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Ijtihad Institutions: The Key To Islamic Democracy Bridging And Balancing Political And Intellectual Islam

Adham A. Hashish
Alexandria University

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THE KEY TO ISLAMIC DEMOCRACY BRIDGING
AND BALANCING POLITICAL AND
INTELLECTUAL ISLAM

Adham A. Hashish*

"Be conscious of God,
And speak always the truth."[1]

Religion is a timeless culture in the Middle East. This article interprets Islam not only as part of the problem of democracy in the Middle East, but rather part of the solution. It proposes a formula of checks and balances that has its origins in Islamic history. In order to introduce this topic, first, I will focus on three stories; second, I will tell some history; and third, I will make my argument.

Wikipedia, a free online encyclopedia, is a common source of information. Even some scholars cite it. In that sense, it probably confuses and misleads researchers. Consider a search of "*Ijtihad*" and "*Ijthad*", two pronunciations for the same word. The encyclopedia redirects the searcher to two different topics; first is "*Ijtihad*" and the second is "*jihad*". These two concepts wholly differ from each other. This search outcome is a brief example of common western misperceptions of fundamental concepts in Islam.

In his recent speech to the Muslim world, President Barack Obama described the two institutions that hosted him, *Al-Azhar* and Cairo University, as a representation of "the harmony between tradition and progress."[2] He emphasized that the "partnership between America and Islam must be based on what Islam is, not what it isn't."[3]

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[1] *Qur'an*, 33:70.

[2] Barack Obama, President, U.S., Remarks by the President on a New Beginning (June 4, 2009) (transcript available at the White House website, http://www.white house.gov/the_press_office/Remarks-by-the-President-at-Cairo-University-6-04-09/).

[3] *Id*.

This exited the audience in two ways. First, Obama acknowledged civilization's debt to Islam which paved the way for Europe's Renaissance and Enlightenment.[4] Second, Obama's approach to democracy excited the audience by pinpointing the relationship between elections and democracy, particularly when he mentioned "there are some who advocate for democracy only when they're out of power; once in power, they are ruthless in suppressing the rights of others."[5] Indeed, the audience reacted to Obama's speech as if he were there not only to bridge the gap between America and Islam, but also to bridge the gap between their past and future. The speech was evidence of a new trend in the Obama administration to encourage an institutional role in shaping democracy in the Arab world.

Soon after Obama's speech to the Muslim world, Iran's controversial presidential election generated a debate about the future of political Islam. Despite the controversy, though, it seems surprising that Thomas Friedman, award-wining writer for the New York Times, commented, "the bad guys are losing."[6] Only a few weeks before this article was written, the Parties Committee in Egypt turned down a request for official recognition of a moderate Islamic party.[7] The founder of the *wasat el-Gadid* (New Center) group, Abu Illaa el-Madi, is a former member of the Muslim Brotherhood.[8] Unlike the Brotherhood, his group would allow a Christian to lead Egypt and has Coptic Christian members.[9] Which model will prevail in the Middle East, the Iranian or the Egyptian? It depends on who will shed intellectual bankruptcy first, the extremists or the moderates.

Much has transpired since Muslims were left to govern their own affairs after the death of prophet Mohamed. Muslims' nostalgia is particularly focused on two famous eras in Muslim history, the Rightly Guided Caliphate Era and the Golden Age of Islamic Civilization.[10] The first era is famous for the dominant atmosphere of justice and represents the rise of the first democratic political institution in Muslim history, the historic *Caliphate*. The second is famous for its advancements in humanities, science, and technology, which represent the rise of advanced academic institutions which include the influential four

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[4] *Id.*

[5] *Id.*

[6] Thomas L. Friedman, Op-Ed., *The Losers Hang On*, N.Y. TIMES, July 25, 2009.

[7] *See* Mohamed El-Sayed, *Party Poopers*, AL-AHRAM WEEKLY, Aug. 27, 2009, *available at* http://weekly.ahram.org.eg/2009/962/eg7.htm.

[8] *Id.*

[9] Magdi Abdelhadi, *Egypt May Allow First Islamist Party*, BBC WORLD NEWS, Oct. 6, 2005, http://news.bbc.co.uk/2/hi/middle_east/4316258.stm.

[10] *See* SAYED KHATAB & GRAY D. BOUMA, DEMOCRACY IN ISLAM 155–63 (2007) (providing details about Muslim thought and the age of reason).

schools of law (*madhhabs*) that continue to shape the Islamic legal system today.

Despite common Western misperceptions, Islamic law is the product of dynamic and diverse scholarship that deeply engages in a critical process of argumentation.[11] This dialog formed different solutions to the same legal issues in a liberal environment based on the rule of reason (*Ijtihad*). However, while *Ijtihad* institutions left us advanced paradigms of private law, which have their equivalents in English common law, the same is not true for the paradigms of constitutional law. The answer to this problem has its origins in Muslim history. Moreover, this approach helps explain the dilemma that faces the Arab world right now manifested in the checks and balances between the two wings of Islam, Intellectual Islam, which is ruled by reason, and Political Islam, which is ruled by passion.[12]

This article focuses on the role of *Ijtihad* in building institutions of Islamic democracy. Rather than addressing the importance of *Ijtihad* in general or its importance in academia, this article attempts to emphasize *Ijtihad's* importance as a main tool to empower the intellectual Islam (Intell-Islam) stream to check the political Islam (Polit-Islam) stream and balance it within a framework of Islamic governance.

Ijtihad represents the untold story behind the big picture of any proposal for Islamic democracy. Both Polit-Islam, through its main tool *Jihad*, and Intell-Islam, through its main tool *Ijtihad*, re-

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[11] *See* Lawrence Rosen, The Anthropology of Justice: Law as Culture in Islamic Society 18 (Cambridge University Press 1989) (mentioning that "[i]n the past, when western scholars have discussed Islamic law and the role of the qadi, they have generally remarked on the absence of doctrinal rigor and the presence of inordinate discretion. That is, they have characterized Islamic law – as opposed, say, to Anglo-American common law, European civil law, or Roman-Canon law – as lacking a rigorous set of logical links among the various aspects of the overall body of law. Thus, it is noted that there exists in Islamic law no general concept of contract or tort around which judges and scholars could refine their conceptual categories as logic or concrete examples might demand. Coupled with this, in western eyes, is the presence of and unguided discretion, for if the law lacks rigorous standards and principles the decision of the qadi seems to depend simply on his own feel for the equalities or his own, perhaps prejudicial, opinions of the matter").

[12] Some scholars use the term "intellectual Islam" to refer to contemporary Islam as opposed to traditional Islam. *See* Mohsen Kadivar, *Human Rights and Intellectual Islam*, *in* New Directions in Islamic Thought: Exploring Reform and Muslim Traditions 47–74 (Karen Vogt et al. eds., 2009). However, I use the term "intellectual Islam" is this paper as opposed to the term "political Islam." These two main streams still shape contemporary Muslim society as they once shaped the early Muslim state. As political Islam (Polit-Islam) basically resorts to the notion of *jihad* to get the passion and support of Muslims, intellectual Islam (Intell-Islam) resorts to the notion of *Ijtihad* to build the Muslims' reason and culture.

present the heart and mind of Islamic democracy.[13] Polls show only the strength of the Polit-Islam stream through measuring civil society's passion in the short term. However, it is the Intell-Islam stream that shapes civil society's culture in the long term, through its structuring of *Ijtihad* institutions.

