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Islamic Constitutionalism and the Concept of Democracy*

*Azizah Y. al-Hibri***

I. INTRODUCTION

Recent developments in the Arab World, especially those surrounding the Gulf War, prompted demands for the introduction of democratic changes to systems of government in that region. These demands spurred a broad-based debate among Muslims concerned about the correct Islamic point of view on the subject. This article contributes to the debate by analyzing Islamic constitutionalism's position on democratic governance. To render such analysis more accessible to a Western reader, it shall be conducted by considering the Islamic system of governance in light of principles basic to Western democracies in general, and the United States in particular. This approach is being used solely for heuristic purposes. It is not meant to suggest that Western democratic principles provide the ultimate criteria in determining the democratic character of alternative systems of government. This latter point is quite important given the fact that some Muslim thinkers believe that, if fully developed, the democratic character of a modern Islamic system of government would surpass that of any existing Western system.[1]

In the predominantly secular world of Western democracies, the concern with the correct Islamic point of view may appear quaint. For, it seems that the Arab World continues to lag behind the West in terms of political development. More specifically, it has yet to fully undergo

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* Editor's Note: Because the accuracy of reprints of older Islamic works depend upon the city in which the works were reprinted, the city of publication has been included, where appropriate, in order to indicate the reliability of the cited sources. As a result, these citations do not conform to the standards of the Bluebook. The *Journal* would like to thank Mrs. Nelly ElSanadi, of the C.W.R.U. School of Law Library Staff, for her assistance with the verification of Islamic sources.

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[1] *See, e.g.*, TAWFIC AL-SHAWI, SIYADAT AL-SHARI'AH AL-ISLAMIYYAH FI MISR 118, 120 (Cairo 1987) who expresses this point of view forcefully. *Cf.*, ABD AL-RAZZAQ AL-SANHURI, FIQH AL-KHILAFAH WA TATAWWOURUHA 230 (1926, N. Sanhouri & T. Shawi trans., Cairo 1989) (argues that the Islamic system of government is quite similar to the system of government in the United States).

the secularization and democratization process experienced by the West in the past few centuries.

This perception of the situation, however, is too parochial. The region is politically and culturally *sui generis* and an expectation that the development of Arab political systems will mimic the development of Western political systems ignores important historical facts. For example, the region is the birthplace of three major world religions: Judaism, Christianity and Islam. Until recently, like the rulers of England, its heads of state (referred to as *khalifahs* [2]) were also the religious leaders of their countries. Furthermore, since there is no clergy in Islam, no centrally organized religious institution ever developed, which could challenge the rulers' authority.[3] As will be explained in this paper, such power to challenge the political authority of a ruler on religious grounds remains in the hands of every single Muslim.

For these reasons, the most significant debates taking place in the region today are not about secularization versus promotion of Islamic forms of government. Rather, they are about the democratization of existing governments in a manner consistent with Islamic law, a process which, though informed by Western democratic experiences, is viewed as neither Western nor secular.

This makes the quest for the Islamic point of view on the subject of democratic governance more than an academic exercise. It addresses the concerns and could actually impact the actions of a large Muslim population in the Middle East which takes the topic very seriously. With that in mind, this article will discuss select, basic principles of Islamic law relating to democratic governance, pointing out in the process certain areas of disagreement surrounding them in the literature and the grounds for such disagreements.

Part II of this article presents a brief overview of Islamic law in order to provide a foundation for later discussion. The article then assesses the Islamic system of government in light of two major principles of Western democracies. They are (1) the principle that the will of the people shall be the basis of the authority of the government (Principle A) and (2) the principle of separation of powers (Principle B).

In the case of Principle A, the discussion focuses on two topics: (a)

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[2] "*Khalifah*" means literally "successor". The *khalifah* (also referred to in English as "Caliph") is the successor of the Prophet, not of God. "*Khilafah*" refers to the position occupied by the *Khalifah*. *See, e.g.*, ALI IBN MUHAMMAD AL-MAWARDI, AL-AHKAM AL-SULTANYYIAH 14 (11th century, reprint, Cairo 1983).

[3] *See, e.g.*, HASSAN AL-TURABI, *The Islamic State*, *in* VOICES OF RESURGENT ISLAM 241, 244 (J. Esposito ed. 1983) [hereinafter VOICES]. *See also*, AL-SANHURI, *supra* note 1, at 71-72 & 191-92. Al-Sanhuri points out that the *khalifah* has no power to absolve Muslims from their sins or to excommunicate them. It appears that Western media is not fully aware of these facts, because they keep referring to Iranian Muslim scholars as "clerics."

the ability of the people to express their will in choosing a head of state and (b) whether the laws of the land rest on the consent of the people. Part III assesses the democratic character of the procedure for choosing the head of the Islamic state. Part IV examines the sources of Islamic law and studies the problem of combining the concept of democratic government with the concept of laws which embody the will of God. Principle B is assessed in Part V. Part VI summarizes the conclusions of this article.

II. ISLAMIC LAW: A BRIEF OVERVIEW

This section provides a brief introduction to Islamic jurisprudence in order to lay the groundwork for later discussion.

A. Basic Sources

1. The Qur'an

The basis of all Islamic law is the Qur'an which is the literal word of God revealed to the Prophet Muhammad over a period of 22 years (610 A.D. - 632 A.D.) in Arabic, through the Angel Gabriel.[4] As the word of God, the Qur'an is immutable.[5] Since its revelation, the text of the Qur'an has not changed even in the minutest detail.[6]

The Qur'an is comprised of *surahs* (equivalent to chapters) which are in turn comprised of *ayahs* (equivalent to verses). The Qur'an contains two kinds of rules, general and specific; the general rules are far more numerous. The specific rules tend to deal with matters of worship or with matters relating to family, commercial or criminal law.[7] Other matters, including those in the area of constitutional law, are governed

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[4] Good sources in the English language for an introductory but substantive overview of Islam include the following: HAMMUDAH ABDALATI, ISLAM IN FOCUS (1977); JOHN L. ESPOSITO, ISLAM: THE STRAIGHT PATH (1991); SEYYED HOSSEIN NASR, IDEALS AND REALITIES OF ISLAM (1975); FAZLUR RAHMAN, ISLAM (2d ed., 1979). On this point specifically, *see* ESPOSITO, *supra*, at 21-22. This article will often cite sources written in English, although they tend to be secondary sources, because of their accessibility to the reader.

[5] ESPOSITO, *supra* note 4, at 20-21. *See also* RAHMAN, *supra* note 4, at 32. For additional discussions on the Qur'an, see NASR, *supra* note 4, at 41-66; RAHMAN, *supra* note 4, at 30-42.

[6] This is one reason why the Qur'an has served throughout the ages as a standard of the classical Arabic language. For more on this point, *see e.g.*, ESPOSITO, *supra* note 4, at 21; SUBHI MAHMASSANI, FALSAFAT AL-TASHRI' FIL ISLAM 146 (Beirut 3d ed., 1961); NASR, *supra* note 4, at 45; SUBHI AL-SALEH, MA'ALIM AL-SHARI'AH AL-ISLAMIYYAH 79-110 (Beirut 1975). *See also* SEYYED HOSSEIN NASR, AN INTRODUCTION TO ISLAMIC COSMOTOLOGICAL DOCTRINES 6-8 (1964) (discussing, among other things, the character of the Arabic language as a vehicle of both divine revelation and most of the muslim sciences).

[7] For a detailed discussion of this point, see ABD AL-HAMID MUTAWALLI, MABADI' NIZAM AL-HUKM FI'L-ISLAM 34-46 (Alexandria 2d ed., 1974). *See also* ESPOSITO, *supra* note 4, at 77-80.

by general rules.[8] Since general rules, by their very nature, require interpretation before they can be applied to a specific context, they are the source of a fair amount of flexibility. Therefore, the Qur'an's predominant reliance on general rules was viewed by *mujtahids*[9] as an indication of divine mercy and a wish to facilitate for Muslims the practice of their religion throughout the ages.[10] This view was articulated in a major jurisprudential principle that is discussed in section B of this part.

2. The Sunnah

Another major source of Islamic jurisprudence is the *sunnah* of Prophet Muhammad. The *sunnah* is comprised of the *hadith* (reported sayings of the Prophet) and his reported actions, and is used to supplement Qur'anic laws as well as to help interpret them.[11] Since the Prophet prohibited, in the early days of the revelation of the Qur'an, the recordation of the *sunnah* in order to underline the status of the Qur'an as the only source of divine law, a significant part of the *sunnah* was not recorded until the ninth and tenth century during the 'Abbasid rule.[12] For this reason, it became necessary for Muslim scholars to develop, in connection with the *sunnah*, a sophisticated science of attribution in order to minimize the problems associated with hearsay.[13] As a result, claims regarding the sayings or behavior of the Prophet were divided into

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[8] MUTAWALLI, *supra* note 7, at 34; J. AL-SUYUTI, 1 AL-ITQAN FI 'ULUM AL-QUR'AN 69 (15th Century, M. Ibrahim ed., reprint, Cairo 1967).

[9] This term literally means "those who study hard" or "those who exert themselves intellectually." It refers to any capable Muslim who engages seriously in the process of interpreting Islamic texts and Islamic law. Unfortunately, Western media sometimes confuses such Muslim scholars with religious practitioners who do not engage substantially in interpretation and who are usuallly referred to by such media as "clerics." The activity in which the *mujtahids* engage is called "*ijtihad*."

