabi decree, specify a set of ten conditions that the Government must consider before a presidential decree for construction of a new non-Muslim place of worship can be issued. The conditions include the requirement that the distance between a church and a mosque not be less than one hundred meters and that the approval of the neighboring Muslim community be obtained.<sup>51</sup>

The report noted some advances in 2005 but indicated that, fundamentally, the regime of licensing and registration continues:

In December [2005] the president decreed that permits for church repair and rebuilding, previously requiring his approval, could be granted by provincial governors. The purpose of this was to reduce delay. The central government continued to control the granting of permits for construction of new churches. Despite the 2005 decree, as well as a previous presidential decree in 1999 to facilitate approvals, many churches continued to encounter difficulty in obtaining permits.<sup>52</sup>

The tension between the Egyptian government and its Coptic citizens is not a recent phenomenon. Nor is the government's preoccupation with religious groups limited to its Coptic minority. The report also indicates that permits are required before one can build a mosque, that the government pays imams' salaries, and it monitors their sermons.<sup>53</sup> This raises larger questions of religious freedom in Egypt across all religious divides. However, the focus on Coptic Christians is of interest because of the parallels between Egyptian government practice and

<sup>49</sup> *Id.* art. 46.

<sup>50</sup> *Id.* art. 41.

<sup>51</sup> U.S. DEP'T OF STATE, EGYPT: INTERNATIONAL RELIGIOUS FREEDOM REPORT 2006, available at <<http://www.state.gov/g/del/tls/trf/2006/71420.htm>> (last visited Aug. 30, 2007). See also Saad Eddin Ibrahim, *Christians Oppressed*, WALL STREET J., Nov. 18, 2005, at A16. For a study of nineteenth-century Ottoman reforms to enhance religious equality, such as the Hatti-Humayun and others, see Roderic H. Davison, *Turkish Attitudes Concerning Christian-Muslim Equality in the 19th Century*, 59 AM. HIST. REV. 844 (1954).

<sup>52</sup> U.S. DEP'T OF STATE, *supra* note 51.

<sup>53</sup> *Id.*

premodern Islamic law. While a more extensive history of Islam in Egypt might illuminate further the subtleties of the current regime's attitude toward its Coptic citizens, my own study suggests that the ongoing commitment to the Humayun decree, despite the 2005 reforms on the licensing procedure, illustrates a challenge facing the government about the current meaningfulness of the premodern Islamic tradition in light of Egypt's constitutional and international commitments to religious freedom.<sup>54</sup>

The Egyptian requirement that Coptic Christians apply for government permission to build new churches or repair old ones correlates with premodern Islamic rules that limited non-Muslims from freely building and repairing places of worship in Islamic lands. Non-Muslims, residing peacefully in the Islamic polity, were required to pay a poll tax (*jizya*) to maintain their faith and receive state protection. In the legal tradition, they were called *dhimmi*s, since they were granted a contract of protection (*'aqd al-dhimma*) that guaranteed their safety on payment of the poll tax. Under the contract, as will be explained below, their freedom to build or refurbish their religious places of worship was limited.<sup>55</sup>

## 5. Understanding historical Shari'a

The Shari'a tradition was developed by jurists who generally developed legal doctrine in a decentralized fashion outside the ambit of government control. Their contribution to defining Shari'a reflected one level of selectivity amid a diversity of possibilities. Each doctrinal school of Islamic law could account for majority

<sup>54</sup> For instance, Egypt is a signatory to various international human rights instruments that protect religious freedom, such as the International Covenant on Economic, Social and Cultural Rights (ratified on Jan. 14, 1982); the International Covenant on Civil and Political Rights (ratified on Jan. 14, 1982); and Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) (ratified on Sept. 18, 1981). Notably, Egypt and other Muslim countries will often ratify such treaties with reservations that limit their commitment to the treaties' terms in the event they contradict the principles and tenets of Islamic law. For a discussion on this practice among Muslim state signatories to international instruments, see ELIZABETH ANN MAYER, *ISLAM AND HUMAN RIGHTS: TRADITION AND POLITICS* (Westview Press 1995); Mayer, *supra* note 15, at 133. But what "Shari'a" means in any given reservation is not entirely clear. In the case of CEDAW provisions, reservations in favor of Shari'a may even undermine the effect of the treaty, despite being ratified. Notably, article 19 of the Vienna Convention on the Law of Treaties 1969 holds that reservations that defeat the purpose of a treaty are impermissible, and thereby may offer some limits on the scope of reservations. On the relationship between the Vienna Convention and reservations to CEDAW, see Belinda Clark, *The Vienna Convention Reservations Regime and the Convention on Discrimination Against Women*, 85 AM. J. INT'L L. 281 (1991). The fact that Egypt is a state within an international system, defines itself as bound by Shari'a, and yet participates in multilateral treaty negotiations concerning rights, trade, diplomatic relations, and crimes against humanity contributes to a context of governance (domestic and international) that arguably ushers in a normative framework of governance, community, and identity that is distinct from those operating in the pre modern Muslim world.

<sup>55</sup> See *infra* §§ 5.1–5.3 for discussion on the premodern Islamic legal restrictions on this issue.

and minority opinions, as well as outlier views.<sup>56</sup> This determinacy amid diversity suggests that a process of interpretive selection gave rise to moderately determinate doctrine, which provided, in turn, sufficient notice about one's legal duties and entitlements. Further, these selected legal rulings were subjected to the impact of colonialism and the rise of the modern state with its centralized configuration of lawmaking. By adopting certain Islamic rules of law in centralized state legislative schemes, most likely what occurred was that the initial normative context of the doctrine was forgotten or ignored while the rules themselves remained. Premodern rules were then inserted into the modern state system without accounting for whether those rules remain meaningful, or how the changed normative frameworks might compel different legal manifestations. Arguably, the early normative framework was premised on a universalist Islamic message made manifest through imperial conquest.