The argument will be addressed in three parts in this article. Part I focuses on understanding Islam as a culture of pursuing justice. Early development of Islamic law mirrors culture as a phenomenon in which pursuing ideals went side by side with appropriating realities. *Ijtihad* played the major role in achieving such development. Part II deals with the institutional role that *Ijtihad* played in the early development of Islamic law. This includes the rise and fall of *Ijtihad* institutions, which applies to both *madhhabs* (as organizations) and *Usul* (as norms). Part III deals with the institutional role that *Ijtihad* could play in contemporary development of Islamic democracy. Following a model of early Islamic governance, I propose a contemporary model that is based on reviving *Ijtihad* institutions. These institutions represent an Intell-Islam stream that could balance the dominating Polit-Islam stream in shaping Islamic culture and ultimately Islamic governance.

I. ISLAMIC LAW AS A CULTURE

A. *Islam*

Islam is not just a religion. In fact it is a philosophy of life that implicates activities "from performing daily prayers to fighting for social justice, from seeking knowledge to smiling to respecting nature."[14] In a few words, Islam commands individuals to pursue ideals in every aspect of life. However, pursuing ideals does not mean ignoring reali-

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[13] The term *jihad* is used here to mean "to struggle in the way of God" or "to struggle to improve one's self and/or society." *See* JOHN ESPOSITO, ISLAM: THE STRAIGHT PATH 93 (3d ed. 1998). In that sense, *jihad* has aspects other than the military one. In light of that, one may understand recent interpretations of *jihad* as a civil society activism. The confusion regarding the Islamic concept of *jihad* happened as some writers unknowingly have used this word interchangeably with different words like *al-harb* (war). *See* KHATAB & BOUMA, *supra* note 10, at 176. In that context, one may understand the famous *hadith* (saying) of the Prophet about *jihad*. Addressing his followers after returning from a battle, Prophet Mohamed said "we return from the lesser Jihad [warfare] to the greater Jihad." By the greater Jihad, he means a "more difficult and more important struggle against ego, selfishness, greed, and evil." JOHN ESPOSITO & DALIA MOGAHED, WHO SPEAKS FOR ISLAM? WHAT A BILLION MUSLIMS REALLY THINK 21 (2007).

[14] Tariq Ramadan, *Ijtihad and Maslaha: The Foundation of Governance*, *in* ISLAMIC DEMOCRATIC DISCOURSE: THEORY, DEBATES AND PHILOSOPHICAL PERSPECTIVES 3, 3 (M. A. Muqtedar Khan ed., 2006).

ties. As the world changes, Muslims have to adapt with it. Being a faithful believer does not mean to resort "to a very restrictive and lazy reading of the two sources and the related scholarly commentaries of the great *Ulama* of the past."[15] Instead, faithfulness demands that one "exerts all intellectual effort to provide solutions that are relevant to social and political reality."[16]

In this sense, pursuing ideals through understanding reality is the main core of Muslim culture.[17] In the Western world, religion could mean "a section or compartment of life reserved for certain matters and separate, or at least separable, from other compartments of life designed to hold other matters."[18] But, in the Muslim world, religion was never so; attempts to separate it from the state are very unlikely to succeed.[19] This is the case simply because Islam is not just a religion. It is a culture.[20]

As a cultural system, Islam has never been static.[21] Cultural systems, at certain times, could be stretched or could be limited. Egypt's Islam is a good example:

> Rulers and opponents alike will phase their concerns in Islamic categories. While there are some things that this culture system will not tolerate, the point is that, beneath that "cosmic" level, cultural limits in Egypt (and elsewhere) can be stretched to accommodate a wide range of things - high inequalities or socialism, war or

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[15] *Id.*

[16] *Id.*

[17] This illustrates some scholars' proposition that Islamic law is characterized by the incompatibility of theory and practice. While Aziz al-Azmeh responds to that proposition in the context of Islamic jurisprudence, the core of his analysis applies to Islam in general. He argues that the problem with the proposition is that it "ignores the real distinction between fiqha and Shari'a.: the former is the domain of legislation, the latter is the utopia that partially inspires it in very determinate ways that are various and open to [i]nquiry. Utopia moreover is a social and ideological fact which cannot be formally glossed and assimilated to a set of logical contradictions between theory and practice." Aziz al-Azmeh, *Islamic Legal Theory and the Appropriation of Reality*, *in* Islamic Law: Social and Historical Contexts 250, 250 (Aziz al-Azmeh ed., 1988).

[18] Bernard Lewis, The Political Language of Islam 3 (1988).

[19] *Id.* (describing such a separation as "an unnatural aberration which in Iran has ended and in some other Islamic countries may also be nearing its end").

[20] *See generally* Bassam Tibi, Islam and the Cultural Accommodation of Social Change 7–30 (Clare Krojzl trans., 1990) (providing more details about the relationship between religion and culture in Islam).

[21] *See generally id.* at 8–15.

peace, a break with the Arab world or a strident version
of pan-Arabism.[22]

B. Islamic Law

Shari'a is not just a law. It is a philosophy of keeping society in
order, encompassing spheres ranging from family affairs and criminal
justice to trade and governance.[23] Overall, *Shari'a* is a path of pursu-
ing justice.[24] It is important to realize that Muslims separate law and
government.[25] As law equates to pursuing justice, the government's
legitimacy depends on its pursuit of justice.[26] In that sense, one may
understand the call for an Islamic state as a call for a legal state, *i.e.*, a
call for law.[27]

However, pursuing justice does not mean denying its relative
nature. In this sense, pursuing justice through providing dynamic
readings of the sacred texts is a main component of legal culture in
Muslim societies. Therefore, it is important to distinguish between
Shari'a and *Fiqh*. While "*Shari'a* is the revealed and immutable path,
Fiqh represents the product of human thought and elaboration on
it."[28] However, it is more important to emphasize their compatibility
as shaping the two main forces in Islamic law. It is Muslim scholars
who undertake the burden of keeping the *Fiqh* dynamic while remain-
ing faithful to the function and purpose of *Shari'a*. *Fiqh* and *Shari'a*
constitute an advanced science; *Usul al Fiqh* (principles of jurispru-

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[22] Fouad Ajami, *In the Pharaoh's Shadow: Religion and Authority in Egypt*, *in*
ISLAM IN THE POLITICAL PROCESS 30, 31 (James Piscatori ed., 1983).
[23] SAMI ZUBAIDA, LAW AND POWER IN THE ISLAMIC WORLD 3 (2003).
[24] *Id.*
[25] NOAH FELDMAN, THE FALL AND RISE OF THE ISLAMIC STATE 116 (2008) (stating
that "[h]istorically, what made Islamic government distinctive was a constitu-
tional order in which the implementation of the shari'a was the nominal raison
d'être of the state and the prime way of legitimating its use of force. Islamic law,
understood to comprehend both the classical constitutional order and the legal or-
der that obtained under it, structured private legal relations as well as relations
between state and citizen").
[26] *See Ihsan Yilmaz, Ijtihad and Tajdid by Conduct: The Gülen Movement, in*
TURKISH ISLAM AND THE SECULAR STATE: THE GÜLEN MOVEMENT 208, 210 (M.
Hakan Yavuz & John L. Esposito eds., 2003) (noticing that "[l]aw in Muslim un-
derstanding is a system of meanings and a cultural code for interpreting the
world").
[27] *See* FELDMAN, supra note 25, at 9. In this context, one may understand the
critical role that classical Islamic legal opinion (*fatwa*) still plays side by side with
contemporary legal rule in Egypt. This also illustrates how the Egyptian govern-
ment solves law enforcement dilemmas through approaching it from an Islamic
dimension. Islamic cover does not only ease the law enforcement process, but also
supports its enactment with a legitimate component.
[28] Ramadan, *supra* note 14, at 3.

dence) ensures a sustainable practice of a systematic methodology, or
Ijtihad (rule of reason).[29]

C. Ijtihad

Ijtihad is not just a "technical term in Islamic Law."[30] Conventional wisdom sees it as the third source of Islamic Law.[31] In fact,
Ijtihad is a philosophy of pursuing development through knowledge
both in the sciences and humanities.[32] It is a scientific methodology
that refers to the process of reasoning and which "essentially consists
in a deduction [*istinbat*] which represents a probability [*zann*]."[33] For
example, in Islamic jurisprudence *Ijtihad* refers to "personal effort undertaken by the jurist in order to understand the source and deduce
the rules or in the absence of a clear textual guidance, formulate independent judgments."[34] The historical origin of this definition can be
traced back to a conversation between the Prophet and Moaz, a companion who was being sent as a judge to Yemen. The prophet approved Moaz's intentions to put "'all his energy into formulating his
own judgments' in cases where he could find no guidance in the *Qur'an*
and *Sunna*."[35]

Pursuing development through knowledge is the most important Islamic value.[36] The first verse of the Koran reads "[r]ecite."[37]
This is commonly interpreted as a divine call to acquire knowledge and

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[29] AL-AZMEH, *supra* note 17, at 251.