[10] The Prophet always advocated the facilitation of the practice of religion, stating that the best of religious practice is the easiest. His wife, 'A'isha, stated that whenever he faced several choices the Prophet always chose the easiest one unless it was religiously prohibited, in which case he was furthest from it. 1 ZARRUQ AL-FASSI, SHARH SAHIH AL-BUKHARI 149 n.3 (15 Century, I. Attiyah & M. Ali ed., reprint, Cairo 1973). *See also id.* at 227 (*hadith* "facilitate, and do not complicate"). Muslim scholars have often said that "Rahmat al-ummah fi ikhtilaf il a'immah." Literally, this means "mercy for the Muslim people is to be found in disagreements among its scholars." MAHMASSANI, *supra* note 6, at 136 n.3 & 481; ESPOSITO, *supra* note 4, at 85.

[11] ESPOSITO, *supra* note 4, at 77; MAHMASSANI, *supra* note 6, at 151. The *sunnah* also includes reports of the Prophet's silence or acquiescence in instances where such behavior is viewed as permissive.

[12] ESPOSITO, *supra* note 4, at 81. According to the *hadith*, the prophet said: "do not record my sayings and anyone who has recorded any of my statements other than Qur'an[ic revelations] should erase them." 8 MUSLIM IBN AL-HAJJAJ, AL-JAMI' AL-SAHIH 229. (9th Century, reprint, Beirut n.d.). There is, however, evidence of recordation of the *hadith* during the life of the prophet. This fact lends credence to the view that the prohibition was temporary and related only to the earlier period of Qur'anic revelations.

[13] *See* ESPOSITO, *supra* note 4, at 81; RAHMAN, *supra* note 4, at 59; MAHMASSANI, *supra* note

numerous categories including claims that were judged to be false, weak, truthful or completely trustworthy.[14] All claims, however, were collected in books which discussed in detail why each claim was judged as it was. The final decision on these matters was left to the reader.

The fact that Muslim scholars, while stating their reasoned opinion, left the final decision regarding the *sunnah* to the Muslim reader is a manifestation of the Islamic belief that each Muslim is responsible directly to God for her or his own decisions and actions.[15] A Muslim may rely on the analysis of a scholar, or may discuss the matter at length with other Muslims, but in the final analysis, a Muslim has to take personal responsibility for her or his own actions. It is for this reason that Islam has no clergy mediating the relationship between God and humans. Islam has only *mujtahids*. Furthermore, the field of *ijtihad*, which is based on serious scholarship, is open to all qualified Muslims.[16]

Not all the utterances or actions of the Prophet constitute *sunnah*. Some were the utterances and actions of a mere layman. The Prophet was clear about that distinction and pointed it out on more than one occasion.[17] In situations requiring nonreligious expertise, he readily deferred to the experts.

There is another distinction which has been a greater source of confusion than the former one. Some of the *sunnah* of the Prophet dealt

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6, at 154-58. *See also* 1 DIYA' AL-DIN NASR ALLAH IBN AL-ATHIR, JAMI' AL USUL FI AHADITH AL RASUL 544-606 (12th Century, A. Arna'out ed., reprint, Beirut 1969).

[14] SUBHI MAHMASSANI, AL-AWDA' AL-TASHRI'IYYAH FI'L-DUWAL AL-ARABIYYAH 148 (Beirut 3d ed., 1965). *See also* RAHMAN, *supra* note 4, at 60-64 (explaining why a minority of jurists rejected the *hadith* as a source and limited their *ijtihad* to the Qur'an).

[15] ESPOSITO, *supra* note 4, at 28; AL-TURABI, *supra* note 3, at 248; AL-QUTB TABLIAH, AL-ISLAM WA HUQUQ AL-INSAN 311 (Cairo, 1976) (compares Islamic and *Jahiliyyah* (pre-Islamic) views of responsibility). In *Jahiliyyah* the whole tribe was viewed as responsible for the individual's action. In contrast, while the Qur'an continued to recognize collective responsibility in certain instances, it emphasized the fact that each individual is responsible for her or his own actions. One famous ayah states "no bearer of burdens can bear the burden of another" (VI:164). The Qur'an, however, also states that where someone misleads unwitting others away from God, such person shares their burden (XVI:25), the reason being that one ought to be responsible for the consequences of one's actions. Furthermore, the Qur'an cautions that God may inflict collective punishment in certain instances (VIII:25).

In writing this article, the author referred to A. Yusuf Ali's translation of the QUR'AN (1983), but the translation was often not adopted verbatim.

[16] *See, e.g.*, NOEL COULSON, A HISTORY OF ISLAMIC LAW 25 (1964); AL-TURABI, *supra* note 3, at 244. *See also* AL-SANHURI, *supra* note 1, at 192.

[17] On point is the following famous story about the Prophet. One day, he happened to pass by a group of people in Madinah who were pollinating palm trees. Upon finding out what they were doing, he opined that the trees would bear fruit with or without their help. The people stopped their activity. Subsequently, the palm trees did not bear fruit. When the prophet passed by them later in the year, he saw the barren palm trees and inquired about them. On hearing what had happened he said "you are more knowledgeable in your worldly matters." 7 MUSLIM, *supra* note 12, at 95; MUTAWALLI, *supra* note 7, at 39 nn.1 & 3.

with specific situations relating to his epoch and his community and were applicable only within that narrow framework. Other parts of the *sunnah* were general and thus, suitable for all times and places, as with many of the Qur'anic general rules. Obviously, failure to draw this distinction properly tends to result in an unnecessary rigidity of interpretation.[18] In practice, it has also resulted in significant differences of opinion.[19] *Ijtihad* addresses not only such basic matters as distinguishing between specific and general rules, but it goes further to derive from the general rules of the Qur'an and *sunnah* the Islamic laws best suited to the relevant epoch and community. Therefore, if *mujtahids* disagreed on the very basic scope of a rule derived from the *sunnah*, their difference permeates the whole body of jurisprudence which is based on that rule.

A high level of tolerance among *mujtahids* was fostered by the Qur'an and the *hadith*. In one instance, for example, the Prophet is reported to have said that a jurist who engaged in *ijtihad* and reached the correct conclusion would be considered as having done two good deeds; if, however, a jurist reached the wrong conclusion that jurist would be considered to have done one good deed.[20] The implication was that the attempt to discover the truth was in itself, regardless of the end result, praiseworthy. This saying, along with Qur'anic verses describing God's infinite knowledge and the limits of human knowledge,[21] encouraged humility, debate and hard work among *mujtahids*.

Thus, the prophet's encouragement of scholarship led to a variety of religious interpretations which, as stated earlier, were viewed as an expression of God's mercy upon the Muslims. This variety made it possible for each Muslim to adopt that jurisprudence which was best suited to her or his circumstances, beliefs and needs. Indeed, many of these differences in interpretation resulted from the growth of Islam that reached distant countries and communities with different customs, needs and circumstances and, hence, different points of view.[22]

A setback to Islamic thought, however, occurred around the tenth century when *Sunni* jurists increasingly discouraged *Sunni* scholars from engaging any further in the activity of unaffiliated *ijtihad* (i.e. *ijtihad*

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[18] MUTAWALLI, *supra* note 7, at 38 nn.1 & 3. For examples of flexibility of interpretation, see MAHMASSANI, *supra* note 6, at 205-15.

[19] MAHMASSANI, *supra* note 6, at 205-15; ESPOSITO, *supra* note 4, at 77-78; Ibn Khaldun, AL-MUQADDIMAH 218 (14th Century, reprint, Beirut 1978).

[20] 25 BADR AL-DIN AL-'AINI, 'UMDAT AL QARI FI SHARH SAHIH AL-BUKHARI 66-67 (1434, reprint, Cairo 1979); 5 MUSLIM, *supra* note 12, at 131. The *hadith* refers to "*hakim*." This word is ambiguous. It means literally "one who rules." It could refer to a ruler or a jurist. The better view is that it refers to the latter.

[21] *See, e.g.*, QUR'AN XIII:8-10; XXI:4; XXXI:34.

[22] ESPOSITO, *supra* note 4, 77. *See also* MAHMASSANI, *supra* note 14, at 132-36 (arguing that such differences are also rooted in the different analytical methods used for interpretation).

outside the scope of any of the existing schools of jurisprudence).[23] Instead, *Sunni* scholars were encouraged to confine their *ijtihad* within the boundaries of the established schools. The intention was to limit the uncontrolled proliferation of ideas, some of which, it was feared, were tainted with foreign influence. This policy undoubtably contributed to, if not significantly accelerated, the decline in intellectual activity that had begun to manifest itself during that time. Centuries passed before Muslims began to stir and assert their right to unfettered free thought in Islam.[24] Yet, in Islam *ijtihad* is not only a right but the duty of every qualified Muslim.[25]

3. Other Sources

Many treatises on Islamic law list other sources of *shari'ah*;[26] however, not everyone accepts these sources as legitimate.[27] The most established are consensus (*Ijma'*) and reasoning by analogy (*Qiyas*). None of these lesser sources will be discussed in this brief overview, although one may point out the democratic character of basing decisions on consensus.

B. Basic Shari'ah Principles

Muslim jurists have agreed upon a number of basic principles of *shari'ah*.