### 5.1 A Qur'anic basis manifested in historical Shari'a?

The Islamic legal treatment of non-Muslims apparently builds on a normative framework of discrimination constructed with reference to the Qur'an, which then branches out into legal doctrine. The discriminatory rules of Shari'a, as will be suggested, were not an inevitable interpretive result of texts such as the Qur'an and the prophetic traditions, or *hadith*. Instead, they may have reflected an extra-textual universalist Islamic ethos made manifest by the early Islamic conquests and reified in law with the aid of a historical-judicial imagination that rendered the law the fulfillment of the community's spiritual and worldly ethos. This universalism is built, in part, on a dichotomy between "us" and "them". Hence, unsurprisingly, the Shari'a rules regarding non-Muslims utilize a superiority/inferiority dichotomy to order society and govern social relations.<sup>57</sup>

One particular Qur'anic verse will provide a starting point for identifying the way religious discrimination became a justified legal value, and how it was selected among alternatives. Specifically, Qur'an 9:29 states:

Fight those who do not believe in God or the final day, do not prohibit what God and His prophet have prohibited, do not believe in the religion of truth, from among those

<sup>56</sup> For surveys and theoretical studies on Islamic legal history and theory, see WAEL B. HALLAQ, *A HISTORY OF ISLAMIC LEGAL THEORIES: AN INTRODUCTION TO SUNNI USUL AL-FIQH* (Cambridge Univ. Press 1999); WAEL HALLAQ, *ORIGINS AND EVOLUTION OF ISLAMIC LAW* (Cambridge Univ. Press 2005); ABOU EL FADL, *supra* note 14; MOHAMMAD HASHIM KAMALI, *PRINCIPLES OF ISLAMIC JURISPRUDENCE* (Islamic Texts Soc'y 2005).

<sup>57</sup> This type of universalist narrative is not unique to the Islamic context. As Hendrik Spruyt has illustrated, the Holy Roman Empire was premised on a similar universalist Christian narrative that was subsequently checked by the historical tension between the king and papal authorities, with perhaps the most dramatic moment of resolution being King Henry IV's penitent visit to Canossa to seek forgiveness from Pope Gregory VII during the Investiture Controversy. HENDRIK SPRUYT, *THE SOVEREIGN STATE AND ITS COMPETITORS* (Princeton Univ. Press 1996).

who are given revelatory books, until they pay the poll tax (*jizya*) from their hands in a state of submission (*saghirun*).<sup>58</sup>

This verse raises three main issues for discussion: who are the people identified in the verse for this special treatment, what is the poll tax, and what does it mean to be in a state of submission? For the purposes of this chapter, the last issue is of immediate relevance.

There are competing views of what "state of submission" means. Some Muslim jurists suggested that by paying the poll tax, non-Muslims residing in Muslim lands (*dhimmis*) effectively acknowledged their humiliated, submissive, and subservient social position as compared with Muslims.<sup>59</sup> Jurists used the law to make clear that submissiveness in social relations, such as when a non-Muslim pays his poll tax: he must stand before the magistrate, who sits when collecting the tax. The standing/sitting distinction conveys to the non-Muslim that he is in a submissive position, given that the magistrate does not rise to greet him.<sup>60</sup> Jurists also stated that non-Muslims must walk on the sides and edges of a pathway, while the honor of walking in the middle of the roadway is reserved for Muslim passersby, both physically and symbolically marginalizing the "religious other".<sup>61</sup> These and other rules illustrate how a universalist Islamic ethos becomes manifest in the law through the use of a superiority/inferiority dichotomy for ordering social relations.

Not all Muslim jurists read the verse as condoning the ethic of subservience and humiliation. Some argued that the verse simply means that the non-Muslim obeys the rule of law. In other words, to remain a full member of society, the

<sup>58</sup> Qur'an, 9:29.

<sup>59</sup> See for example MUQATIL, TAFSIR MUQATIL B. SULAYMAN 2:166–167 (Dar Ihya' al-Turath al-'Arabi 2002) (by giving the *jizya*, the *dhimmis* are made lowly (*madhallun*)); AL-NISABURI, AL-WASIT 2:489 (Dar al-Kutub al-'Ilmiyya 1994) (payment of *jizya* renders *dhimmis* lowly and vanquished (*dhalilun mugahharun*)); MUHAMMAD B. JARIR AL-TABARI, TAFSIR AL-TABARI 4:98–99 (Mu'assasat al-Risala 1994). Mahmoud M. Ayoub, *The Islamic Context of Muslim-Christian Relations*, in CONVERSION AND CONTINUITY: INDIGENOUS CHRISTIAN COMMUNITIES IN ISLAMIC LANDS, EIGHT TO EIGHTEENTH CENTURIES 461 (Pontifical Inst. Mediaeval Stud. 1990); Ziauddin Ahmad, *The Concept of Jizya in Early Islam*, 14 ISLAMIC STUD. 293 (1975); Bosworth, *supra* note 1; MAWIL IZZI DIEN, THE THEORY AND THE PRACTICE OF MARKET LAW IN PRE-MODERN ISLAM: A STUDY OF KITAB NISAB AL-IHTISAB 51–52 (E.J.W. Gibb Memorial Trust 1997); Wadi Zaidan Haddad, *Ahl al-Dhimma in an Islamic State: The Teaching of Abu al-Hasan al-Mawardi's al-Ahkam al-Sultaniyya*, 7 ISLAM & CHRISTIAN MUSLIM REL. 169 (1996).

<sup>60</sup> AL-MAWARDI, AL-NUKAT WA AL-'UYUN 2:351–352 (Dar al-Kutub al-'Ilmiyya no date); FAKHR AL-DIN AL-RAZI, AL-TAFSIR AL-KABIR 6:25 (3d ed. Dar Ihya' al-Turath al-'Arabi 1999); ABU 'ALI AL-TABARSI, MAJMA' AL-BAYAN FI TAFSIR AL-QUR'AN 3:44–45 (Manshurat Dar Maktabat al-Hayah no date); ABU JAFAR AL-TUSI, AL-TIBYAN FI TAFSIR AL-QUR'AN 5:203 (Dar Ihya' al-Turath al-'Arabi no date); JALAL AL-DIN AL-SUYUTI, AL-DURR AL-MANTHUR 3:411 (Dar al-Kutub al-'Ilmiyya 2000); AL-TABARI, *supra* note 59, at 4:98–99.

<sup>61</sup> For premodern treatises addressing this rule, see AL-GHAZALI, *supra* note 43 at 4:207; AL-NAWAWI, *supra* note 44, at 10:325; AL-SHIRAZI, *supra* note 43, at 3:313; BADR AL-DIN AL-'AYNI, AL-BINAYA SHARH AL-HIDAYA 7:259 (Dar al-Kutub al-'Ilmiyya 2000); ZAYN AL-DIN IBN NUJAYM, SHARH AL-BAHR AL-RA'IQ 5:192 (Dar al-Kutub al-'Ilmiyya 1997); AL-QARAFI, *supra* note 45, at 3:459.

non-Muslim must abide by the Shari'a.<sup>62</sup> This interpretation of the verse, debatably, does not rely on norms of discriminatory subservience but, instead, endorses a conception of political society in which Muslim and non-Muslim alike undertake obligations to uphold the law of the land.