[30] *See, e.g.*, Wikipedia Ijtihad, http://en.wikipedia.org/wiki/Ijtihad.

[31] Ramadan, *supra* note 14, at 11.

[32] *See Yilmaz*, *supra* note 26, at 217 (mentioning that "[b]ecause culture is conceived as law in Muslim understanding and life, any discussion of change, transformation, or renewal inevitably intermingles with discussions surrounding
ijtihad. Thus, any new discourse is directly or indirectly a result of a new *ijtihad*,
which does not have to be in the field of law only, as strictly defined and understood by legal modernity"). In that sense, one may understand how some famous
Muslim scholars succeeded in mastering several branches of knowledge at the
same time. Averroes, for example, mastered Islamic jurisprudence as well as the
sciences of astronomy, geography, mathematics, and physics. *See* Wikipedia Averroes, http://en.wikipedia.org/wiki/Averroes.

[33] Ramadan, *supra* note 14, at 10.

[34] *Id.* at 9–10.

[35] *Id.* at 9.

[36] This explains the term "jahiliyyah" (ignorance era) which refers to the pre-Islam era in the Arabian Peninsula. *See* KHATAB & BOUMA, supra note 10, at 131.
In that context, the Prophet proclaimed "education to be the duty of every Muslim,
male and female." Ajmel Queresbi, *Are Hopes of a Democratic Iraq Rooted in More
Than Faith?: Islam, Democracy, and the Future of the Middle East*, 9 J. ISLAMIC L.
& CULTURE 57, 84 (2004).

[37] *Qur'an*, 96:1.

to cope with the ever-changing pattern of life.[38] While the divine call addresses all Muslims, it is the scholars who are deeply burdened with such an important task (*Ijtihad*). According to one of the most famous sayings of the Prophet Mohamed, "[t]ruly the scholars are the heirs of the prophets, and what one inherits from prophets is not money . . . but knowledge."[39] In that sense, scholars "have at their disposal to fulfill the universal vocation of Islam, through a constant dynamic of adaptation in response to the time and the context."[40] "This applies not only to . . . theology and ethics, as one would expect, but also to the mastery of the intricacies of Islamic law and, at least in previous historical periods, of the so-called 'Islamic sciences,' ranging from politics and economics to mathematics, medicine and areas of Islamic mysticism."[41]

As early Islamic culture laid stress on the role of knowledge in developing Muslim society, scholars enjoyed a prestigious position as custodians of change. As long as the scholar is practicing *Ijtihad*, his conclusions are rewarded, once if it is wrong and twice if it is right.[42] Awarding the scholars' pursuit of development guarantees that his works will be well-received among Muslims.[43] On the one hand, they have no direct interest with the body politic that questions their loyalty to Muslims. On the other hand, the social standing they enjoy allows them a considerable degree of moral influence on the body politic, which chooses from the alternatives proposed by the scholars.[44]

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[38] Zubaida, supra note 23, at 4.

[39] Ramadan, *supra* note 14, at 15.

[40] *Id.* at 14.

[41] G.P. Makris, Islam in the Middle East: A Living Tradition 59 (2007).

[42] Queresbi, *supra* note 36, at 73.

[43] Makris concludes from the theoretical expression of Islamic discourse that scholars' "knowledge constitutes one of the foundations of political authority, conferring on its guardians and interpreters undoubted political significance and a central role in the process of productions of 'orthodoxy.'" Makris, supra note 41, at 59.

[44] This situation continues to exist in exist in contemporary Muslim communities. In Egypt, for example, one may find different cases that relate to different fields; economy (payment of interest), health (organs transplant), and even dress (Islamic veil). Each of them "became the object of a lengthy public debate, with the press requiring clear stands from the '*ulamā*'." Bernard Botiveau, *Contemporary Interpretations of Islamic Law: The Case of Egypt*, *in* ISLAM AND PUBLIC LAW 261, 269 (Chibli Mallat ed., 1993).

II. *IJTIHAD* INSTITUTIONS AND ISLAMIC LAW

A. *Institutions and Legal Development*

Islamic law[45] has developed in different stages.[46] As mentioned before, Islamic law includes both the sacred texts of Islam as well as the dynamic readings of scholars. Such legal development is the product of *Ijtihad* institutions.[47] The term "*Ijtihad* institutions" applies to the two modern meanings of institution.[48] An institution is a group of individuals or norms designed to achieve a common objective or to solve a common problem.[49] Therefore, an institution could be an organization (group of individuals) or a custom (group of norms).[50] As to organizational institutions, the four influential schools of law, *Hanfi, Maliki, Shafi'I,* and *Hanbali,* are perfect examples of organizational institutions that still shape the Islamic legal system.[51] Social institutions, including precedent and jury systems, have their Islamic equivalents or origins.[52]

Early *Ijtihad* institutions enjoyed three main features that deeply contributed to the legal development of early Muslim society.[53]

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[45] FELDMAN, *supra* note 25, at 28.

[46] *See* TIBI, *supra* note 20, at 41.

[47] Institutional change is not exclusive to the evolution of Islamic law. For instance, the common law also witnessed a form of institutional change through its evolution. DOUGLASS NORTH, INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE 96 (1990). The example of the common law demonstrates that as a system evolves it becomes more efficient and improved. *Id.* at 97.

[48] *See* Institution, http://www.merriam-webster.com/dictionary/institution.

[49] C. MANTZAVINOS, INDIVIDUALS, INSTITUTIONS, AND MARKETS 83 (2001).

[50] *Id.* (noting that "it is useful to distinguish sharply between institutions constituting the rules of the game and organizations as corporate actors, that is, as groups of individuals bound by some rules designed to achieve a common objective (or to solve a common problem)").

[51] DEVIN J. STEWART, ISLAMIC LEGAL ORTHODOXY: TWELVER SHIITE RESPONSES TO THE SUNNI LEGAL SYSTEM 1 (1998).

[52] *See* John Makdisi, *The Islamic Origins of The Common Law*, 77 N.C. L. REV. 1635, 1635, 1731 (1999) (tracing the origins of three common law institutions—action of debt, the assize of novel disseisin, and trial by jury—to Islamic legal institutions).