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[23] ESPOSITO, *supra* note 4, at 84 (stating that as the consensus of scholars evolved, it served as a brake on further individual interpretations); MAHMASSANI, *supra* note 6, at 183; NASR, *supra* note 4, at 105. This development is often labelled as the "closing of the door of *ijtihad*." The label is not accurate because it suggests a complete bar to *ijtihad*. It was not. Many *sunni* jurists, like Ibn Taymiyah, continued to engage in *ijtihad*; but intellectual activity was already on the decline for a variety of other reasons. Consequently, there were fewer outstanding *mujtahids*.

[24] ESPOSITO, *supra* note 4, at 122; NASR, *supra* note 4, at 117.

[25] The Prophet said "the best of religious practice is the easiest and the best worship is engaging in *Fiqh* [Islamic jurisprudence which is based on *ijtihad*]." AL-FASSI, *supra* note 10, at 149. *See also* MAHMASSANI, *supra* note 6, at 185-88; (stating that the qualifications of a *mujtahid* include rationality, maturity, morality, piety and knowledge of the literature, the facts and the applicable modes of reasoning). It is worth noting that the *shi'i* view on some of the matters discussed in this article (like that of *ijtihad*) is different from the *sunni* view. These differences, however, can not be discussed without delving into scholastic arguments that go well beyond the scope of this article. At this level of discussion, there are no significant differences between the two views that are worth focusing upon, nor do these differences alter the conclusions reached in this article. NASR, *supra* note 4, at 105.

[26] "*Shari'ah*" means the body of Islamic law. Originally, it referred only to Qur'anic, then *hadith*-based laws. Now, it is also used to refer to laws developed by Islamic jurisprudence on the basis of at least two additional sources, namely, consensus and reasoning by analogy. *See, e.g.*, MUTAWALLI, *supra* note 7, at 51-57.

[27] *See* RAHMAN, *supra* note 4, at 71-79. Mutawalli questions the usefulness of these two additional sources in today's Islamic community. MUTAWALLI, *supra* note 7, at 51-57. *See also* MUTAWALLI, *supra* note 7, at 78-79 (discussing reasons for rejecting the remaining sources). *Cf.*, AL-SANHURI, supra note 1, at 67-82 (arguing that *ijma'* is basic to modern Islamic democracies). For a good discussion on *ijma'*, see AL-SANHURI, *supra* note 1, at 68-82.

1. Change in Time, Place and Circumstance

As already stated, a major principle of Islamic jurisprudence is that laws may change with the passage of time and the change of place or circumstances.[28] Properly understood, this principle permits a *mujtahid* to examine a specific *ayah* in light of both the attendant circumstances of its revelation as well as its meaning to determine the scope and significance of the *ayah* in general, or with respect to a specific situation at hand. A corollary of this principle is that a change in law is permitted whenever a custom on which such law is based changes.[29]

2. Necessity/Avoidance of Harm

This principle has also been stated in terms of choosing the lesser of two evils. Several Qur'anic *ayahs* as well as the *hadith* clearly permit the prohibited in case of necessity or severe harm.[30] Some *ayahs* state that God will forgive anyone who breaks the law under duress.[31] A famous saying of the Prophet is that Islam is a religion of facilitation not compli-

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[28] *See, e.g.*, COULSON, *supra* note 16, at 49; MAHMASSANI, *supra* note 6, at 201. The relationship between Qur'anic rules and their attendant circumstances was pushed to an extreme by A. an-Na'im who, following his mentor, the late Mahmoud Taha of Sudan, concluded that a substantial part of the Qur'an should be abrogated. To reach this conclusion, an-Na'im first noted that a substantial part of the *ayahs* (which literally mean "miraculous signs") in the Qur'an were revealed in Madinah and related to the circumstances of the Madinah society. He then argued that the Madinah circumstances are not only no longer relevant to today's society but are also the source of problematic principles of Islamic law. For this reason, he concluded, that part of the Qur'an relating to the Madinah stage should be abrogated. *See*, ABDULLAH AHMED AN-NA'IM, TOWARD AN ISLAMIC REFORMATION 34-35, 99 (1990). To the extent this view recognizes the relation between an *ayah* and the circumstances of its revelation, it is accurate. To the extent it deems Madinah *ayahs* out of date and advocates their abrogation it is seriously misstated, as well as overly simplistic. As stated in the related text above, the relationship between each *ayah* and the circumstances of its revelation is a complex matter requiring careful investigation and thoughtful analysis. Furthermore, since each *ayah* is multi-faceted and has a wealth of significance, the analysis must be determined on a case by case basis. If the circumstances surrounding the revelation of an *ayah* are significantly different from those under consideration, then the possibility exists that the *ayah* may not be applicable to the situation at hand. In such event, a thoughtful analysis must be undertaken to determine the proper conclusion. This approach has been engaged in repeatedly over the centuries. On the other hand, an-Na'im's approach which a priori abrogates a substantial part of the Qur'an wholesale is not a worthwhile new methodology but an exercise in intellectual laziness. Furthermore, it embraces uncritically the notion that certain *ayahs* in the Qur'an are or can be simply abrogated, as opposed to being merely inapplicable to the situation at hand.

[29] ESPOSITO, *supra* note 4, at 98-101 (providing an example for the interaction of Islam with local customs); MAHMASSANI, *supra* note 6, at 200-01 & 214.

[30] QUR'AN VI:119 & 145; MUHAMMAD IBN AL-HASAN AL-SHAYBANI, SHARH KITAB AL-SIYAR AL-KABIR 1427 (8th century, S. Munajjid ed., reprint, Cairo 1971); MAHMASSANI, *supra* note 14, at 480, MAHMASSANI *supra* note 6, at 215-16. These sources define "necessity" narrowly, meaning to save one's life.

[31] QUR'AN XVI:115.

cation.[32] For this reason the *Hanafis* (one school of Islamic thought), among others, permitted drinking alcohol and eating pork out of necessity.[33]

3. Cessation of Cause

Where an Islamic law applies to specific factual situations, the existence of the law itself is dependent on the continued existence of that factual situation.[34] For example, the Qur'an encouraged Muslims to give a certain group of Arabs, called "*al-Mu'allafatu Qulubuhum*," a share in the charitable donations paid by Muslims.[35] This group consisted of leaders of local communities who were either not Muslim or whose belief in Islam was weak. The share was assigned to them in order to bring them closer to Islam. But after the death of the Prophet, *Khalifah 'Umar Ibn al-Khattab* refused to continue the practice on the basis that it was predicated on Islam's initial weakness.[36] Since Islam had become strong, the *Khalifah 'Umar* concluded that the practice was no longer justifiable. Note that this reasoning was applied by *Khalifah 'Umar* to a practice based on explicit verses in the Qur'an which clearly encouraged such payments. This principle could be viewed as a corollary of that stated in subsection 1.[37]

4. Public Interest

Islamic laws must accord with public interest. If they do not, they must be reexamined and reformulated. Furthermore, if the public interest changes, Islamic laws must change accordingly.[38]

C. *Approach to Change*

Despite the fact that, from its dawn, Islam caused a clear change in the Arab Peninsula's religious life, it is not a religion of abrupt change. Islam itself professes to be a continuation of the teachings of Abraham, Moses, Jesus and other prophets. Islam also proclaims Prophet Muhammad as the last of these prophets.[39] Furthermore, the God of Islam is the

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32 *See* 2 AL-'AINI, *supra* note 20, at 45-46; 1 AL-'AINI at 234-35. *See also* AL-FASSI, *supra* note 10.

33 AL-SHAYBANI, *supra* note 30, at 1427.

34 MAHMASSANI, *supra* note 6, at 201-02; AL-SANHURI, *supra* note 1, at 258 (considering the implications of this principle for a deficient *khilafah*). A deficient *khalifah* is one who does not possess all the required qualification for *khilafah*.

35 QUR'AN IX:60.

36 MAHMASSANI, *supra* note 6, at 207.

37 *See supra* notes 28-29 and accompanying text.

38 MAHMASSANI, *supra* note 14, at 480.

39 In fact, the Qur'an asserts that Abraham was a Muslim (III:67). This is because Abraham yielded to the will of God and "Islam" means "to yield to divine will." For this and other reasons,

same God of Judaism and Christianity. (The Orientalist adherence to the Arab word for God ("Allah"), which is used in the Arab world by Christians and Jews as well as Muslims to refer to "God", created much unnecessary confusion in this regard.)

The Qur'an was not revealed all at one time. Rather, it was revealed gradually in accordance with the needs and capabilities of society. For example, Arabs consumed substantial amounts of alcohol in pre-Islamic times. Hence, the Qur'anic prohibition of drinking alcohol was imposed gradually on them. First, the prohibition was only advisory, then it was made binding but only at the time of prayer. Later the prohibition became absolute.[40]

Gradualism is an important feature of Islamic law.[41] It applies to many aspects of Islamic life but not all. There was no gradualism, for example, in Islam's rejection of idol worship or the belief in more than one God.[42] These matters are so fundamentally inconsistent with Islam that a gradualist approach is inapplicable to them.