A third position on the notion of submission is that the verse foreshadows legal rules that give non-Muslims incentives to convert to Islam. For instance, Fakhr al-Din al-Razi (died in 1209) held that requiring a poll tax is not intended to facilitate the mutual coexistence of Muslims and non-Muslims, thereby, preserving the continuation of non-Islamic traditions. Rather, it creates, instrumentally, a situation of peace during which the non-Muslim can experience the glory of Islam (*mahasin al-Islam*) and convert.<sup>63</sup>

These three opinions about one such verse suggest that Qur'anic meaning is neither determinate nor transparently accessible from the words on the page. Its meaning is the product of a gradual process of exegetical construction in light of competing views about, inter alia, the political aims sought by and through the law. While Muslim theologians argued about whether the Qur'an itself can be contextualized or must be read as the eternal speech of God,<sup>64</sup> the juristic and exegetical derivation of meanings from the Qur'an is subject to historical shifts in normative frameworks, given the jurists' subjective engagement with the text. This one verse by itself says little until interpreted and applied in a coercive rule-of-law system. By adopting a universalist norm and reading it into the Qur'anic verse using the superiority/inferiority dichotomy, jurists fashioned additional rules that manifested the norm through the law.

## 5.2 The case of wrongful-death damages

As noted in the Saudi Arabian example above, a troubling aspect of Shari'a rules of law is how the measure of damages in wrongful-death suits depends, in part, on one's religious belief and gender. To understand the underlying normative context that gave meaning to this tort liability scheme requires an investigation

<sup>62</sup> Dallal, *supra* note 11, at 189. For this position, see also Haddad, *supra* note 59, at 172–173. As an example see AL-MAWARDI, *supra* note 44, at 2:351–352; RASHID RIDA, TARSIR AL-MANAR 10:266 (Dar al-Kutub al-'Ilmiyya 1999); AL-SHAFI'I, *supra* 44, at 4:186.

<sup>63</sup> AL-RAZI, *supra* note 60, at 6:27. See also Jane Dammen McAuliffe, *Fakhr al-Din al-Razi on Ayat al-Sizya and Ayat al-Sayf*, CONVERSION AND CONTINUITY, *supra* note 59, at 103.

<sup>64</sup> Premodern Muslims debated whether the Qur'an is the eternal word of God, or whether God revealed the text in history as events unfolded. In the words of Muslim theologians, the debate was whether the Qur'an was created (*makhluq*) by God in time or, rather, was eternal and thereby uncreated (*ghayr makhluq*). For general accounts of this debate, see WILLIAM MONTGOMERY WATT, THE FORMATIVE PERIOD OF ISLAMIC THOUGHT (Oneworld Publ'n 1998); HARRY AUSTRYN WOLFSON, THE PHILOSOPHY OF THE KALAM (Harvard Univ. Press 1976). This theological debate about the Qur'an itself, however, does not adversely affect the critical historicist approach involved in (re)narrating Shari'a rules of law, since the Qur'an itself has relatively few *legal* verses. Nevertheless, to the extent one wants to challenge the notion that Qur'anic verses have legal effect, one will need to grapple with the historicist construction of the Qur'an itself. This issue is the subject of future research but is beyond the scope of this chapter.

into the liability rules for *qisas*, or retribution (also known as *lex talionis*), in cases of negligent homicide. The central question concerns how and why legal liability differs depending on the victim's religious commitments.

Jurists of the Sunni Shafi'i, Hanbali, and Maliki schools, as well as the Shi'ite Ja'fari school held that if a Muslim kills an unbeliever (*kafir*), the Muslim is not executed. However, if an unbeliever kills a Muslim, the former is executed.<sup>65</sup> Maliki jurists held that Muslim perpetrators are executed only if they killed their victims while lying in wait (*qatl al-ghila*).<sup>66</sup> Shi'ite Ja'fari jurists would sentence a Muslim to execution if he was a serial murderer of non-Muslims; however, execution was contingent on the victim's family compensating the Muslim perpetrator's family for the difference in wrongful-death compensation (*diyya*) between the non-Muslim and the Muslim.<sup>67</sup> In other words, if the compensatory liability for a Muslim male's wrongful death is one hundred camels, and for a Christian or Jewish male victim it is fifty camels, then the family of the non-Muslim victim must pay the Muslim serial killer's family fifty camels before the killer can be lawfully executed.

The discriminatory application of the death penalty rule is further illustrated by cases where the perpetrator or victim is an apostate from Islam. If a Muslim kills an apostate from Islam, the killer suffers no liability; but if the apostate kills a Muslim the apostate will be executed.<sup>68</sup> Given the superiority/inferiority framework, this result is perhaps not surprising. A Muslim will be considered superior to an apostate from Islam, and, as a result, will be given preferential treatment under the law. But what if a non-Muslim kills an apostate from Islam? Jurists fell into three camps over the legal consequences:

1. The non-Muslim is executed given his general liability under *qisas*;
2. The non-Muslim is not executed because the apostate enjoys no legal protection;
3. The non-Muslim is executed pursuant to the discretion of the ruler (*siyasa*), although his estate is not burdened with compensatory liability since the apostate is not protected under the law.<sup>69</sup>

<sup>65</sup> AL-SHAFI'I, *supra* note 44, at 3:40, who would subject the Muslim killer to prison and *ta'zir* punishment; AL-GHAZALI, *supra* note 43, at 4:36–37; AL-MAWARDI, *supra* note 44, at 12:10; AL-NAWAWI, *supra* note 44, at 9:150; AL-SHIRAZI, *supra* note 43, at 3:171; IBN QUDAMA, *supra* note 45, at 7:652; AL-MUHAQQIQ AL-HILLI, *supra* note 46, at 2:452–453, who also held that the Muslim murderer can be sentenced to discretionary punishment (*ta'zir*) and monetary compensation (*diyya*); AL-HURR AL-'AMILI, *supra* note 46, at 19:127.

<sup>66</sup> In other words, one might argue that lying in wait is an aggravating circumstance that affects sentencing.

<sup>67</sup> MALIK B. ANAS, *supra* note 45, at 2:434–435; IBN RUSHD AL-HAFID, *supra* note 45, at 2:582; AL-MUHAQQIQ AL-HILLI, *supra* note 46, at 2:452–453; AL-HURR AL-'AMILI, *supra* note 46, at 19:79–80. For others reporting the Maliki position, see AL-'AYNI, *supra* note 61, at 13:79.

<sup>68</sup> AL-GHAZALI, *supra* note 43, at 4:36–37; AL-BAHUTI, *supra* note 45, at 5:614; AL-MUHAQQIQ AL-HILLI, *supra* note 46, at 2:455.