[53] These three features also participated in the political development of the early Muslim state. Masoud Kamali noted five conditions that must be fulfilled to establish the basis of a civil society. He concluded that, "[t]he ulema enjoyed a particular religious and legitimate basis from which to challenge the state. Their economic independence from the state . . . underpinned the autonomy of the ulema from the state. *Ijtihad* . . . has been another important source of the position and authority of the ulema." MASOUD KAMALI, MULTIPLE MODERNITIES, CIVIL SOCIETY AND ISLAM: THE CASE OF IRAN AND TURKEY 40 (2006). Three of these conditions are: (1) the "relative autonomy of a societal sphere from the state," (2), the "rela-

The rise and fall of these institutions depended on such features. They include intellectual influence, institutional independence, and political tolerance toward academia. These three elements constitute what we may call the academic democracy of Islam.[54]

1. Intellectual Influence

Early Muslim scholars believed in the importance of consistency and predictability as critical features of a mature legal system.[55] They established *Ijtihad* institutions based on systematic methodology to meet the pressing needs of Muslim society.[56] Such institutions prepared a jurist to solve emerging problems presented by rapid changes in the society.[57] Generating dynamic readings of the sacred texts provided scholars with intellectual influence between the ruler and the ruled as they proposed alternative solutions for emerging problems.[58]

2. Institutional Independence

Madhabbs (schools of law) were designed to keep the scholars free from influence of the body politic.[59] This institutional structure allowed scholars to "establish their exclusivity and theoretical autonomy from outside powers, such as the rulers and the caliphs."[60] The *Awqaf* system allowed such institutions a great financial independence from the state.[61] "*Awqaf* or endowments . . . were closely in-

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tive autonomous access of some societal actors to the state or its elite," and (4) "legal and/or normative protection of societal agents and institutions." *Id.*

[54] *See* George Makdisi, *Freedom in Islamic Jurisprudence: Ijtihad, Taqlid, and Academic Freedom, in* LA NOTION DE LIBERTÉ AU MOYEN AGE: ISLAM, BYZANCE, OCCIDENT [THE CONCEPT OF FREEDOM IN THE MIDDLE AGES: ISLAM, BYZANTIUM AND THE WEST] 79, 81 (George Madkisi et al. eds., 1985) (mentioning that "[i]n its essence [academic freedom] . . . is the search for the truth by means of a method of inquiry which systematically examines all the pros and cons of a given thesis . . . [I]t applies to the two essential components of the academic community, the professor and the student . . . Back in the Middle Ages, the terms representing these two sides of academic freedom were supplied by concepts of Islamic jurisprudence: the concept of ijtihad and the concept of taqlid. Ijtihad means 'exerting oneself to the utmost limit'; taqlid means 'investing with authority,' 'clothing with authority'").

[55] FELDMAN, *supra* note 25, at 27.

[56] ZUBAIDA, *supra* note 23, at 4.

[57] *Id.*

[58] FELDMAN, *supra* note 25, at 40.

[59] STEWART, *supra* note 51, at 1.

[60] *Id.*

[61] *See generally*, GEORGE MAKDISI, THE RISE OF COLLEGES: INSTITUTIONS OF LEARNING IN ISLAM AND THE WEST 35–74 (1981) (describing the role of law of *waqf* in developing the institutions of learning in Islam, the objects of the *waqf,* the committee of overseers, and the endowment income).

volved in religious institutions, which were the main beneficiaries of charitable, *khayri*, endowments."[62]

3. *Political Tolerance towards Academia*

A fair reading of *Usul* shows that it equally applies to private and public law.[63] Scholars were involved in discussing classical public law issues. "*Kitab al-Kharaj*" is a treatise on taxation and fiscal problems of the state prepared by Abu-Yusuf, student of Abo Hanifah, for the caliph Harun al-Rashid.[64] The body politic tolerated academia because of academia's efforts to facilitate the effective functioning of the classical Islamic state.[65] More specifically, scholars provided the state with a more predictable and stable legal system.[66] They secured revenues for the state through lawful taxation[67] and provided governmental works that are consistent with the system scholars built, with "an aura of legitimacy."[68]

B. *The Rise*

1. Madhabbs *as Institutions*

The eighth and ninth centuries witnessed the emergence of *madhhabs*, generally termed "schools of law" in Western scholarship on Islam.[69] The main four schools of law in Islamic legal literature are the *Hanfi, Maliki, Shafi'i*, and *Hanbali*.[70] These *madhhabs* "came to be accepted as standard, with recognized legal traditions going back, at least in theory, to their eponymous founders, Abu Hanifah, Malik, al-Shafi'i, and Ahmed b. Hanbal, jurists of the eighth and ninth centuries."[71] Influence of these institutions "may be seen in many areas of Islamic social, political, and intellectual history, but the features and

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[62] ZUBAIDA, *supra* note 23, at 66.

[63] LEWIS, *supra* note 18, at 28 (explaining that Islamic jurisprudence is termed *fiqh* and "[t]he standard treatise on *fiqh*, almost without exception, include sections on government, and some authors devote whole works to this topic").

[64] Hamid S. Hosseini, *Contributions of Medieval Muslim Scholars to the History of Economics and their Impact: A Refutation of the Schumpeterian Great Gap, in* A COMPANION TO THE HISTORY OF ECONOMIC THOUGHT 28, 24 (Warren J. Samuels et al. eds., 2003).

[65] FELDMAN, *supra* note 25, at 40–41.

[66] *Id.* at 40.

[67] *Id.*

[68] *Id.* at 40–41.

[69] STEWART, *supra* note 51, at 1. *See generally* Irshad Abdal-Haqq, *Islamic Law: An Overview of Its Origins and Elements*, 7 J. ISLAMIC L. & CULTURE 27, 67–76 (2002).

[70] STEWART, *supra* note 51, at 1.

[71] *Id.*

the workings of these thousand-year-old institutions remain poorly understood."[72]

Madhhabs marked a "mature legal system."[73] As a young scholar devoted himself to a certain school, he was "learning . . . and committing himself to following those doctrines when it came to issuing actual legal rulings."[74] Commitment to the jurisprudential framework of one's *madhhab* contributed to the consistency and predictability of the Islamic legal system.[75] In fact, *Maliki*, a school of law, developed a case law system two centuries before English judges were bound by precedent.[76] In that system, "judicial decisions became the practice . . . that was followed by subsequent courts and that acquired regulatory force even to the extent of prevailing over dominant legal opinions within the *Maliki* school of law in the latter half of the fifteenth century."[77]

2. Usul al-Fiqh *as Institutions*

Muslim scholars developed several jurisprudential institutions in order to provide society with a dynamic platform of conflict resolution.[78] They affirmed that geographical and historical contexts could lead to different legal judgments on the same question.[79] These institutions are applications of the main science developed by the scholars.[80] *Usul al-Fiqh* allowed Muslim scholars to develop norms, rules, and doctrines to meet the pressing needs of Muslim society.[81] Such rules still exist in contemporary Muslim states, but are not limited to personal affairs, as some might imagine. The Supreme Constitutional Court of Egypt still cites *Usul al-Fiqh* when it decides modern economic and social issues.[82] Egypt's *Conseil d'Etat* (Administrative Courts system) was established from a comparative design with Is-

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[72] *Id.* at 2.

[73] FELDMAN, *supra* note 25, at 27.

[74] *Id.*

[75] *Id.*

[76] Makdisi, *supra* note 52, at 1635.

[77] *Id.* at 705.

[78] *See* ZUBAIDA, *supra* note 23, at 4.

[79] Ramadan, *supra* note 14, at 16 (giving the example of *Shafi'i* who modified some of his legal judgments after traveling from Baghdad to Cairo).

[80] Abudullahi A. An-Na'im, *A Theory of Islam, State, and Society*, *in* NEW DIRECTIONS IN ISLAMIC THOUGHT, supra note 12, at 152.

[81] *See generally* Abdal-Haqq, *supra* note 69, at 50–67 (explaining the methodologies and braches of *fiqh*).