On the other hand, some jurists have discouraged an abrupt change in the system of government, even for a good cause, if it results in chaos and divisiveness among the Muslim people.[43] This position may reflect a preference by such jurists for maintaining the status quo, but the better view is that this position is the direct result of the application of the *shari'ah* principle, discussed *supra* in subsection 2, combined with the Qur'anic view of the good Muslim as someone who promotes the unity of the *ummah* (the Muslim community), a matter of primary value.[44] This suggests that the proper Islamic approach for democratizing institutions is one that builds consensus in the *ummah* for the desired change, rather than advocates it by the use of divisive force. On the other hand, the use of force may be excused if it is shown to be either unavoidable or the lesser of two evils.[45]

Islam is viewed as a primordial religion, revealed by God at various stages of history through Abraham, Moses, Jesus, and other prophets before Muhammad. Prophet Muhammad is viewed as having communicated the last stage of this revelation.

[40] QUR'AN, II:219, IV:43 and V:90.

[41] For a discussion of this principle, see MUTAWALLI, AL-ISLAM, 71-72 (Alexandria n. d.)

[42] QUR'AN II:163, XXXI:13. The Prophet was a member of the powerful Quraysh tribe, although he belonged to a less powerful clan of that tribe. Quraysh, like most other tribes in the Arabian peninsula, worshiped hundreds of idols installed in *Ka'bah*, a cubic structure in Makkah which was built as a house of God by Abraham. When the Prophet began spreading his message he was forced to flee Makkah to Madinah. After the successful spread of Islam, he returned to Makkah with his supporters, fought the idol-worshippers and banished idols from the *Ka'bah*, which became once again the sacred House of God. Islam has five "pillars." Monotheism is the first among them.

[43] *See, e.g.*, MUTAWALLI, *supra* note 7, at 469-70; AL-SANHURI, *supra* note 1, at 262 (arguing that under some circumstances muslims may obey a deficient *khalifah* to avoid chaos); MUHAMMAD F. AL-NABHAN, NITHAM AL-HUKM FIL ISLAM 528 (Kuwait 1974).

[44] QUR'AN III:103 & 105. *See also* 4 AL-'AINI, *supra* note 20, at 262.

[45] *See*, *supra* note 42. A more radical point of view was discussed by AL-NABHAN, *supra* note

III. Western Democratic Principles and the Islamic Point of View

This article now examines the Islamic system of government in light of Principle A — the will of the people shall be the basis of the authority of the government.

As previously stated, the will of the people is expressed in two major ways: first, through the people's choice of a head of state, and second, through the people's choice of a constitution. This section, focuses first on the procedure for the choice of a head of the Muslim state.

Historically, the doctrine asserting that the will of the people was the basis of the authority of the government was formulated in the West as a response to monarchs who claimed to possess a divine right to rule. Despite an abundance of examples of authoritarian rule in the Arab and Muslim world, there is generally no history of claims to rule by divine right, least of all by the Prophet.[46] This messenger of God, was chosen as the leader of the Muslims through the process of *bay'ah*.[47] Many of his successors were selected in a similar fashion. As heads of an Islamic state, they ruled in accordance with the laws of God, not as his representatives on earth.[48]

Since this process of *bay'ah* was used repeatedly for choosing heads of the Muslim state, it is necesary to examine this process with an eye to determining any democratic features it may have.

A. Bay'ah

The word "*bay'ah*" is derived from "bay' " which means "selling." As such it connotes a contract between someone who makes an offer and another who accepts it, the latter being the one engaged in *bay'ah*. In the case of political succession, *bay'ah* is the act of accepting and declaring allegiance to a potential ruler. *Bay'ah* takes place when one or more individuals inform another that they support his assumption of the leadership position and pledge their allegiance to him. In the past, this was usually done by visiting the potential leader, expressing allegiance face to face and shaking his hand as is traditionally done when concluding a sale. Hence the use of the term *bay'ah*. Of course, no *bay'ah* is valid

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43, at 528 (noting that certain Muslim groups, basing their arguments on certain *ayahs* in the Qur'an, justified the removal of an unjust head of state by use of force in order to reestablish a just state).

46 A small minority argued at one point that the *khalifah* derives his authority from God's authority. But this group has been historically insignificant and the majority holds otherwise. For more on the minority view, see MUTAWALLI, *supra* note 7, at 185. *See also* AL-MAWARDI, *supra* note 2, at 14.

47 *See infra*, notes 48-54, and accompanying text.

48 *See supra* note 2.

without the acceptance of the potential leader. If the majority of the people gave their support, the potential leader would ascend to the leadership position. In the days of the Prophet, for example, women sent a delegation to the Prophet to inform him of their support and allegiance to him.[49]

Historically, the process of the *bay'ah* of the *khalifah* came to consist of two stages. In the first stage certain individuals, referred to as "*Ahl al-Hal wa'l 'Aqd*" (those who can enter into a contract or dissolve it), engaged in extensive consultations to build a consensus and then gave the *bay'ah* to a potential *khalifah* they agreed upon. This choice was tantamount to a nomination and it carried great weight. In the second stage, the general public gave its *bay'ah* to the chosen candidate.[50]

Individuals engaging in consultations at the first stage had to meet certain requirements. Basically, they had to be just and had to possess the kind of knowledge which would enable them to make the best choice for *khalifah* in light of the requirements that such *khalifah* had to meet. They also had to be capable of making a wise choice in light of all the relevant circumstances at that time.[51] As the requirements were sufficiently loose to qualify a large number of people, no limitations were placed on the number of individuals who could be considered part of *Ahl al-Hal wal' 'Aqd* (hereinafter referred to as "Wise Ones"), nor were there any economic, racial or gender-related requirements for obtaining such a status in society.[52]

Theoretically, therefore, in an Islamic nation-state of tens of mil-

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[49] This *bay'ah* was reported in the QUR'AN LX:12.

[50] Theoretically, *Ahl al-Hal wa'l 'Aqd* could reach an impasse or the general public could reject the nomination. However, because of the extensive efforts by *Ahl al-Hal wa'l 'Aqd* at consensus building and the small size of the Muslim community at that time, neither problem appeared, although a small faction, called thereafter "*al-Khawarij*", did reject one such nomination. The fact that the general public tended to accept the choice made by *Ahl al-Hal wa'l 'Aqd* led some jurists to argue that the choice was not a mere nomination but an actual election confirmed by the public. *See, e.g.*, AL-NABHAN, *supra* note 43, at 477. Al-Sanhuri divides the process into three stages, including an initial one where several candidates are nominated and considered by the Wise Ones. AL-SANHURI, *supra* note 1, at 141-42. But his discussion here is uncharacteristically confusing. It does appear, however, that the Muslim Brotherhood, a political movement which was formed in Egypt around the turn of the century, holds a view of this process similar to that of al-Sanhuri. For a more expanded discussion on the Muslim Brotherhood's views, see RICHARD P. MITCHELL, THE SOCIETY OF THE MUSLIM BROTHERS 245-250 (1969). Generally, the Muslim Brotherhood's views on democracy coincide with those of mainstream Muslim scholars.

[51] *See* AL-MAWARDI, *supra* note 2, at 6; AL-SANHURI, *supra* note 1, at 136-37.

[52] *See generally* AL-TURABI, *supra* note 3, at 244. In an address during his farewell pilgrimage the Prophet said: "All people are equal, as equal as the teeth of a comb. The only basis for preferring an Arab over a non-Arab, a white over a non-white or a male over a female is that of piety." MUHAMMAD S. AWWA, ON THE POLITICAL SYSTEM OF THE ISLAMIC STATE 111 (1980). The Qur'an also states that God created humanity as male and female and of different nations and tribes so that people may meet and know each other, the most righteous amongst them being the most pious (XLIX:13).

lions of people, the number of Wise Ones (unless deliberately limited by the people or otherwise reduced by requiring additional qualifications) could run into the millions.[53] Among the Wise Ones would be members of various segments of society, including lawyers, doctors, engineers, teachers, farmers, workers and homemakers. Each would provide a valuable perspective which would enrich the selection process. The mechanics of this process would be immensely facilitated by the use of the media and electronic voting and tallying. In addition, such Wise Ones may in turn decide to elect a limited number of the most qualified amongst them to choose a *khalifah*. The details of such a process may vary from country to country, depending on the circumstances, customs and needs of each.

Historically, however, there was no general election of the Wise Ones to their preferred position. Indeed, there was no specific mechanism for selecting them or removing them. They were simply recognized in their society as the Wise Ones.[54] Originally, in the small community of the *Sahaba* and the early Muslims, such recognition was easily achieved. However, as Islam grew and Muslim communities proliferated, it became necessary to develop new ways for choosing the Wise Ones which could cope with the sheer size of the Muslim state, as well as its diverse communities.[55] This was not done. Instead, Islamic governance took a different direction.

B. Istikhlaf

There was another, less common form of choosing a head of the Islamic state, which existed during early Islam. It was that of *istikhlaf* (choosing one's own successor).[56] According to the *sunni* view, the

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[53] *See* AL-TURABI, *supra* note 3, at 244. *Cf.* MUTAWALLI, *supra* note 7, at 255-56 (disputing the claim that the Prophet at times asked the "people" for counsel. He argues that the Prophet could not have possibly asked for counsel from any one other than those who were capable of good advice; namely, the Wise Ones). I believe that Mutawalli's argument is elitist and that the Prophet was not. What is clear, however, from the literature is that the Prophet gave more weight to the views of some experienced Muslims from the *Sahaba* (companions of the Prophet) over others. It is reported that the Prophet once said to his companions 'Umar and Abu Bakr: "if you agree on an advice I would not overrule you," 2 ABU AL-FIDA ISMA'IL IBN KATHIR, TAFSIR 142-43 (14th Century, reprint, Beirut 1966). TABLIAH, *supra* note 15, at 631, reports that A. al-Mawdudi, a Muslim scholar, holds the view that the *khalifah* was not free to consult at whim anyone he wished using arbitrary procedures. He was obligated to consult those who had the confidence of Muslims. This does not refute the position that the *khalifah* may consult the public at large. It only shows that if he does not, and chooses to restrict his circle of advisers, they must be selected carefully and they must be Wise Ones.