<sup>69</sup> AL-GHAZALI, *supra* note 43, at 4:36–37. See also AL-SHIRAZI, *supra* note 43, at 3:172. The Ja'fari AL-MUHAQQIQ AL-HILLI, *supra* note 46, at 2:455, would execute the *dhimmi* because

The non-Muslim does not always enjoy superior protection over the Muslim apostate. This diversity in valuation is further emphasized in a case where an apostate from Islam kills a non-Muslim protected in the Islamic polity. Muslim jurists divided generally into two camps concerning the apostate's liability:

1. The apostate is executed;
2. The apostate is not executed, since his prior adherence to Islam gives him a sanctity that transcends his apostasy and protects him against liability for killing a non-Muslim.<sup>70</sup>

The different treatment of non-Muslims illustrates a tension between competing conceptions of equality and entitlement within Islamic law. An apostate who abandons Islam, and thereby becomes a non-Muslim, may still enjoy the benefit of an Islamic identity over and against someone born a non-Muslim.

Muslim jurists defended the discriminatory application of *qisas* liability by reference to a *hadith* in which the Prophet said "[a] believer is not killed for an unbeliever". Importantly, the full tradition states that "[a] believer is not killed for an unbeliever or one without a covenant during his residency".<sup>71</sup> Jurists who constructed discriminatory rules of liability would rely on the first half of the *hadith* but not the whole tradition. Furthermore, they argued that the rules discriminating against non-Muslims reflected the fact that Muslims were of a higher class than their non-Muslim co-residents. For instance, the Shafi'i jurist al-Mawardi argued that as a matter of law someone from a lower class (*al-adna*) can be executed to vindicate the interests of someone from a higher class (*al-a'la*); but the opposite cannot occur.<sup>72</sup> He justified this legal distinction in religious and eschatological terms by citing Qur'an 59:20, which states that "[t]he companions of the hellfire are not equivalent to the companions of heaven".<sup>73</sup> From this he concluded that just as

the apostate still enjoys, as against the *dhimmi*, the protection that arose with his prior Islamic commitments.

<sup>70</sup> AL-GHAZALI, *supra* note 43, at 4:36–37; AL-SHIRAZI, *supra* note 43, at 3:172.

<sup>71</sup> AL-MAWARDI, *supra* note 44, at 12:10; AL-BAHUTI, *supra* note 45, at 5:616; IBN NUJAYM, *supra* note 61, at 9:19, who has a variant of this same tradition. For similar traditions and others with common themes, see the discussion in IBN AL-JAWZI, *AL-TAHQIQ FI AHADITH AL-KHILAF* 2:307–309 (Dar al-Kutub al-'Ilmiyya no date).

<sup>72</sup> AL-MAWARDI, *supra* note 44, at 12:11; AL-NAWAWI, *supra* note 44, at 9:150, stated that freedom, Islamic faith, and paternity provide exceptions to liability for execution. Where the two parties are of equal status, *qisas* liability applies; otherwise, the person of lower status (*al-masduq*) is executed for the higher status victim (*al-fadil*), but not the opposite. AL-SHIRAZI, *supra* note 43, at 3:171, referring to a Qur'anic verse requiring execution of the free for the free, slave for the slave, and women for women, held that if one is executed for killing someone of an equal social standing, then certainly he should be executed for killing someone who is superior to him (*afdal minhu*). The Maliki IBN ROSHD AL-HAFID, *supra* note 45, at 2:582, said that there is no dispute that the slave is executed for murdering a free male, just as the one of lower status is executed for killing the higher status (*al-angad bi al-a'la*). See also AL-QARAFI, *supra* note 45, at 12:332; AL-BAHUTI, *supra* note 45, at 5:617.

<sup>73</sup> AL-MAWARDI, *supra* note 44, at 12:11–12. The Hanbali al-Bahuti also relies on the notion of equivalence to justify the differential treatment in sentences for murder. AL-BAHUTI, *supra* note 45, at 5:616.

the Qur'an denies any equivalence between these groups in eschatological terms, the law should deny any equivalence between them in legal terms.<sup>74</sup> Furthermore, using the logical axiom of *a minore ad maius*, al-Mawardi held that just as a Muslim bears no liability for falsely accusing a resident non-Muslim of illicit sexual relations, how can he be liable for killing one, which is a much more serious offense?<sup>75</sup>

This is not to suggest all Muslim schools of law held to this discriminatory application of capital punishment. As explained below, Hanafi jurists rejected such discriminatory legal applications. Anticipating a Hanafi critique, the Shafi'i al-Mawardi narrated an incident involving the important premodern Hanafi jurist Abu Yusuf (died in 797). According to the story, Abu Yusuf sentenced a Muslim to death for killing a non-Muslim, which is consistent with Hanafi doctrine. However, he subsequently received a disconcerting poem criticizing him for doing so. The poem read as follows:

O killer of Muslims on behalf of *kafirs*  
 You commit an outrage, for the just are not the same as the oppressor  
 O those of Baghdad and its vicinity, jurists and poets  
 Abu Yusuf [commits] an outrage on the faith when he kills Muslims for *kafirs*  
 Make demands, cry for your faith, and be patient, for reward belongs to the patient.<sup>76</sup>

Troubled by the thought of a public outcry, Abu Yusuf informed the 'Abbasid caliph Harun al-Rashid (ruled from 786–809) about his predicament. Al-Rashid advised him to use a technical legal loophole to avoid the execution sentence and, thereby, avoid any social discord (*fitna*). Specifically, Abu Yusuf learned that the victim's family could not prove that they paid their poll tax and, therefore, could be denied the full protection of and entitlements under Shari'a. As a result, Abu Yusuf did not execute the Muslim and, instead, held him liable for wrongful-death damages. Al-Mawardi, however, glossed the entire story by suggesting that, since the original decision led to public dissatisfaction (known as *fitna*), it was right and good to avoid that decision generally.<sup>77</sup>

Nonetheless, Hanafi jurists justified executing a Muslim for killing a non-Muslim<sup>78</sup> by referring to a tradition in which the Prophet did so, saying, "I am the most ardent to uphold his security".<sup>79</sup> The Hanafi jurist Badr al-Din al-'Ayni

<sup>74</sup> The Maliki AL-QARAFI, *supra* note 45, at 12:356–357, relied on a similar argument to justify different compensatory payments (*diyya*) for wrongful death, depending on the victim's religious commitments.

<sup>75</sup> AL-MAWARDI, *supra* note 44, at 12:13–14. For a discussion of this mode of reasoning in Islamic legal theory, see WAEL HALLAQ, *A HISTORY OF ISLAMIC LEGAL THEORIES* 96–99 (Cambridge Univ. Press 1997).

<sup>76</sup> AL-MAWARDI, *supra* note 44, at 12:15–16. <sup>77</sup> *Id.*

<sup>78</sup> MUHAMMAD B. AL-HASAN AL-SHAYBANI, *KITAB AL-ASL* 4:488 (Wizara al-Ma'arif li'l-Hukuma al-'Aliyya al-Hindiyya 1973), required that the murder be intentional (*'amd*); AL-'AYNI, *supra* note 61, at 13:79; AL-MARGHINANI, *AL-HIDAYA: SHARH BIDAYAT AL-MUBTADI'* 2:446 (Dar al-Andam no date).