[82] *See* Shannon M. Roesler, *Modern Legal Feform in Egypt: Shifting Claims to Legal Authority*, 14 CARDOZO. J. INT'L & COMP. L. 393, 418–28 (2006).

lamic origins that go back to the *Mazalim* jurisdiction.[83] As mentioned before, recent studies propose Islamic origins to some English common law institutions.[84]

Discussing Islamic law paradigms goes beyond the scope of this article. However, three examples could explain the situation. They belong to criminal law, administrative law, and constitutional law within Islamic jurisprudence. The theft paradigm is the first example. Muslim scholars developed a wide range of strict conditions that must be fulfilled in order to prosecute the accused for theft.[85] Administrative jurisdiction is the second example. Such new jurisdiction emerged to deal with the growing number of petitions against the actions of state officials.[86] Judicial independence is the third example. Traditions of such independence continued to develop beyond its origins that go back to the era of *Umar*, the second caliph.

3. *The Fall*

When scholars approached political democracy issues, it was the turning point of the academic democracy institutions. Some argue that compromises have been worked out between Muslim scholars and rulers regarding controlling discretion over private and public law issues.[87] However, scholarly works present several paradigms of Islamic public law. In fact, when *Ijtihad* institutions approach Islamic democracy and other concerns of political thought, political tolerance towards academia starts to dissipate.[88]

Regarding the increased interference of the body politic into *Ijtihad* institutions, several observations emerge. As Professor Makdisi noted:

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[83] For more details about public law in Islam and *mazalim* jurisdictions see Enid Hill, *Majlis al-Dawla: The Administrative Courts of Egypt and Administrative Law*, *in* ISLAM AND PUBLIC LAW, *supra* note 44, at 212, 213. For more details on how *mazalim* became institutionalized and even bureaucratized, *see* ZUBAIDA, *supra* note 23, at 53.

[84] *See generally* Makdisi, *supra* note 52.

[85] MOHAMED S. EL-AWA, PUNISHMENT IN ISLAMIC LAW: A COMPARATIVE STUDY 3 (1982) (mentioning that "there is almost complete agreement on [the] definition [of theft] among jurists, but they are not so unanimous concerning the value of the stolen property . . . and the question of the place from which property is stolen, i.e., the problem of custody").

[86] *See* Hill, *supra* note 83, at 213–15.

[87] "Compromises have been worked out between Sunni jurists and the Muslim sovereigns, allowing rulers wide discretionary control over issues on public law, such as taxation, defense, and the maintenance of public order, while the jurists controlled private law, including trade and contracts, marriage and divorce, inheritance and so on." STEWART, *supra* note 51, at 2.

[88] *See* ZUBAIDA, *supra* note 23, at 80–103.

> Early in Islamic history, the governing powers created the paid post of qadi, or judge, which became a means of attempting to bring the Muslim intellectual within the orbit of central power as a means of controlling the masses. Many . . . refused the post. It was not until the latter part of the thirteenth century that the central power created a paid post for the mufti, the professor of legal opinions . . . What the central power did was to divide the two competences . . . and appropriate to its own advantage the one prerogative of the Muslim intellectual that had remained free down through the centuries. By a stroke of genius, of Machiavellian spirit, it stripped him of his last vestige of intellectual freedom: the freedom to express his legal opinion resulting from his practice of ijtihad in search of religious truth as he saw it, and answerable to God alone . . . [I]t proceeded to college; so that, under the Ottoman Empire, the Muslim intellectual's institutional protections fell within the central power's all-encompassing orbit. But the main blow had already been struck, and the irreversible damage already done.[89]

The "Closure of *Ijtihad*'s Gate"[90] is another stage of that fall.[91] Either political interference or intellectual weakness led to the declaration "that it was no longer necessary to practice *ijtihad*."[92] Overall, "Muslims were moving further from the 'Golden Age' of the Prophet and his immediate successors, [and] things were going into decline."[93]

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[89] Makdisi, *supra* note 54, at 86–87. The same situation continues to exist in contemporary Muslim society. The ambiguous attitude arising from changing positions of the great *Ulama* of al-Azhar University towards the 1979 law of personal status "*Jihan* law" and the implementation of Islamic penal law in Sudan is best understood under this analysis. *See* Botiveau, *supra* note 44, at 266.

[90] Closure of the gates of *ijtihad* is an expression that refers to cessation of independent interpretation and "the concomitant institutionalization of *taqlid*, or blind following, as it is most commonly referred to, has led modern observers, Muslim and non-Muslim alike, to the conclusion that Shari'a is doggedly impervious change." Sherman A. Jackson, *Shari'ah, Democracy, and the Modern Nation-State: Some Reflections on Islam, Popular Rule, and Pluralism*, 27 FORDHAM INT'L L.J. 88, 90 (2003).

[91] "The so-called 'closure of the gate of *ijtihad*' precisely attempts to put an end to the process of legal innovation in favor of a fixed corpus juris established by the founders." ZUBAIDA, *supra* note 23, at 43.

[92] Ramadan, *supra* note 14, at 14.

[93] MAKRIS, *supra* note 41, at 43.

This "had to do more with the disintegration of political institutions rather than with the decline of legal standards."[94]

However, the fall of *Ijtihad* institutions and the closure of *Ijtihad* gates did not signify the complete disappearance of *Ijtihad* practices. Scholars had to fulfill their duty to Muslim society if not through organizations, then as individuals.[95] Of course, scattered efforts by individuals do not have the same strength of institutions. In Egypt, for example, Kamal Abu al-Magd, a professor of law at Cairo University and ex-minister, believes that "contemporary Egyptian reformers do not belong to any specific organization, but constitute an *ad hoc* group of people with similar ideas who work on the same issues and consult each other's publications."[96]

Egypt's major legal developments are efforts of individuals rather than achievements of institutions. Muhammad Abduh (1849–1905) studied theology and Islamic sciences at *Al-Azhar* University in Cairo.[97] "Abduh's 'modern' and moderate views on Islam carried him to the office of the Grand *Mufti*, the highest Egyptian judge [at the time], and to membership of the legislative council of the country."[98] The School of Magistrature in Egypt, which was founded in 1907 according to a project already formulated by Abduh shortly before his death, produced a codification of civil law.[99] Such codification was classified and presented like a Western code.[100] It contained the rules of Islamic law that best adapted to social change. "The first Egyptian law on personal statute was promulgated in 1920 on this basis."[101] Abd al-Razaq al-Sanhori (1895–1970) also played a remarkable role in developing the legal system, not only in Egypt, but also in the Arab world. He is "remembered today as the principle architect of the present civil codes of Egypt, Iraq, Syria, Libya, and the commercial code and other basic legislation of Kuwait."[102] Viewing Islam as culture and civilization,[103] he "attempted nothing less than to develop a

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[94] *Id.*

[95] Ramadan, *supra* note 14, at 14 (mentioning that "[t]he doors of *ijtihad* have never been closed . . . a declaration such as this, by its very nature, is against Islam . . . [i]*jtihad* . . . is *fard kifaya*, a collective responsibility").

[96] MAKRIS, *supra* note 41, at 189.

[97] *Id.* at 178.

[98] *Id.*

[99] Botiveau, *supra* note 44, at 266.

[100] *Id.*

[101] *Id.*

[102] Enid Hill, *Islamic Law as a Source for the Development of a Comparative Jurisprudence*, *in* ISLAMIC LAW, *supra* note 17, at 146.