[54] MUTAWALLI, *supra* note 7, at 256-57.

[55] AL-TURABI, *supra* note 3, at 246, 248.

[56] *See* AL-MAWARDI, *supra* note 2, at 9. For a discussion of the various methods for choosing a *khalifah*, see ABU ABDULLAH AL-ANSARI AL-QURTUBI, MUKHTAR TAFSIR 56-61 (13th century, T. Hakim ed., Cairo 1977).

Prophet did not use this form.[57] After his death, Muslims chose his successor through *bay'ah*.[58] Some of the early Muslim rulers, however, did choose their own successors and this form of transfer of power later took root. Some jurists, however, arguing from early Islamic precedents, have approved of this method of succession only if *istikhlaf* was based on extensive consultation.[59]

While it is generally agreed that the *bay'ah* of the Wise Ones to a nominee must be followed by the *bay'ah* of the general public, there is some disagreement in the literature as to whether such a *bay'ah* is necessary after *istikhlaf*. The better view is that a *bay'ah* by the public is necessary after *istikhlaf*, because *istikhlaf* is merely a form of nomination, similar to that engaged in by the Wise Ones at the initial stage of the traditional process of *bay'ah*.[60] Some, however, have argued that *istikhlaf* does not require a *bay'ah* unless the nominee is a parent or child of the *khalifah*.[61] Still others have argued that a *bay'ah* after any *istikhlaf* is not necessary at all.[62] Some of these latter views were infected by outside political pressure exerted by dynastic rulers. Clearly, however, the democratic character of the process of choosing a head of state is at least partially related to whether the *bay'ah* of the general public (or its representatives) is viewed as necessary.

The variety of views on such an important topic should not be surprising. Since the Qur'an did not specify mechanisms for the choice of a head of state, the task was left to the Muslims. A succession system, consistent with the teachings of the Qur'an, as interpreted with the help of the *sunnah*, was to be developed by Muslims in accordance with their times and circumstances and the other principles previously discussed in Section II(B), (henceforth, referred to collectively as "*Shari'ah* Princi-

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[57] *See, e.g.*, JAVID IQBAL, *Democracy and the Modern Islamic State*, *in* VOICES, *supra* note 3, at 252 & 254. *See also* ESPOSITO, *supra* note 3, at 38; SA'ID HAWWA, AL-ISLAM 385 (Beirut 3d ed. 1981); AWWA, *supra* note 52, at 30-31.

[58] IQBAL, *supra* note 57, at 255; ESPOSITO, *supra* note 4, at 38; HAWWA, *supra* note 57, at 385.

[59] 1 AHMAD IBN MUHAMMAD IBN-HANBAL, AL-MUSNAD 56 (9th Century), accompanied in the margin with ALI IBN ABD AL-MALIK AL-MUTTAQI'S MUNTAKHAB KANZ AL-'UMMAL FI SUNAN AL-AQWAL WAL AF'AL (16th century, reprint, Beirut 1969) (quoting Khalifah 'Umar that one who gives his *bay'ah* to a potential ruler without consulting the muslims, has no *bay'ah*). *See, e.g.*, AWWA, *supra* note 52, at 35-36 (arguing that consultation is essential in the process of choosing a head of state and that no ruler may be chosen without the will of the *ummah*. He also argues that the *ummah* may not be deprived of this basic right of choosing its head of state even under the pretense of preserving its unity).

[60] *See, e.g.*, HAWWA, *supra* note 57, at 364, 386-89; MUTAWALLI, *supra* note 7, at 203-06; AL-SANHURI, *supra* note 1, at 149-51.

[61] MUTAWALLI, *supra* note 7, at 207; *See also* AL-MAWARDI, *supra* note 2, at 9, which argues that once a ruler designates his successor, then so long as the successor is neither his father nor son, the designation does not require confirmation by anyone, even the Wise Ones.

[62] *See, e.g.*, AL-MAWARDI, *supra* note 2, at 9. But this view is erroneous and is criticized at length by AL-SANHURI, *supra* note 1, at 149-51.

ples"). Given Islam's flexible approach to *ijtihad*, scholars formulated different proposals, each more suitable to the milieu and epoch in which the scholar lived. These various approaches reflected the political realities and pressures to which the scholars were subjected.[63] To the extent this diversity was the result of flexibility and the free exercise of *ijtihad* in light of the Qur'an and *sunnah* it was healthy.

C. *Some Observations*

The democratic character of a selection by the Wise Ones depends in part on the process through which the Wise Ones are chosen. If the Wise Ones are chosen by the people as such, whether directly or indirectly, then the group of Wise Ones would be no different than a democratically chosen nominating (election) body. There is no reason in Islam why the Wise Ones cannot be so chosen and historically the spontaneous recognition by the community of their status was tantamount to a vote of confidence. Today, more may be needed to familiarize a growing community with the qualifications of its members. But, in this age of the global village, the flow of such information should be easily attainable. Note that if the Wise Ones are democratically elected, then even if the *bay'ah* of the general public is dispensed with, the democratic character of the process will remain significant.

On the other hand, the democratic character of succession by *istikhlaf* depends on whether the nomination is followed by *bay'ah* and, in any case, whether the role being played by the *khalifah* is akin to that of a constitutional monarch or is more akin to that of an absolute one.[64] These matters are addressed in Part IV which argues that there is no such thing as an absolute monarch in an Islamic state. It also discusses the separation of powers and the role of consultation in Islam.

Before concluding these observations, a brief comment about the applicability of the concept of *khalifah* to today's world is in order. A *khalifah* must meet several requirements that are very demanding. For example, the *khalifah* must be knowledgeable enough to engage in *ij-*

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[63] *See supra* note 22. These views were sometimes influenced by pressure from the head of state. *See, e.g.*, AL-SANHURI, *supra* note 1, at 63 (including n.12). *See also* AWWA, *supra* note 52, at 27.

[64] HAWWA, *supra* note 57, at 366 (recounting the story of the Khalifah 'Umar who inquired about the difference between a *khalifah* and a king. An unidentified individual responded that the difference between them lay in the fact that a *khalifah* takes only what is rightfully his and utilizes it only in the service of the truth. A king on the other hand, he said, oppresses people, for he is unjust. He takes from anyone and gives to anyone, as he so chooses. The comparison appears to be drawn between a *khalifah* and an absolute monarch. The speaker rejected equating the two because the *khalifah* is bound by divine principles of truth and justice. An absolute monarch is not so bound). This story confirms our analysis in Part IV.

tihad and be a very wise and prudent political leader.[65] Very few people today would satisfy this combination of requirements and if they did it is unlikely that they would be the best *mujtahids* or the best political leaders. Furthermore, the *khalifah* is supposed to be the leader of the Muslim *ummah* and, at the present, the *ummah* is part of numerous nation-states. These facts, considered in light of the *Shari'ah* Principles, suggested to some the need to modify the concept of *khalifah* so as to make it applicable to nation-states and not to the *ummah* as a whole.[66] Others proposed revising the qualifications of the *khalifah* so as to make them more realistic.[67] In exchange, the system of government was somewhat revised to provide additional support for the *khalifah*. For example, under such proposals one would require the *khalifah* to be pious but not necessarily a *mujtahid*. In exchange, the system of government would allow for a *majlis shura* (consultative council of *mujtahids*) whom the *khalifah* may or ought to consult when making certain decisions. Such an approach, its proponents argue, could be used to bolster democracy.

IV. COMPATIBILITY OF DIVINE LAW WITH A DEMOCRATIC FORM OF GOVERNMENT

Democratic governments derive their legitimacy from the will of the people and rest legality on their consent. More specifically, in a democratic government, the elected representatives of the people enact the laws. In Islam, the laws derive their legitimacy from divine will. They

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[65] Among the requirements listed are *ijtihad* (based on a good grasp of Islam, a sense of justice, physical fitness, wisdom in political and administrative matters, and courage). AL-MAWARDI, *supra* note 2, at 6.

[66] IQBAL, *supra* note 57, at 255-57. Historically, there have been many instances where several *khalifahs* ruled different parts of the Muslim world. For example, while the Abbasids ruled in the East, the Umayyads ruled in Spain. The trend today is to reject this approach as having been instrumental in the ultimate weakening of the *khilafah* system. However, if the concept of a single *khalifah* for all the Muslims is to be advocated today, the end result would be to enhance the *khalifah*'s role as the religious leader of Muslims but diminish his political leadership role since Muslims inhabit many nation-states. His status would thus become similar to that of the Pope. This would distort the true significance and function of the *khalifah*. On the other hand, permitting a coexistence of several *khalifahs*, while preserving the basic concept of *khilafah*, consecrates the fragmented state of the Muslim world. Those problems could probably be avoided today by forming a council of Muslim heads of state whose transitional function would be to work towards a unified Muslim community, in the fashion of the European Council. Such a council could even elect a *khalifah* as its leader. The relation between the *khalifah* and members of the council can be structured to respect the varied national interests of such members while giving supremacy to interests relating to the *ummah* as a whole.