<sup>79</sup> AL-'AYNI, *supra* note 61, at 13:79; IBN NUJAYM, *supra* note 61, at 9:19; ABU BAKR AL-KASANI, *BADAI' AL-SANAI' FI TARTIB AL-SHARA'I* 10:258 (Dar al-Kutub al-'Ilmiyya 1997). Notably, AL-MAWARDI, *supra* note 44, at 12:10, held this tradition to be weak.

(died in 1451) explained that other schools discriminate against non-Muslims because they assume an inherent inequality between Muslims and non-Muslims. Shafi'i jurists, he said, consider disbelief (*kufr*) to be a material characteristic that raises ambiguity (*shubha*) about the quality of a non-Muslim's dignity in comparison with a Muslim's.<sup>80</sup>

But for Hanafi jurists, Muslims and non-Muslims are equally inviolable.<sup>81</sup> One's inviolability, or *'isma*, depends on whether one has the capacity (*qudra*) to satisfy his or her legal obligations (*taklif*).<sup>82</sup> In other words, inviolability is not contingent on faith commitments but, instead, on one's ability to abide by the law. Once the non-Muslim agrees to be subjected to the laws of a Muslim polity, he becomes inviolable as a matter of law. Certainly, non-Muslims outside Muslim lands do not enjoy the same legal protections as non-Muslims within the polity. This distinction has to do with territoriality, residence, and social contract. Disbelief (*kufr*) by itself, though, does not irrevocably undermine the inviolability of a non-Muslim who lives peacefully in an Islamic polity.<sup>83</sup> The Hanafis were certainly aware of the tradition of the Prophet's rejecting the execution of a Muslim for killing a non-Muslim. But they read it as a general rule from which those with a contract of protection (such as *dhū 'ahd*) were exempted.<sup>84</sup>

The discriminatory approach to capital punishment for homicide was also used when computing compensation for wrongful death (*diyya*). As noted above, many Sunni schools of law provided a schedule of compensatory liability for wrongful death that discriminated on religious grounds. However, the Hanafis opposed this discriminatory approach and demanded equal compensation across the board. They argued that the compensation for a Muslim and a non-Muslim victim is the same since both are equally inviolable and, therefore, enjoy the same protections under the law.<sup>85</sup> Religious commitment, in other words, was not a relevant factor in determining the scope of one's legal entitlements.<sup>86</sup> Rather, what mattered for the Hanafis was whether or not non-Muslims enjoyed a contract of protection, thus bringing them within the polity on an equal footing with Muslims.

<sup>80</sup> AL-'AYNI, *supra* note 61, at 13:79.

<sup>81</sup> IBN NUJAYM, *supra* note 61, at 9:20; AL-KASANI, *supra* note 79, at 10:246, who required the victim to be inviolable (*ma'sum al-damm*); ABU AL-FATH AL-SAMARQANDI, *TARIQAT AL-KHILAF BAYNA AL-ASLAF* 522–525 (Dar al-Kutub al-'Ilmiyya 1992).

<sup>82</sup> AL-'AYNI, *supra* note 61, at 13:80; IBN NUJAYM, *supra* note 61, at 9:20; AL-MARGHINANI, *supra* note 78, at 2:446. As such, Hanafi jurists like al-Kasani imposed no *qisas* liability for killing a *harbi* or apostate since they are not *ma'sum*. AL-KASANI, *supra* note 79, at 10:246.

<sup>83</sup> AL-'AYNI, *supra* note 61, at 13:80. Disbelief becomes relevant if the unbeliever threatens the Muslim polity. But since those enjoying a contract of protection (*'aqd al-dhimma*) agree to lawfully reside in Muslim lands, they are entitled to legal protection of their lives and property. AL-'AYNI, *supra* note 61 at 13:81; IBN NUJAYM, *supra* note 61, at 9:20; AL-KASANI, *supra* note 79, at 10:248, 257–258.

<sup>84</sup> AL-KASANI, *supra* note 79, at 10:259; AL-MARGHINANI, *supra* note 78, at 2:464.

<sup>85</sup> AL-'AYNI, *supra* note 61, at 13:171; IBN NUJAYM, *supra* note 61, at 9:75; AL-KASANI, *supra* note 79, at 10:305; AL-MARGHINANI, *supra* note 78, at 2:464; ABU 'ABD ALLAH AL-MARWAZI, *IKHTILAF AL-FUQAHA'* 429–431 (Maktabat Adwa' al-Salaf 2000).

<sup>86</sup> AL-KASANI, *supra* note 79, at 10:310.

To justify their position, the Hanafis looked to Qur'an 4:92, which addresses the case of a Muslim who has killed another: "and if he [the victim] is from a people with whom you have a treaty (*mithaq*), his people are entitled to a *diyya musallama/muslima*, and [the killer] must free a believing slave". The reference to *diyya* is not entirely clear. Linguistically, it can refer to an agreed-upon amount (known as *diyya musallama*), or it can refer to the *diyya* appropriate for a Muslim (known as *diyya muslima*). Between these two possible readings, Hanafi jurists adopted the latter and held that Muslims and non-Muslims are entitled to the same *diyya* for wrongful death.<sup>87</sup> As additional support for the Hanafi position, Ibn Nujaym referred to the view of the fourth caliph, 'Ali b. Abi Talib (died in 661), who held that since resident non-Muslims are obligated in the same way as Muslims, they also enjoy the same entitlement to damages for personal injury.<sup>88</sup>

The foregoing discussion illustrates how Muslim jurists contended with one another to determine the rules of tort liability amid religious differences in the Muslim polity. The different views indicate that no single position was accepted as inevitable or true, but rather that jurists ruled in light of competing presumptions about identity and community filtering into their determination of the law. Certainly, this doctrinal analysis illustrates the diversity of Shari'a positions on this issue. However, this legal diversity did not come about in a vacuum. Probably, it reflects an historical context in which norms of identity were made manifest through law at a time of conquest, expansion, and a developing ethos of Islamic universalism.

Reconstructing a full historical context and normative framework is no easy task; certainly, it is beyond the scope of this chapter, which is intended merely to introduce how a historicist jurisprudence of Islamic law might allow for a nuanced engagement with both the historical tradition and the contemporary climate of Muslim states. Even within this limited scope, however, we can still discern some trace of the contextual factors that contributed to the doctrine on tort liability. The jurist and philosopher Ibn Rushd (Averroës, died in 1198) relates how the early Muslim historian al-Zuhri<sup>89</sup> recounted that, during the era of the Prophet and his first four successors, non-Muslims would receive the same compensation as Muslims. Furthermore, he noted that, during the caliphate of Mu'awiya (ruled from 661–680) and thereafter, half the *diyya* was paid by the public treasury (*bayt al-mal*). However, the later Umayyad caliph 'Umar II b. 'Abd al-'Aziz (ruled from 717–720) terminated the payments from the public treasury to the families of non-Muslims.<sup>90</sup> This reduction came at a time when the Umayyad dynasty was

<sup>87</sup> *Id.* at 10:310–311.