[103] *Id.* at 149.

comparative legal 'science' within which Islamic law was incorporated."[104]

III. *IJTIHAD* INSTITUTIONS AND ISLAMIC DEMOCRACY

A. *Institutions and Political Development*

Scholars' role in advancing the Islamic legal system was not a mere academic work. Their position as heirs of prophets inaugurated them as custodians of change. However, the change they brought was not delivered by occupying the body politic. They established *Ijtihad* institutions that stood as think tanks, conducting research and engaging in advocacy on behalf of Muslim civil society.[105] Despite being non-political entities, *maddhabs* gained support from the public. This allowed them to devote a great deal of thought and attention to sensitive constitutional issues.[106] In this context, they discussed "features, functions, and also ailments of the body politic—the nature of sovereignty, how it is acquired, how it should be exercised; the characteristics of good and bad governments; and, in general, the relations between the ruler and the ruled."[107]

In that sense, one can read Islamic governance as a product of two balanced streams: Polit-Islam and Intell-Islam. While the Polit-Islam stream guarantees keeping Muslim community (*umma*) in static unity, the Intell-Islam stream guarantees that this static unity adopts with the changing world. In light of this, one may understand several intellectuals in the Arab world who view *jihad* as an arena for more reform and involvement in today's civil society. This is the same concept of *jihad* that Polit-Islam once used to direct civil society activists to Afghanistan during the 1980s.[108] Accordingly, one may illustrate the democracy crisis that faces some contemporary Muslim states in light of this reading of Islamic governance. Such crisis can be summarized as an absence of balance between the two streams.

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[104] *Id.*

[105] KAMALI, *supra* note 53, at 40.

[106] LEWIS, *supra* note 18, at 25.

[107] *Id.*

[108] Ironically, the political use of the notion of *Jihad* has a long story in Muslim history. As Esposito and Mogahed noted, "*Jihad*, which in the Quran means 'to strive or struggle' to exert oneself to realize God's will, to lead a virtuous life, is sometimes referred to as the sixth pillar of Islam, but it has no such official status. *Jihad* is not associated or equated with the words 'holy war' anywhere in the Quran. However, historically, Muslim rulers, with support of religious scholars and officials, did use *jihad* to legitimate wars of imperial expansion. Early extremist groups also appealed to Islam to legitimate rebellion, assassination, and attempts to overthrow Muslim rulers." ESPOSITO & MOGAHED, *supra* note 13, at 17.

B. Early Islamic Governance

After the death of the Prophet, the appointment of Abū Bakr as his successor in the guidance of the Muslim community represents the establishment of the "the first and by far the greatest and the most important sovereign institution in Islamic history" of the Caliphate.[109] The Rightly Guided Caliphate is the period that witnessed "governing of the Islamic community by four *khalīfas* [caliphs] . . . all of whom were numbered among the initial and faithful followers of the Prophet. During the leadership of the first three the great expansion of Islam began."[110] However, it is second caliph, Umar, who sharply clarified the nature of this institution, its powers, and its limits.[111] In early days of his regime, he refused to be addressed as the "caliph of Allah," the deputy of God.[112] More than eliminating the theocratic nature from the growing institution, he set a constitutional custom regarding appointment of the caliph. Right before his death, he appointed a committee of six people to choose the next caliph from among them.[113]

However, the most important achievement of Umar is his contribution to the Islamic jurisprudence. He earned a legacy as "the Great Jurist" in light of his unique practice of *Ijtihad*. Such practices are still cited by many Muslim intellectuals who call for reforming Islamic law through contextual reading of sacred texts. More interestingly, while he was the caliph, Umar assured separation between Polit-Islam institutions and Intell-Islam institutions on several occa-

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[109] LEWIS, *supra* note 18, at 44.

[110] MAKRIS, *supra* note 41, at 21.

[111] *See generally* Muhammad Khalid Masud, *The Changing Concepts of the Caliphate – Social Construction of Shari'a and the Question of Ethics*, *in* NEW DIRECTIONS IN ISLAMIC THOUGHT, supra note 12, at 187, 187–205 (describing the history of the institution of the caliphate).

[112] LEWIS, *supra* note 18, at 44 (explaining the story that "[w]hen Abū Bakr succeeded the Prophet, he was called *Khalīfatu Rasūl Aāh*, the deputy of the prophet of God. Then Umar succeeded [of perhaps replaced] him . . . A man came to hear Umar and addressed him as *Khalīfat Allāh*, deputy of God. Umar cursed him, and said: 'That is David.' The man then called him *Khalīfatu Rasūl Alāh*, deputy of the deputy prophet of God, and Umar said: 'But that was Abū Bakr, who is now dead.' So the man addressed him as *Khalīfatu Khalīfati Rauūl Allāh*, deputy of the deputy of the prophet of God, and Umar said: 'That is correct, but it will grow longer,' and the man said: 'Then what shall we call you?' And Umar said: 'You are the believers and I am your commander, therefore call me commander of the believers'").

[113] *See* Tamara Sonn, *Elements of Government in Classical Islam*, *in* ISLAMIC DEMOCRATIC DISCOURSE, supra note 14, at 21, 23 (noticing that "Abū Bakr appears to have suggested his successor to a council of community leaders who approved the choice (Umar). The next two successors (Uthman and Ali) are also reported to have been chosen by such a council").

sions. Despite disagreeing with the outcome, Umar refused to inter-
fere with a case before one of his judges. Umar emphasized the
intellectual independence of the judge that allowed the latter to exer-
cise his independent judgment in the case before him. Another situa-
tion emphasized that Umar separated the ability to interpret the law
(Intell-Islam) from the authority to impose the law (Polit-Islam), and
favored the first over the second. The story goes something like this:

> Umar proposed a change in marriage laws and an old,
> unknown woman in attendance stood up and challenged
> him. She said, "You shall not deprive us [women] of what
> God gave us." The Khalifah [Umar] asked her to provide
> support for her statement. When she cited a Qur'anic
> verse, the Khalifah [Umar] said: "The woman is right
> and the Khalifah is wrong."[114]

Umar also contributed institutionalizing judicial practices at
the very early moments of the Muslim State.[115] His famous epistle to
Abu Musa al-Ash'ari, whom he is supposed to have designated as
Qadi, stands as a paradigm of judicial ethics and responsibilities.[116]
Until today, Egyptian judges received a handout of Umar's epistle dur-
ing oath-taking ceremonies. In the epistle, Umar repeatedly empha-
sizes the judicial autonomy issues.

Early Muslim states had their own democratic institutions that
existed and functioned to pursue ideal Islamic governance.[117] Such
institutions might have a different structure, different mechanisms,
and different titles than their equivalents in modern democracies.[118]
However, they had the same notion of "government of the people, for
the people, and by the people."[119] In light of these institutions, there

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[114] Queresbi, *supra* note 36, at 84.

[115] ZUBAIDA, *supra* note 23, at 41.

[116] *Id.*

[117] *See generally* KHATAB & BOUMA, *supra* note 10, at 7–92 (explaining the politi-
cal theory and notion of political participations in Islam).

[118] *See* JOHN ESPOSITO & JOHN VOLL, ISLAM AND DEMOCRACY 27 (1996) (stating
that "[i]n presentation of democracy within a broad Islamic conceptual framework,
much attention is given to some specific aspects of social and political operation. In
particular, Islamic democracy is seen as affirming longstanding Islamic concepts
of consultation (*shurah*), consensus (*ijma*), and independent interpretive judgment
(*ijtihad*)").