[67] *See, e.g.* MUTAWALLI, *supra* note 7, at 162-64. *See also* AL-SANHURI, *supra* note 1, at 128 (including n.24), (discussing the views of some Hanafite jurists on this matter). The most radical proposal in this arena came from the *Khawarij*, in the early days of Islam. They proposed that the Muslim community rely totally in managing its affairs on mutual consultation and dispense altogether with the office of *khalifah*. The *Khawarij*, though, did not represent the mainstream point of view. IQBAL, *supra* note 57, at 256.

have not been enacted by representatives of the people. Rather, they have been revealed to the Prophet through God's will. The contrast appears striking. In the one case, the people are subject to laws of their own making. In the other, the people are subject to another will, divine will. The latter seems to be more akin to a totalitarian system than a democratic one. In this section it is argued that the contrast between democratic government and Islamic government is superficial and that a closer look results in a different conclusion.

Perhaps the best way to approach this problem is by studying more closely a specific system of democratic government, such as the democratic form of government in the United States. The U.S. system is based on a constitution that is supplemented by laws and regulations promulgated by the legislative and executive branches of government. While the laws are enacted by the representatives of the people and the regulations are introduced by the executive branch to implement these laws, the Constitution has a different stature. The Constitution is that historical document on which the whole political system in the United States rests. It is superior to any law which may conflict with it, even though such laws may have been passed by a majority vote of the legislature.

Having described the United States political system this way, the "Antimajoritarian Difficulty", discussed by Lawrence Tribe, becomes more apparent.[68] In Tribe's words "[i]n its most basic form, the question . . . is why a nation that rests legality on the consent of the governed would choose to constitute its political life in terms of commitments to an original agreement - made by the people, binding on their children, and deliberately structured so as to be difficult to change."[69] A corollary question is: why have remarkable powers of judicial review been ceded by the system to federal judges, so as to permit them to invalidate as unconstitutional certain laws promulgated by the legislative branch?[70]

This is not the place to debate the antimajoritarian difficulty or judicial review. But these matters were mentioned in order to point out the fact that societies historically coalesce around some basic sets of deep values and beliefs that define them as a group. These sets of shared values and beliefs are usually memorialized in a most basic document, like the Constitution of the United States or the Magna Carta. As time passes these documents are reinterpreted and supplemented to highlight an issue or resolve a problem. But through all the decades, the essential character of these documents remains the same and best reflects the values of the society that created it.

Therefore, in matters that relate to such deep beliefs and values, a

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68 LAWRENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 9 (1978).

69 *Id.* at 9.

70 *Id.* at 47-52.

majoritarian consent is not sought every year or every generation. Once given, it is assumed to be there unless the people clearly say otherwise. And when they do, such statements constitute challenges that can result in civil wars because they tear at the very fabric of society.[71]

The case is no different in Islam. The Qur'an is the core of the Muslim's constitution.[72] It defines the very essence of the Muslim society for generations to come. Just like in the United States, the consent of the Muslim *ummah* was achieved at the outset, when the Islamic state was first established.

Since the Qur'an provides mostly general laws, a Muslim legislature needs to promulgate a multitude of laws in the process of governance, just as the U.S. legislature does. And, just as the U.S. legislature sometimes discovers, some of these promulgated laws may be "unconstitutional", i.e. they may run contrary to the Qur'an. The Muslims who would have the power of "judicial review" in the Muslim state would be those of a judicial *majlis shura*, referred to at the end of Part III.[73] Other *mujtahids* outside the *majlis*, like their American counterparts, i.e. the constitutional scholars, can contribute to the discussion.

This discussion should not be interpreted as suggesting the historical existence of a separate judicial branch in the Muslim state which reviews the actions of the legislature and executive branches. This is not the case.

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[71] While Lawrence Tribe refers to this point of view, he seems to reject it. *Id.* at 12-13. He argues that constitutional changes could take place through "constitutional discourse and decision in political dialogue". *Id.* at 13. Whether a proposed change to the constitution is viewed as a challenge which plunges the country into civil war or is viewed as the subject of dialogue, depends to a great extent on a variety of its attendant circumstances, including the subject matter of this proposal. I suppose that a powerful movement for the repeal of the Thirteenth Amendment could result in a civil war. Few on the opposing side would find the proposal a suitable subject of constitutional discourse and decision in political dialogue. This same analysis applies to the discussion of the Qur'an as the constitution of the Muslim state, and the possibility of amending such constitution.

[72] AL-TURABI, *supra* note 3, at 244. Al-Turabi extends the argument from the Qur'an to the whole of the *shari'ah*. However, where *shari'ah* is defined conservatively to include only those Islamic laws which are the direct, clear and uncontroversial consequences of Qur'anic passages or uncontroverted and unambiguous parts of the *hadith*, the extension is reasonable. However, where *shari'ah* is defined liberally to include laws based on other sources, the extension is unwarranted.

[73] Muslim scholars seem to think of *majlis shura* as analogous to a parliament. *See*, AL-TURABI, *supra* note 3, at 245; TABLIAH, *supra* note 15, at 633; MUTAWALLI, *supra* note 7, at 251; *but cf.* IQBAL, *supra* note 55, at 259 (suggesting that a committee of *'ulama* (scholars) supervise legislative activity). This is a result of the fact that the Islamic *majlis shura* had many functions, reflected in its constitution as a body of experts belonging to fields ranging from religion and engineering to art. One could develop the notion of *majlis shura* and refine it further by calling for several bodies of *shura*, each having a different function. The judiciary *majlis shura* would be analogous to the Supreme Court, the legislative branch would be analogous to the parliament, and the executive branch would be analogous to an executive council. Once such an approach is accepted, the relationship of each *majlis* to the other needs to be addressed. It has been argued that complete independence of the judiciary must be insured in accordance with the Qur'an and *sunnah*. See IQBAL, *supra* note 57, at 258.

A discussion of the separation of powers will follow in Part V. All that is being suggested here is that such a structure can be adopted, if desired. Where the actual religious leadership of an Islamic nation or the *ummah* is vested in *majlis shura*, such a group can be regarded as the "Supreme Court" of the Muslim state, because it would provide the highest Islamic judgment as to whether a certain law is contrary to the Qur'an.[74] Is the *khalifah*, however, bound by the decisions of the *majlis*? This is also discussed in Part V.

One might point out an important difference between the U.S. Constitution and the Qur'an. The former can and has been amended. The latter cannot. The difference, however, is to a large extent semantical. The American Constitution has rarely been amended by introducing a later provision which superseded an earlier one. Rather, jurists have tended to resolve even the most substantial constitutional issues through reinterpretation, a process analogous to *ijtihad*. Amendments were generally used to enhance, clarify and supplement constitutional principles. In this sense, the Qur'an has already been supplemented by the *sunnah* and can be further supplemented by legal scholars who see the need for articulating additional principles. As explained earlier, Islam is flexible, and part of its flexibility lies in the ability to interpret and supplement the Qur'an, in ways consistent with the Qur'an, to produce laws suitable to a certain epoch and society. While the additions will have the weight of constitutional laws, they will never, however, be confused with divine laws. This distinction should carry no legal significance; but from a religious point of view it is very significant in so far as it separates the inner sanctum of the Muslim's religious beliefs from the temporal cultural ones.

To summarize our response to the problem posed by this section, the Qur'an was consented to by the Muslim people when the Islamic state was established. As a result, it reflects not only divine laws but the will of these people to abide by such laws. This reduces the problem at hand to a variant of the "antimajoritarian difficulty" described by Lawrence Tribe and can thus be treated along the same lines. Furthermore, all laws that supplement the Qur'an have also either been consented to at the outset, as in the case of the *sunnah*, or are formulated by legislative bodies. Therefore, Islamic laws rest their legality on the consent of the *ummah* in the same sense that the United States laws rest their legality on the consent of the American people.

The result of the discussion of Principle A shows that the Islamic

[74] This structure of course may not detract from the right of each Muslim to engage in *ijtihad* and follow her or his own religious conclusion. The relationship, however, between such individual and the state, as represented by the judicial *majlis shura*, must be explored further to deal with cases of fundamental disagreements between them.

system of government is sufficiently flexible as to admit the most democratic structures. The discussion also shows that the flexibility of the Qur'an permits Muslims to choose from a variety of political systems ranging from monarchist to republican, depending on the needs, customs and other relevant circumstances of the community.[75] The discussion concludes by rejecting the notion that Islamic divine law does not rest on the consent of the Muslim people. But, to formulate final conclusions about the democratic character of the Muslim system of government, one still needs to examine such system in light of Principle B — the principle of the separation of powers.

V. THE PRINCIPLE OF SEPARATION OF POWERS

In the days of the Prophet, all legislative, executive and judicial powers rested with him.[76] This arrangement made sense during that period, since the Prophet was the Messenger of God who was in charge of teaching Muslims the basic principles of Islam, as well as showing them how to act and live in accordance with these principles.