<sup>88</sup> IBN NUJAYM, *supra* note 61, at 9:75.

<sup>89</sup> For a biography and analysis of al-Zuhri's historical contributions, see ABD AL-AZIZ DURI, *THE RISE OF HISTORICAL WRITING AMONG THE ARABS* (Lawrence I. Conrad trans., Princeton Univ. Press 1983).

<sup>90</sup> Ibn Rushd relates a countertradition in which al-Zuhri states that 'Umar b. 'Abd al-'Aziz did not reduce the *dhimmi's* *diyya* entitlement. IBN RUSHD AL-HAFID, *supra* note 45, at 2:604. For the purposes of this analysis, however, the fact that 'Umar may have altered the entitlements for

experiencing financial insecurity as its expansionist policies suffered military setbacks. Furthermore, the caliphate had developed an Islamization policy to deter the influence of the Byzantines on the Christians residing in Islamic lands.<sup>91</sup> From Ibn Rushd's text, one may surmise that the doctrine regarding wrongful-death compensation may reflect political and economic policies that only became normative over time.

A further study of the public treasury in the eighth century may shed additional light on both the nature of 'Umar II's decision and how it influenced the legal discourses on *diyya* that arose thereafter. Nevertheless, this review of Islamic legal doctrine and history concerning non-Muslims and tort liability suffices to show that jurists did more than report on the Qur'an or prophetic traditions; rather, their readings were informed, additionally, by reference to competing and contextualized values regarding identity, inclusion, and exclusion in the Muslim polity. Certainly, each school of law had its authoritative sources to support its respective positions on wrongful-death liability. Those positions, however, arose in a context of shifting political and military developments in early Islamic history.

### 5.3 Restrictions on building and repairing religious places of worship

As noted above, Egypt imposes limits on the extent to which non-Muslims can build or repair religious places of worship; these limits are parallel to, if not causally derived from, early Islamic rules limiting non-Muslims' freedom to construct/repair religious buildings. With these limitations, Egypt effectively conceals the early diversity of rules and thus impedes a critical analysis of the early history of Islam that gave those rules meaning. Moreover, with its actions, the Egyptian regime also obscures whether and to what degree the modern Egyptian national identity suffers from a certain dissonance when these premodern rules concerning non-Muslims inform a modern constitutional state that otherwise accedes to the language of rights and religious freedom.<sup>92</sup>

Under premodern Islamic law, generally, non-Muslims could not build new places of worship in regions where the land was initially cultivated and urbanized by Muslims themselves (known as *amsar al-islam*). Churches that existed prior to Muslim conquest and development could remain, according to some jurists, although others argued for their destruction.<sup>93</sup>

*dhimmis* is significant as it alerts one to the need for further investigation of how the norms and rules of discrimination may have arisen from a contingent historical development.

<sup>91</sup> KHALID YAHYA BLANKINSHIP, *THE END OF THE JIHAD STATE: THE REIGN OF HISHAM IBN 'ABD AL-MALIK AND THE COLLAPSE OF THE UMAYYADS* 93 (SUNY Press 1994).

<sup>92</sup> For Egypt's international human rights commitments, see *infra* note 51.

<sup>93</sup> AL-GHAZALI, *supra* note 43, at 4:207; AL-MAWARDI, *supra* note 44, at 14:320–321; al-Muzani, *Mukhtasar al-Muzani*, in AL-SHAFI'i, *supra* note 44, at 5:385; AL-NAWAWI, *supra* note 44, at 10:323;

The difficult legal questions concerned lands that fell under Muslim sovereignty but that already had urban and rural areas in which non-Muslims resided. Whether *dhimmi*s could lawfully build or repair places of worship depended on the type of land they occupied, often described in terms of the method by which Muslims had become sovereign (such as by conquest or treaty) or else in terms of land-tax liability.

For example, if Muslims acquired sovereignty by force and conquest, the *dhimmi*s living in the region could not erect new religious buildings. Jurists disagreed about whether old ones might remain and whether dilapidated ones could be repaired.<sup>94</sup> Al-Nawawi, for instance, held that if Muslims destroyed the non-Muslims' religious buildings during the conquest, the buildings may not be rebuilt. Also, any religious buildings that remained after the conquest should be removed.<sup>95</sup> The Hanafi jurist Badr al-Din al-'Ayni illustrated a tension within his legal school. He said that, according to the Hanafis, non-Muslims would be required to convert their existing religious structures into residences, but they need not be razed.<sup>96</sup> However, al-'Ayni also suggested that dilapidated religious buildings could be refurbished. However, they could not be relocated since that would be akin to building anew; nor could they be refurbished to be bigger than they were previously.<sup>97</sup>

If Muslims and non-Muslims peacefully negotiate a treaty to transfer sovereignty, land-tax liability will be a decisive factor in granting non-Muslims the right to repair and build religious buildings. There are three scenarios jurists discussed, each with different consequences:

1. If Muslims are sovereign over the land and assume land-tax liability (*kharaj*), the non-Muslims can retain the remaining religious buildings but cannot build new ones.<sup>98</sup>

AL-'AYNI, *supra* note 61, at 7:255–256; IBN NUJAYM, *supra* note 61, at 5:190; AL-QARAFI, *supra* note 45, at 3:458; IBN QUDAMA, *supra* note 45, at 8:526–527; AL-BAHUTI, *supra* note 45, at 3:151; AL-MUHAQQIQ AL-HILLI, *supra* note 46, at 1:262.

<sup>94</sup> IBN NUJAYM, *supra* note 61, at 5:190; AL-MAWARDI, *supra* note 44, at 14:320–321. IBN NUJAYM, *supra* note 61, at 5:191 held that existing buildings can be repaired but cannot be expanded or transferred. For this same position, see IBN QUDAMA, *supra* note 45, at 8:527–528.

<sup>95</sup> AL-NAWAWI, *supra* note 44, at 10:323. The Maliki al-Hattab likewise indicated the juristic disagreement about whether to allow old religious buildings to remain intact in areas conquered by Muslim forces. AL-HATTAB AL-RA'INI, MAWAHIB AL-JALIL LI SHARH MUKHTASAR AL-KHALIL 4:599 (Dar al-Kutub al-'Ilmiyya 1995). The Hanafi jurist al-'Ayni indicated that al-Shafi'i, Ahmad b. Hanbal, and Maliki jurists required remaining buildings to be destroyed. AL-'AYNI, *supra* note 61, at 7:255–256. See also the Maliki AL-QARAFI, *supra* note 45 at 3:458; the Hanbali IBN QUDAMA, *supra* note 45 at 8:526–527.