[119] *See* FELDMAN, *supra* note 25, at 6 (stating that "[t]he Islamic state is preemi-
nently a shari'a state, defined by its commitment to a vision of legal order. The
state historically organized under what I shall call the classical or the traditional
Islamic constitution—a constitution that, like the English constitution, was un-
written and ever-evolving—was a *legal* state in both meanings of the term. The
system was justified *by* law, and the system administered basic government
through law").

has never been, either in theory or practice, the false picture that portrays Islamic government "as a system in which the ruler is an all-powerful despot and the subject his helpless slave, entirely at his mercy."[120]

Madhhabs also contributed to the Islamic governance structure. *Kitab al Khraj*, the "introduction to the *Book of the Land Tax*," stands as the first major statement on politics.[121] It introduces "the ruler as shepherd at considerable length."[122] It was written for the caliph Harun al-Rashid by his chief *quadi* Abū Yusuf.[123] Abū Yusuf was a student of Abū Hanifah, the founder of Hanafi School of Law. However, the most important contribution of *Madhhabs* in Islamic governance is the so-called "climate of opinion."[124] This expression refers to "the coexistence and mutual tolerance" among *Madhhabs* that believed in the significance of disagreement while remaining orthodox.[125] Malik repeatedly refused demands from Caliph al-Mansour to allow the state to adopt Malik's famous book (*al-Muwatta*) as the formal doctrine of the state.[126] In addition, the structure and goals of *Ijtihad* institutions in general gave rise to a growing civil society that "does not depend on the presence of sovereign and free individuals, but on groups or communities and their institutions enjoying a significant degree of autonomy from the state."[127] To conclude, the *Ijtihad* institutions planted democratic values in basic legal ideas that influenced the civil society and, to some extent, the body politic.[128]

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[120] LEWIS, *supra* note 18, at 31 (concluding that "Muslim law has never conceded absolute power to the sovereign, nor, with few exceptions, have Muslim sovereigns ever been able to exercise such power for any length of time").

[121] *Id.* at 18

[122] *Id.*

[123] *Id.*

[124] *Id.* at 29.

[125] *Id.*

[126] *See* MUHAMMEAD QASIM ZAMAN, RELIGION AND POLITICS UNDER THE EARLY ABBASIDS 84 (Brill 1997) (noting that "[t]here are some reports . . . according to which the caliph [al-Mansur] intended to promulgate the Muwatta' of the Medinee jurist Malik b. Anas (d. 179/795) as the single and uniform basis of the legal decisions in the empire . . . Malik, for his part, remained unimpressed with what the caliph intended . . . Malik reportedly argued that such regional diversity in legal matters was too developed to be harmonized or regulated.") *Id*.

[127] KAMALI, *supra* note 53, at 40.

[128] *See generally* KHATAB & BOUMA, *supra* note 10, at 93–128 (explaining democratic values in some basic Islamic legal ideas. For example, some ideas relate to human relations: respect and compassion; property: trusteeship and charitable trust; human life: privacy and human dignity; work: labor and industrial relations; economics: free market and commercial integrity).

C. Contemporary Islamic Governance

One missing piece of the picture could illustrate the democracy crisis that Arab countries face. These countries have different political systems, political forces and political institutions. However, they all share one critical deficit to any democracy—a fragile civil society.[129] As Islam is the main component of culture in these states, any "Islamic" stream will easily gain popularity.[130] In the political game, being "Islamic" is a very strong asset and probably the winning card.[131] Islam represents "the most widely intelligible formulation of ideas, on the one hand of social norms and laws, on the other hand, of new ideals and aspirations."[132] However, being "Islamic" cannot be briefed in a mere slogan or name for a party or group.[133] Without an intellectual input that reflects the society's needs, political entities will continue to impose their custody on the people according to these entities' agenda, not the society's agenda.[134] While this basically applies to the Polit-

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[129] For more details about contemporary civil societies in Muslim countries, see KAMALI, *supra* note 53, at 254–58 (explaining contemporary civil societies in Muslim countries). Kamali noted that:

> Some state organizations, such as the military, the police and the bureaucratic apparatus, hold greater importance in Muslim countries than do their counterparts in 'the West'. . . . In many Muslim societies, other state institutions and organizations, such as the welfare system, the judicial system, the constitutions of the political system, and so forth, have not been developed very far, having been pushed back by organs of state such as the military, and by an authoritarian elite.

Id. at 254–55.

[130] That explains "the increasing tendency of political parties to raise religious issues" in the secular Turkish Republic where legal separation of religion and state is clear. LEWIS, supra note 18, at 4.

[131] *See* ALAN RICHARDS & JOHN WATERBURY, A POLITICAL ECONOMY OF THE MIDDLE EAST 342 (3d ed. 2008) (providing the experiences of Algeria, Palestine, Iraq, and Egypt as examples).

[132] LEWIS, *supra* note 18, at 5 (concluding that "as recent events have repeatedly demonstrated, Islam provides that most effective system of symbols for political mobilization, whether to arouse the people in defense of a regime that is perceived as possessing the necessary legitimacy or against a regime which is perceived as lacking that legitimacy, in other words, as not being Islamic or, perhaps, as having forfeited that legitimacy by no longer being Islamic.").

[133] FELDMAN, *supra* note 25, at 113.

[134] RICHARDS & WATERBURY, *supra* note 131, at 323 (stating that while civil society "has grown in size, complexity, and voice," political Islam groups "have captured a significant part of it, but whether they merely reflect a high level of frustration among the citizenry as opposed to a genuine quest for an Islamic state is moot.").

Islam groups, contemporary regimes are not exceptions to this rule.[135] The most famous example is the 1980 constitutional amendments in Egypt.[136]

Noah Feldman argued that scholars, through their lawmaking authority, practiced powerful and effective checks on the ruler in classical Muslim states.[137] During the Ottoman Empire's economic reforms, he argues, adopting codes of law, rather than the common law of *Shari'a*, removed an effective lawmaking authority from the hands

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[135] In the same context, Ihsan Yilmaz distinguishes between state-generated *Ijtihad* (which might end up in civil disobedience) and civil *Ijtihad* (which may create postmodern fragmentation as a result of micro *mujtahids*). *Yilmaz*, *supra* note 26, at 208–09.

[136] For more details, see Patricia Prentice, *Article 2 of the Egyptian Constitution*, Arab-West Academic Papers, *available at* http://www.arabwestreport.info/AWRpapers-fulltext.php?report_id=1 (mentioning that "the 1923 [mis] Egyptian Constitution did not contain any provision requiring deference to [Shari'a] . . . [Then] [i]n 1970 the government made an important gesture towards the Islamic groups calling for governance according to [Shari'a]. When the new Constitution was adopted in 1971, Article 2 states that Egyptian legislation should be consistent with Islamic legal norms, and 'the principles of the Islamic [Shari'a] shall be *a* primary source of legislation' (emphasis added)). *Id.* at 10–11. However, "[i]n [M]arch 1980 the shari'ah was made *the* main source of legislation through a plebiscite (emphasis added)." *See* R. HRAIR DEKEMEJIAN, ISLAM IN REVOLUTION: FUNDAMENTALISM IN THE ARAB WORLD 81 (Syracuse University Press 1995). Another amendment that took place through the 1980 plebiscite should be mentioned. "Article 77 of the revised Constitution was particularly interesting since it had the effect of making Sadat President for life." *See* MOHAMED HEIKAL, AUTUMN OF FURY: THE ASSASSINATION OF SADAT 215 (Andre Deutsh 1983). Overall, "[Sadat] not infrequently made use of the plebiscite to change the constitution or to alter the rules of the system and in 1980 when he changed the constitution to permit himself an unlimited number of six-year terms in office." *See* RAYMOND A. HINNEBUSCH, JR., EGYPTIAN POLITICS UNDER SADAT 79 (Cambridge University Press 1985). In his book "The Ulama in Contemporary Islam," Professor Muhammed Q. Zaman clearly notes that "[a]s part of the effort to seek the favor of Islamic groups and the 'ulama and to mobilize them against the regime's Nasserist and socialist opponents, Sadat's new Constitution of 1971 had declared that the principles of the shari'a were to be 'a *principal* source of legislation' in the state. A constitutional amendment in 1980 went further, recognizing the shari'a as 'the *principal* source of legislation" (emphasis added). *See* MIHAMMED QASIM ZAMAN, THE ULAMA IN CONTEMPORARY ISLAM 146 (Princeton University Press 2002). Article 2 of the 1971 Egyptian Constitution reads that "the Islamic Shari'a is *a* principal source of legislation." In 1980, the same Article was amended to read: "the Islamic Shari'a is *the* principal source of legislation." While the legal jurists debate as the importance of amending Article 2 from "a" to "the", one may not ignore that Article 77 is also amended, in the same referendum, allowing the re-election of the president for other terms rather than two. EGYPT CONST. part I, art. 2.