However, even the Prophet consulted his companions, though only in matters not relating to religion.[77] For, in matters of religion, he was the expert. In worldly matters, like those of agriculture or warfare, the Prophet consulted the experts.[78] He also repeatedly encouraged Muslims to do the same.[79] Furthermore, the Prophet was in the habit of consulting with other Muslims, and at times followed the advice of Muslims even when he clearly disagreed with it.[80] Such was his respect for the consultative process that, in one instance, when the advice of his com-

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[75] *See, e.g.*, AWWA, *supra* note 52, at 64 (for others sharing this point of view).

[76] MUTAWALLI, *supra* note 7, at 223. *See also* COULSON, *supra* note 16, at 11; MAHMASSANI, *supra* note 14, at 93.

[77] For example, before the battle of Badr, a fighter named al-Habbab ibn al-Jamouh gave the Prophet advice as to the best location to be occupied by the Muslim armies. Al-Habbab, however, gave his advice only after he ascertained that the original location proposed by the Prophet was not the result of divine revelation. The Prophet followed the fighter's advice. 2 ABD AL-MALIK IBN HISHAM, AL-SIRAH AL-NABAWIYYAH 192-93 (9th century, M. Sirjani ed., reprint, Cairo 1978).

[78] *See* IBN HISHAM, *supra* note 77, at 193. (recounting the story of Sa'd bin Ma'az who was one of those who gave the Prophet military advice). See also the story of the battle of Khandaq, which recounts that the Prophet abandoned his proposal of seeking peace with the enemy, after two of his expert fighters advised against it. *See supra* note 17; *supra* note 76.

[79] *See supra* note 17.

[80] *E.g.*, in one instance the prophet was not inclined to go out and meet the Quraysh armies which had amassed at the outskirts of Madinah. But many Muslims insisted that it was best to meet them than to wait for them in town. Despite his disagreement, the Prophet abided by the majority view. He went out and engaged in the battle of Uhud, in which the Muslims were defeated. This incident has been reported extensively. 3 IBN HISHAM, *supra* note 77, at 6; TABLIAH, *supra* note 15, at 627-28; MUTAWALLI, *supra* note 7, at 242.

panions cost him the battle, he did not blame them.[81] This course of conduct by the Prophet established the importance of consultation (*shura*) in government as part of the *sunnah*.

After the death of the Prophet, *al-Khulafa' al-Rashideen* (the first four successors to the Prophet, also referred to as the Rightly-Guided *khalifahs*) followed in the Prophet's footsteps to the extent possible. Since the revelation of the Qur'an was completed before the Prophet's death, Muslims had to do their best to find the proper laws governing each new situation they encountered based only on the learning the Prophet left them and on common sense. If they erred, God would not intervene with a revelation to correct them. They were thus thrown into the world on their own. To minimize error, the *khalifahs* turned to *shura*. In matters of religion, other *mujtahids* were consulted.

On other matters, the *khalifahs*, following the example of the Prophet, also relied on *shura* with the appropriate groups. Thus, *shura* was a hallmark of early Islamic governance. We shall now turn to a discussion of the *Shura* Principle, in order to lay the foundation for assessing its democratic merit.

A. *The Shura Principle*

Shura represents one of the most basic principles of Islamic government. It is referred to twice in the Qur'an.

The first *ayah* in the Qur'an about *shura* mentions it in the same sentence with two of the cornerstones of Islam, prayer and *Zakat*.[82] The *ayah* draws a picture of good Muslims as those who respond to their God, pray, reach their decisions by discussing matters amongst them in accordance with *shura* and pay (in *Zakat*) what God has given them.

In another passage, the Qur'an says:

> It is part of the Mercy of God that you deal gently with [your people]. Were you severe or harsh-hearted, they would have broken away from around you. So pass over [their faults] and ask for God's forgiveness for them and consult them in important matters. Then, when you have taken a decision, put your trust in God [and execute it], for God loves those who put their trust [in him].[83]

In this passage, the need for *shura* was communicated to the Prophet in

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[81] *See* IBN HISHAM, *supra* note 75, at 6; MUTAWALLI, *supra* note 7, at 244 n.3; TABLIAH, *supra* note 15, at 623-24.

[82] *Zakat* is best analogized to a tax paid solely for charitable purposes. In the past, *zakat* was paid by Muslims to the treasury of the Muslim state in order to support the needy. Today, Muslims often pay their *zakat* money directly to the poor.

The translated text of the *ayah* is as follows: "And those who answer the call of their Lord and establish regular prayer, who conduct their affairs by mutual consultation, and who spend out of what we have bestowed upon them [are true believers]." QUR'AN XLII:38.

[83] QUR'AN III:159.

an imperative form. Therefore, the need for the ruler to consult is not subject to interpretation in Islam.[84] What is subject to interpretation, however, is the range of matters requiring *shura*, the method of selecting those who provide *shura* and whether, once *shura* takes place, the ruler is bound to abide by the resulting advice. Different scholars have come up with different conclusions on these matters depending on their own reading of the Qur'an and *sunnah* as well as their own experiences and circumstances in the country and epoch in which they lived.[85]

1. Range of Matters Covered by *Shura* Principle

Some *mujtahids* held that any matter, other than one covered by specific Qur'anic laws, is the proper subject of *shura*.[86] Others, based on their interpretation of *sunnah*, limited *shura* to military matters.[87] Still others argued that *shura* applied to "important matters" only.[88] Therefore, the scope of matters covered by the *Shura* Principle, though not the principle itself, is subject to *ijtihad*. As such, it is also subject to the rules used by the *mujtahids*, including those which permit flexibility in interpretation in accordance with the *Shari'ah* Principles.

This means that a *mujtahid* living in this epoch of democratic governance can define the range of matters which are covered by the *Shura* Principle liberally so as to include all those matters that are viewed today as the proper subject of consultation whether by parliament, cabinet, leadership of the armed forces or the supreme court of the land. In other words, the *Shura* Principle could readily become applicable to all the different branches of democratic government and thus take different, more complex forms than it did in the early days of Islam. It also could become applicable to each branch of government at its various levels. This complexity, of course, is to be expected in the era of the technetronic society.

2. Whether Advice Resulting from *Shura* Is Binding

Scholars have also disagreed on this matter. Those who believe that advice resulting from *Shura* is not binding argue that the Qur'an imposed on a ruler the duty to engage in *shura*, but it did not bind the ruler

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[84] Indeed, early *mujtahids* concluded that a ruler who abandons *shura* must be removed. *See*, AWWA, *supra* note 52, at 90; AL-QURTUBI, *supra* note 56, at 261 (citing Ibn Attiyah who said that it is the duty of Muslims to remove a *khalifah* who does not engage in *shura*).

[85] AL-SANHURI, *supra* note 1, at 224-26; TABLIAH, *supra* note 15, at 633-36 & 642. For a detailed discussion of this matter, see MUTAWALLI, *supra* note 7, at 247-50.

[86] *See, e.g.*, AL-TURABI, *supra* note 3, at 245; TABLIAH, *supra* note 15, at 625 & 637.

[87] MUTAWALLI, *supra* note 7, at 252-54; TABLIAH, *supra* note 15, at 625.

[88] MUTAWALLI, *supra* note 7, at 253-54.

to follow the resulting advice.[89] The actual *ayah* says "when you have taken a decision, put your trust in God [and execute it]."[90] The focus of dispute became the phrase "when you have taken a decision." Some concluded that such decisions need not conform to the advice received, but only be informed by it. Others disagreed.[91] The *sunnah* is not totally clear on the matter.[92]

Regardless of the dispute, two things are clear. First, the ruler in Islam does not have absolute power. The ruler's power is, at minimum, limited by the Qur'an and *sunnah*, some of which is quite specific and permits little room for interpretation. Second, depending on the subject matter for which *shura* is sought, it may well be advisable in some circumstances to permit the ruler to override the advice received or choose to be bound by it, as the case may be. This is already part of the practice in modern Western democracies where the president often has the right of veto in certain legislative matters and the right to consult his staff without necessarily abiding by the staff's advice on certain executive matters. Such flexibility could be accommodated in a system based on *shura*.

3. Qualifications and Selection of Those Who Provide *Shura*

In the days of the Prophet those who provided *shura* (the "*Shura* People") were Wise Ones and ascended to their status by a natural process of recognition by the Muslims at large.[93] They ranged from wise heads of tribes to individuals who were first to adopt Islam and Madinah leaders who supported the Prophet when he left Makkah for Madinah in order to escape persecution.[94] Later, these were supplemented by astute politicians, experienced military leaders and religious scholars of note in the community.[95] Since then, the *mujtahids* have formulated the main qualities required in the *Shura* People.

For matters relating to religion, the *Shura* People must be *mujtahids*.[96] In other matters, they must be experts in the relevant

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89 *See, e.g.*, IQBAL, *supra* note 57, at 253; AL-QURTUBI, *supra* note 54, at 262-63. *See also* 2 IBN KATHIR, *supra* note 53, at 142-43.

90 QUR'AN, III:159.

91 *See supra* note 77; AWWA, *supra* note 52, at 93-97 (arguing that such advice is binding in all matters subject to *shura*. He argues further that those who take the opposite view relying on certain historical precedents have seriously misunderstood these precedents) *See also* TABLIAH, *supra* note 15, at 643; MUTAWALLI, *supra* note 7, at 243-44.

92 This is consistent with the argument that in Islam there is no class of clergy which constitutes a final authority on certain matters. *See supra* note 64.