<sup>96</sup> AL-'AYNI, *supra* note 61, at 7:255–256.

<sup>97</sup> *Id.* at 7:256.

<sup>98</sup> AL-MAWARDI, *supra* note 44, at 14:320–321; AL-'AYNI, *supra* note 61, at 7:255–256. The Hanbali Ibn Qudama held that in cases where Muslims retain sovereignty of the land and the *dhimmi*s only pay the *jizya*, one must look to the terms of the treaty to determine whether the *dhimmi*s have the liberty to erect new religious buildings. IBN QUDAMA, *supra* note 45, at 8:526–527. For this Hanbali opinion see also AL-BAHUTI, *supra* note 45, at 3:151.

2. If Muslims assume sovereignty over the land but the non-Muslims collectively assume land-tax liability, the existing religious buildings can remain; some jurists held that the non-Muslims can negotiate for the liberty to build new religious buildings.<sup>99</sup>
3. If the non-Muslims administer the land but collectively pay the land tax to Muslim sovereigns, they can retain old religious buildings and build new ones.<sup>100</sup>

Hanafi jurists generally did not make distinctions based on tax liability but, rather, on the demographics of each region. They held that non-Muslims could not build new religious buildings in the towns that Muslims built and cultivated (*amsar*). But they had more liberty to build and repair their religious structures in villages where they were demographically dominant.<sup>101</sup> However, the Hanafi al-Marghinani related that some Hanafi jurists prohibited the non-Muslims from erecting religious buildings regardless of demographic analysis, since Muslims could potentially reside in all areas.<sup>102</sup> The Hanafi Ibn Nujaym held that erecting religious buildings was prohibited in both towns and villages in Arab lands, specifically, since the Prophet had indicated there cannot be two faiths in the Arab peninsula.<sup>103</sup>

The legal limits established by these three models illustrate how Muslim jurists manifested a particular, normative vision of Islamic identity amid pluralism and difference. To focus simply on whether non-Muslims could or could not build or refurbish places of worship misses the larger picture of how the legal question was affected by a normative context embedded in an early history of conquest, the nascent development of Islam as a basis for identity, and the effect demographics can have on the budding ethos of an Islamic polity.

Muslim jurists provided a justification for their limits on constructing churches and synagogues that illustrates how they were interested in preserving the Islamic ethos of Muslim controlled lands. Badr al-Din al-'Ayni relates how the caliph 'Umar b. al-Khattab (ruled from 634 to 644) stated that the Prophet forbade erecting religious buildings in Islamic lands.<sup>104</sup> Al-'Ayni held that allowing Jews

<sup>99</sup> AL-NAWAWI, *supra* note 44, at 10:323; IBN NUJAYM, *supra* note 61, at 5:190. The Maliki al-Qarafi held that if the *dhimmis* are responsible for the land tax, they can keep their churches. But if they include in the treaty a condition allowing them to build new religious buildings, the condition is void except in land where no Muslims reside. However, in such regions, *dhimmis* can erect new religious buildings without having to specify their right to do so in any treaty. AL-QARAFI, *supra* note 45, at 3:458.

<sup>100</sup> AL-MAWARDI, *supra* note 44, at 14:320–321; AL-GHAZALI, *supra* note 43, at 4:207; AL-NAWAWI, *supra* note 44, at 10:323; IBN QUDAMA, *supra* note 45, at 8:526–527; AL-BAHUTI, *supra* note 45, at 3:151.

<sup>101</sup> AL-'AYNI, *supra* note 61, at 7:257. See also AL-MARGHINANI, *supra* note 78, at 1:455. See also the Maliki AL-HATTAB, *supra* note 95, at 4:600.

<sup>102</sup> AL-MARGHINANI, *supra* note 78, at 1:455.

<sup>103</sup> IBN NUJAYM, *supra* note 61, at 5:190. See also *id.* at 1:455.

<sup>104</sup> AL-'AYNI, *supra* note 61, at 7:255.

and Christians to construct religious buildings freely would alter the character of Islamic lands.<sup>105</sup> The Shafi'i jurist al-Mawardi also argued that allowing non-Muslims to erect religious buildings in Muslim lands (*amsar al-Islam*) would undermine the dominance of Islam by perpetuating disbelief in the land under Islamic control. Erecting such buildings, he said, is a sin (*ma'siyya*), since those who congregate there perpetuate disbelief (*kufr*). In Islamic lands, he argued, only Islam should be visible (*zahir*).<sup>106</sup>

The concern that Islam should remain visibly dominant may have reflected an early political preoccupation with the development of a nascent Islamic polity contending with the Byzantine and Sassanian empires to its north, as well as with the existing religious diversity in the Arabian Peninsula. In fact, one well-known tradition of the Prophet, already noted, explicitly rejects the possibility that there could be two faiths in the Arabian Peninsula. Based on this tradition, or perhaps on the political ethos it manifested, 'Umar b. al-Khattab (ruled from 634–644) ushered in a policy of expelling non-Muslims from the Arabian Peninsula, which resulted in the Arab-Christian Banu Najran tribe's departure from the region.<sup>107</sup> Certainly, if non-Muslims cannot reside in Arab lands, they could not build religious buildings. But some Muslim jurists went further by prohibiting non-Muslims from building religious buildings in both Arab and non-Arab lands.

The late Muhammad Hamidullah argued that this prophetic prohibition was not directed against religious minorities out of intolerance. Rather, the idea that the peninsula should be reserved for Muslims referred to the Prophet's political aim to secure a safe and secure region for Muslims. In other words, the *hadith* should not be interpreted as an indication of the Prophet's lack of tolerance for religious pluralism but, instead, as a statement of political unity, identity, and cohesion for a nascent community still struggling to survive.<sup>108</sup> While a historical positivist might attempt a reconstruction of the "original" intent of the Prophet, the fact remains that the tradition was read within the context of an emergent political community engaging in conquest and expansion, presumably based on the principle of a universalist Islamic message. As later jurists occupied new geographic spaces, they used the law to order those spaces according to that same universalist Islamic ethos. However, in the era of the nation state, ideological or religious universalism is thwarted by geopolitical borders and commitments to the international system. This geo-political limit, I have suggested, reflects a fundamental historical shift that becomes especially noticeable when premodern Islamic rules regarding non-Muslims are infused into the state system.

<sup>105</sup> *Id.*

<sup>106</sup> AL-MAWARDI, *supra* note 44, at 14:321.