[137] FELDMAN, *supra* note 25, at 6.

of scholars.[138] In Iran, "instead of restoring the balance between the ruler and scholars, he sought to merge these two separate institutions under a single supreme jurist-ruler" despite the revival of scholars.[139] In this context, the modern legislature, he proposes, can undertake the lawmaking and achieve balance through effective checks on the ruler.[140]

To a great extent, Feldman approached the core of the problem. However, he missed one important dimension when proposing the solution. It is true that the scholar's role is the missing piece of the picture that portrays how Islamic rule of law worked in early Islamic governance. However, their role cannot be abbreviated in lawmaking authority. Their contribution in the lawmaking process should be seen as ability rather than an authority. Their engagement with the civil society allowed them to be law-makers and law-takers at the same time.[141] This allowed Muslim civil society to check the ruler and challenge governmental abuses. This could not take place in the absence of the institutional framework that scholars developed, both in an organizational and a social sense. Such institutional framework that hosts the Intell-Islam stream could stand side by side with Polit-Islam and check the reasonableness of its actions.

Again, Egypt is a good example that could illustrate the picture. Anwar Sadat's regime (1971–1981) witnessed the rise of Polit-Islam discourse by both Islamists and the political system. "Sadat employed Islamic symbols and rhetoric generously."[142] This includes referring to himself as the "believer-president," releasing Muslim Brothers from prison and allowing them to function in public life, and describing the 1973 Egyptian-Israeli war as a *jihad*.[143] Sadat's initiatives proved counterproductive as he relied on the Polit-Isalm groups to play the role of Intell-Islam groups. In fact, they approached the civil society with their own agenda as any other political entity would. They mobilized opposition for Sadat's policies in different sectors of the society (i.e., student unions, professional associations). Mubarak's regime (1981-present) spent considerable amounts of time and effort to curtail Islamist involvement in civil society. While succeeding in that task to a great extent through security institutions, it has left civil society vulnerable without an Intell-Islam

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[138] *Id.* at 7.

[139] *Id.* at 11.

[140] *Id.* at 12.

[141] Recently, voices in Iran, even among clergy, suggest that scholars should retreat to their *madrasas*, "where they enjoy some comparative advantage." RICHARDS & WATERBURY, *supra* note 131, at 322.

[142] ESPOSITO & VOLL, *supra* note 118, at 174.

[143] *Id.*

shield.[144] Despite Mubarak's call for "renewal of Islamic discourse" on several religious occasions, no serious steps were taken to encourage Intell-Islam to institutionalize[145] or even to protect its individuals from judicial claims brought by Polit-Islam groups.[146]

Absent an institutionalized understanding of what Islamic law stands for, formal institutions in Egypt have to make hard choices. The Executive branch's proposal for constitutional amendments attempts to emphasize citizenship, instead of Muslimship, as a base for functioning on the political stage. Amending the constitution, however, has not weakened the Muslim Brotherhood's standing among the people. The Legislature tries to approach Islamic law with a comparative methodology. But the calls for "codification of Islamic law," or even "Islamisation of Egyptian law," still easily gain public support.[147] The Judicial branch's chance to redefine Islamic law is much better than the other two branches. This is because of the classical portrayal in Muslim literature of the judge as a person who has knowledge and practices *Ijtihad*. However, Egyptian judges are restricted by the limited intellectual proposals and unlimited public skepticism towards governmental interference into the judiciary. Overall, without enough public support, one may question the future applicability of these choices.

It is not hard to link the democratic crisis in Arab countries with the "Rule of Law" dilemma.[148] Law and democracy entrepre-

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[144] Even more, it has been "argued that the state's increasing dominance over religious institutions, such as al-Azhar, has contributed to radicalism, particularly the political violence of the 1990s." Roesler, *supra* note 82, at 426.

[145] Some humble attempts are taking place in academia. For example, a program for studying the *Maqasid* (goals of *Shari'a*) was initiated between Alexandria University Faculty of Law and London Center of Maqasid. However, this remains restricted to the limited academic influence in the Egyptian society. For more details about the program, see Mohammad Hashim Kamali, *Law and Ethics in Islam—The Role of the* Maqāsid, *in* NEW DIRECTIONS IN ISLAMIC THOUGHT: EXPLORING REFORM AND MUSLIM TRADITIONS 23, 23–46 (Kari Vogt et al. eds., 2009).

[146] For more details about prosecuting critical theologian Nasr Hamid Abu Zayd for apostasy and other maneuvers "to use various legal rules within Egyptian law," see ZUBAIDA, *supra* note 23, at 169–70.

[147] *Id.* at 166–70.

[148] This linkage has its origins in early Muslim states. The dueling political crisis of Ali, the forth Rightly Guided Caliph, ended with a dramatic damage to both law and democracy. Ali approved to arbitrate his political dispute with Mu'awia, a competing political leader, which ended with the rebellion of a group (Khawarij) against Ali. They argued that he accepted the humans' law instead of God's law. Ali attempted to refute their argument by emphasizing that the Qur'an "is but ink and paper, and it does not speak for itself. Instead, it is human beings who give effect to it according to their limited personal judgments and opinions." Eventu-

neurs are the same in Arab countries as in western countries. This includes formal institutions like courts, and informal institutions like "schools, colleges, and universities where ideas are inculcated and exchanged, and . . . professional offices where habits and practices are learned."[149] Noah Feldman noted that "[i]nstitutions are no substitute for legal ideas or values, but without them, law is homeless and thus is not really law at all."[150] The same is true as for democracy. Political institutions are no substitute for the culture of democracy, but without them, democracy is homeless and thus is not democracy at all.

CONCLUSION

As Noah Feldman noticed in his remarkable book *The Rise Fall and Rise of Islamic State*, "[t]here is nothing unique to Muslims about this active and continuing engagement with the constitutional past. Madison, Jefferson, and Hamilton continue to shape the American constitutional traditions from beyond the grave."[151] The same is true for Mohamed and the Rightly Guided Caliphs. Indeed, "[t]he call for Islamic state is a call for legal state, a call for law."[152] But, as law cannot be invoked by a word, institutions have to do their magic. Formal institutions are not the only law entrepreneurs. Informal institutions provide formal institutions with the intellectual material and public support. Polit-Islam pursuit, for either law or democracy, is attractive and thus likely to gain public support in the short-term. However, it is the Intell-Islam that could rationalize that support in the long-term.

There was a time when true Islamic democracy existed. Despite its life being very short and full of interruptions, Muslims still remember it in their nostalgia. Overall, it was the product of a balanced interaction between two main powers in Islam: intellectual Islam (Intell-Islam) and political Islam (Polit-Islam). Each of them played a remarkable role in early Islamic governance that reflects itself in culture, law, and, eventually, democracy. *Ijtihad* institutions represent the Intell-Islam stream along Muslims' history. The rise and fall of these institutions illustrate the rise and fall of Islamic governance. There is still a chance for these institutions to play a role in contemporary Islamic governance. *Ijtihad* institutions can still redirect the *Jihad* institutions from militants to civil society activists.

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ally, after the death of Ali by the hands of a member of this group, Mu'awia headed the state. This ended the Rightly Guided Caliphate and started another royal caliphate or, in fact, kingdom. KHALED ABOU EL FADL, ISLAM AND THE CHALLENGE OF DEMOCRACY 7–8 (Joshua Cohen & Deborah Chasman eds., 2004).

[149] FELDMAN, *supra* note 25, at 10.
[150] *Id.*
[151] *Id.* at 5.
[152] *Id.* at 9.