93 TABLIAH, *supra* note 15, at 630-31; MUTAWALLI, *supra* note 7, at 257.

94 TABLIAH, *supra* note 15, at 630; MUTAWALLI, *supra* note 7, at 257.

95 TABLIAH, *supra* note 15, at 630-31; MUTAWALLI, *supra* note 7, at 257.

96 TABLIAH, *supra* note 15, at 631; MUTAWALLI, *supra* note 7, at 255.

field.[97] In both cases, however, rationality and Islamic morality (like honesty and truth) are basic prerequisites. Furthermore, no advice by the *Shura* People may contravene the laws of the Qur'an or *sunnah*.[98] Finally, according to *sunnah*, choosing the best qualified group for *shura* is a serious religious duty; since not doing so to the best of one's abilities constitutes betrayal of God and fellow Muslims.[99]

For this reason, it is important in today's complex and populous society to develop a more workable method of selection. Writers who view a *majlis shura* as tantamount to a parliament argue for a selection process based on general elections, others would leave it for the head of state to choose the providers of *shura*.[100] The expanded concept of *shura* discussed earlier would accommodate both views if it required, for example, the election of the legislative *majlis shura* but left to the head of state the freedom to appoint members of the judicial *majlis shura* (subject to confirmation by the legislative *majlis shura*) and choose personal advisers.

B. Checks and Balances in the Islamic State

As mentioned earlier, there was no separation of powers in the days of the Prophet. There was no fully articulated system for separation of powers later either, although such separation did occur and was a hallmark of the Islamic system of government.[101] Rather, it was always understood and agreed that the *khalifah* and the state were subject to the rule of the Qur'an and *sunnah* whose interpretation rested with the *mujtahids*. Furthermore it was always understood and agreed that it was the duty of every Muslim to right wrongs even if the perpetrator was the *khalifah*.[102]

To emphasize his submission to the rule of the Qur'an and *sunnah*, *Khalifah* Abu Bakr said to Muslims in his first address after he became *khalifah*: "I have been given authority over you, but I am not the best of you. If I do well help me, and if I do ill, then put me right."[103] In

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97 TABLIAH *supra* note 15, at 634; AL-TURABI, *supra* note 3, at 245.

98 AWWA, *supra* note 57, at 89; TABLIAH, *supra* note 15, at 629-31.

99 TABLIAH, *supra* note 15, at 632 (referring to a *hadith* by the Prophet stating that anyone who brings to power an unsuitable ruler betrays God, the Prophet and all believers).

100 Nevertheless, those selected must be Wise Ones. *See supra* notes 91 & 94-95, and accompanying text.

101 *See* AL-SANHURI, *supra* note 1, at 65 & 204-225 (describing the existing separation of powers and arguing that judges also derive their power from the *ummah*, not the appointing *khalifah*). Al-Sanhuri provides precedents which illustrate the independence of judges and the ability of the people (including non-Muslims) to sue the *khalifah*. *Id.* at 213 & 228. *See also* AL-NABHAN, *supra* note 43, at 39 (arguing that the Khalifah had solely executive tasks).

102 QURAN, III:110 (stating that Muslims enjoin what is right and forbid what is wrong.) *See also* AWWA, *supra* note 52, at 114.

103 AWWA, *supra* note 52, at 115; 2 AL-MUTTAQI, *supra* note 59, at 159.

another instance, *Khalifah* 'Umar attempted to reduce the amount of "Mahr" (assets transferred by the prospective groom to his prospective bride as consideration for her assent to marry him). An old woman in the mosque who understood correctly the role of the Mahr in providing the prospective bride with a cushion for her own sole use in business or pleasure, objected by saying: "You shall not deprive us of what God gave us." *Khalifah* 'Umar backed down saying: "A woman is right and a man is wrong."[104]

The last story reflects three facts.[105] The first is about the *Khalifah* 'Umar; namely, that he continued to struggle (with different degrees of success) throughout his life against his strong pre-Islamic patriarchal upbringing. This struggle was greatly helped by the Prophet's extensive *sunnah* on the question of women.[106] The second, which is true of the first story as well, is that every Muslim (regardless of class, race or sex) had a voice in the state. The third, also true of the first story, is that in matters of religion, Islamic law prevails even if it is being used by an ordinary Muslim against the head of state. In fact, a Muslim has a duty to right a wrong and to state the truth. Unfortunately, this tradition was quickly lost with the rise of imperial Islam during the Umayyad and 'Abbasid periods and later even some of the greatest *mujtahids* were punished by the state for their religious views.[107] Such a development was clearly contrary to Islamic tradition insofar as Islam respected the human dignity of individuals and favored *ijtihad*.

The Islamic system of government, that was left by the Qur'an and *sunnah* to the Muslims to develop in accordance with (i) the dictates of their own epoch, customs and needs, and (ii) the few basic but flexible and democratic divine rules, was never really fully developed. In fact, its development was seriously hampered with the "closing of the door" of *ijtihad*. This led Muslims to utilize older and sometimes outdated forms of political institutions for their system of government.

In modern times, however, many Muslim thinkers have reclaimed their right to *ijtihad* and restudied the structure of the Islamic state. As

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104 1 ABU HAMID AL-GHAZALI, IHYA' ULUM AD-DIN 50 (11th century, reprint, Cairo 1939); MUTAWALLI, *supra* note 7, at 260 (stating "a woman is right and 'Umar is wrong").

105 The story also illustrates that, in those days, women prayed in mosques and participated in public debate.

106 The status of *Jahiliyyah* women depended mostly on the tribe to which they belonged. On the whole, such status steadily eroded as the Arab peninsula became increasingly subject to surrounding patriarchal Byzantine and Persian influences. The Prophet attempted to stem the tide and reverse it. *See* AZIZAH AL-HIBRI, *A Study of Islamic Herstory*, *in* WOMEN AND ISLAM 207 (Azizah al-Hibri ed., 1982); *See also* AL-SANHURI *supra* note 51.

107 Imperial Islam refers to Islam during the Umayyad and later periods. *See* ESPOSITO, *supra* note 4, at 42. One example of such creeping intolerance comes from the days of Abbasid Khalifah al-Ma'mun who persecuted the leading mujtahid Ibn Hanbal for disagreeing with him on the philosophical question of whether the Qur'an was created by God or, as the word of God, was eternal.

a result, some have already argued that the notion of separation of powers is not only desirable but in fact already exists in the theoretical framework of the Muslim state as a fundamental principle.[108] In one such study, the author analogized the *Shura* People to a parliament and called for checks and balances.[109] On the whole, such views have tended to restrict unnecessarily (and perhaps unintentionally) the scope of *shura* to the parliament, since (as discussed earlier) the *Shura* Principle permeates all levels and branches of government.

The task of the modern *mujtahids*, therefore, is to develop a modern system of government, suitable to the needs and customs of their respective nation-states, which is based on a principle of *shura* in all the branches of such government, to the extent appropriate to each branch and among the branches, and which develops a system of checks and balances that preserves the democratic ideal propagated by the Prophet and his successors *al-Khulafa' al-Rashidun*.

VI. CONCLUSION

Both the Muslim state, regardless of its particular form of government, and its head of state are subject to the rule of Islamic law which is based on the Qur'an and *sunnah*. Islamic law rests on the consent of the Muslim people in the same way the American Constitution rests on the consent of the American people.

The Qur'an does not attempt to articulate, except in certain specific cases, detailed rules to be followed in every country or epoch. Rather, the philosophy of the Qur'an is to establish certain basic principles which could then be used by Muslims to develop specific laws suitable for their epoch, customs and needs.

With respect to developing a method for the selection of a head of

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[108] *See, e.g.*, AL-SANHURI, *supra* note 1, at 65 & 219 (stating that the principle of separation of powers is fundamental to the Islamic system of government and agreeing that *shura* permeates all branches of government and pointing out that the *khalifah*, in any case, has no legislative powers and no religious ones either. *Cf.* MUTAWALLI, *supra* note 7, at 236-38 (arguing that the *khilafah* system was not based on the concept of separation of powers because the checks and balances relied upon in the early days were internal, springing from piety and the Muslim ethics). With the introduction of imperial Islam, the internal checks began to erode. For this reason, Mutawalli argues that a modern system of *khilafah* which incorporates the principle of separation of powers may be worth considering in light of the present practices and circumstances. Mutawalli also points out that the *khilafah* system should not be considered a basic principle of Islam. It is, rather, a political system developed by Muslims in light of Islamic law. As such, it is open to modification in light of the *Shari'ah* Principles.

I add that, while it may be true that the specific *khilafah* system known today is not basic to Islam, certain features of it, like *shura*, the office of the *khalifah* and the supremacy of the Qur'an are. Furthermore, in denying the separation of powers in the Islamic state, Mutawalli appears to have confused theory with practice.

[109] *See generally supra* note 73.

state, different Muslims developed different methods. These methods depended in part on whether the system of government adopted was monarchist or not. In any case, the general view is that each method required first the selection of a nominee, whether by a group of people or the existing head of state, and then the acceptance of such nomination by the public at large.

Regardless of the form of government chosen, the Qur'an requires that the Muslim government be based on the principle of *shura* (consultation). This requirement, combined with the supremacy of Islamic law and the fact that the interpretation of such law rests with the *mujtahids* points to a *de facto* if not *de jure* separation of powers.

For this reason, the article concludes that attempts by Muslims to improve the democratic character of their various Muslim states, if properly undertaken, need not run afoul of the rule of Islamic law, but may in fact enhance it.