<sup>107</sup> Hugh Goddard, *Christian-Muslim Relations: A Look Backwards and a Look Forwards*, 11 ISLAM & CHRISTIAN MUSLIM REL. 195, 196 (2000).

<sup>108</sup> Hamidullah, *supra* note 1, at 10.

This analysis illustrates that Muslim jurists did not provide a blanket prohibition against non-Muslims from practicing or exhibiting their faith. Nor did they allow without restriction the expression of non-Muslim religious identity. Rather, it seems that various interests were balanced that had to do with issues of demographics, sovereignty, tax liability, and the development of an Islamic political ethos. The balance between competing values led to a particular construction of legal rules that reflected a time when religion *per se* was not a distinguishable category of analysis, separate from other aspects of identity. In other words, in a nascent Islamic polity, where the conceptual language of identity (political and otherwise) was Islamic in form and content, everything was expressed in Islamic terms. However, if everything was expressed in Islamic terms, then nothing was distinctively Islamic in a religious sense. To be Muslim or non-Muslim in an Islamic territory was to be more than a member of a faith community; it was an index of identity, political and otherwise.

However, with the rise of the international system of nation states, with its boundaries, governance structures, multilateralism, and rights commitments comes competing modes of identity, whether as state citizen, constitutional subject, and individual rights holder. Before one can begin to use accommodation or integration models to reform the rules of premodern Shari'a, one must first rethink how Shari'a values can be implemented in light of a normative framework in which the past becomes relevant for defining the present and sketching the future amid changed modes of political organization and governance. To take a contemporary state's definition of Shari'a at face value ignores how the adoption of one Islamic doctrinal school—to the exclusion of others—can impede efforts to uncover the underlying values that gave the legal issues significance in the first place and in a prior time. To uncover the underlying values of a legal issue can help us explain why premodern jurists reached different and at times conflicting legal rules, and allow us to contextualize those rules as we develop modern rule of law systems in pluralist nation states. The significance of a historicist jurisprudence of Shari'a is that it attempts to understand Shari'a as a legal system with jurisprudential integrity, but never fully divorced from its historical context—political, economic, social, or otherwise.

## 6. Conclusion

The above examples from Saudi Arabia and Egypt and the discussion of Islamic legal doctrines, which parallel (if they do not contribute to) the *de jure* discrimination against non-Muslims, illustrate a complex process of state coercion in the twenty-first century. This is the state of affairs that comes about when premodern legal rules are extracted from a prior context that gave them a certain meaning at one time, and are then inserted piecemeal into a state context to give

Islamic content to a present-day new nation. The character and definition of this "Islamic" content, though, relies on its assumed objectivity, determinacy, and even its inevitability as God's law.<sup>109</sup> Yet, as was suggested above, the legal rules were the product of a juristic process that used the authority of Shari'a-based language to prioritize some readings over others. The Qur'anic verse requiring non-Muslims to pay the *jizya* in a state of submission could have been interpreted in multiple ways, but it was given the normative power of humiliation and subservience that then may have informed other areas of law. Similarly, the legal liability for negligent homicide need not necessarily discriminate on the grounds of religion. But when Saudi Arabia adopts the Hanbali tradition as the basis for its rule-of-law system, it uses its coercive power to prioritize one view and silence the others. It precludes, thereby, a historical-juridical analysis of the underlying values manifested in tort rules of liability, as well as an analysis of whether those rules remain meaningful for the purposes of governance.<sup>110</sup>

The resort to a historicist jurisprudence of Islamic law illustrates why relying on theories of accommodation and integration alone to theorize governance models is insufficient. To accommodate or integrate another's value system within a governance structure assumes that a certain determinacy and objectivity (or essential constancy) can be attributed to that value system. But to assume such determinacy in the case of Shari'a ignores how its historical doctrine was a contingent manifestation of norms about, *inter alia*, identity, order, and meaning. Whether one looks to premodern rules limiting church repair or awarding tort damages, the rules were the product of juristic deliberation at a particular time and space. But the context in which those deliberations occurred has materially changed, thus contributing to the logical or social dissonance that arises when the same rules are applied in settings marked by profound institutional, political, and social alterations. The dissonance that results is, perhaps, what has prompted the Islamic legal scholar Wael Hallaq to state that modern Islamization programs suffer from an "irredeemable state of denial".<sup>111</sup> Certainly, Hallaq is right if he means that the uncritical adoption of premodern rules of Shari'a within constitutional state systems will create incoherence in meaning and identity for those living in states that adopt Islamic values, embrace human rights, and participate in an international system that is premised on borders of geography and identity.<sup>112</sup>

<sup>109</sup> For an analysis of how contemporary debates on Islamic law suffer from an overdeterminism of the doctrine, see Emon, *supra* note 2, at 331–335.

<sup>110</sup> It may have been this very phenomenon that al-Sanhuri attempted to avoid when describing how resort to Islamic law under the Egyptian Civil Code should not prioritize one Islamic legal school over another, and should not violate the general principles of the civil code. See discussion in *supra* note 17.

<sup>111</sup> Hallaq, *supra* note 8, at 22.

<sup>112</sup> This dissonance is evident in the ongoing utilization of universalist paradigms by Muslim organizations promoting an Islamic value system. For instance, in 1990 the Organization of the Islamic Conference issued the Cairo Declaration on Human Rights in Islam as an Islamic version

Historicist jurisprudence reveals that the dissonance witnessed in Muslim nation states cannot be resolved if the premodern Shari'a rules are considered—either as a matter of explicit faith or as an assumption of theories of governance—objective, determinate, and unassailable. Rather, a historicist jurisprudence of Islamic law must uncover the multiplicity of values that once existed within the Shari'a tradition, and show how the reality of the international system requires a reframing or a remanifesting of Shari'a in a contemporary Muslim state.

of the Universal Declaration of Human Rights. In the first paragraph of the Preamble, the Cairo Declaration reads:

Reaffirming the civilizing and historical role of the Islamic Ummah which Allah made as the best community and which gave humanity a universal and well-balanced civilization, in which harmony is established between this life and the hereafter, knowledge is combined with faith, and to fulfill the expectations from this community to guide all humanity which is confused because of different and conflicting beliefs and ideologies and to provide solutions for all chronic problems of this materialistic civilization.

Cairo Declaration on Human Rights in Islam, Aug. 5, 1990, U.N. Doc. A/CONF.157/PC/62/Add.18 (1993), available at <<http://www1.umn.edu/humanrts/instree/cairodeclaration.html>> (last visited Aug. 30, 2007). The reference to Islam as a universal civilization and the role of a Muslim Ummah to guide a confused humanity certainly suggests that the universalist paradigm of Islam has not been discarded.

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